RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENT UNDER PRIVATE INTERNATIONAL LAW

BY

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DECLARATION

I, Farida Aisha Kera (Mrs) hereby declare that this work is the product of my personal research. It has not been presented or published anywhere at anytime by anybody, institution or organisation. All published and unpublished works cited have been duly acknowledged.

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2009

CERTIFICATION

The thesis entitled "RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENT UNDER PRIVATE INTERNATIONAL LAW**"** by Farida Aisha Kera (Mrs) meets regulations governing the award of the Degree of Master of Law (LL.M) of Ahmadu Bello University, Zaria and is approved for its contribution to knowledge and literary presentation.

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DEDICATION

This thesis is dedicated to Almighty Allah for giving me the wisdom and capability to undertake this research.

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To my caring mother Hajiya Mairo Abdulkadir who despite her old age is always there for the children throughout the period of my studies.

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ABSTRACT

Judgment or order of the court is meant to be effected or enforced. So that justice will be seen to have been done, any failure to effect or enforce such judgment will be nothing but travesty of justice. For example where a plaintiff brings an action against the defendant in Nigeria for damages for breach of contract or for tort, and eventually obtains judgment, only to discover that the defendant has surreptitiously removed his assets to England, so that the Nigerian judges can not enforce the judgment. The question here is must he begin all over again and bring a fresh action against the defendant in England? Or what happens to the judgment? Currently, the answer is no to both questions. The law has provided an avenue where the plaintiff can now pursue the judgment to England, for the court in England to authenticate and coarse the defendant to comply with the judgment. This in conflict of laws parlance is what is known as recognition and enforcement of foreign judgment. In an application for the recognition and enforcement of a foreign judgment to an English or Nigerian court the court is obliged to find out and be sure that the judgment was not obtained by fraud and that the trial court had jurisdiction to have tried the case and that the judgment of that court was final and conclusive. However, even in this circumstances the Nigerian court by virtue of the provision of the foreign judgment (Reciprocal enforcement) Act laws of the federation of Nigeria Cap F35 2004, the judgment shall only be recognized or enforced if it is obtained from a superior court of a country which the minister is satisfied shall give the same treatment to Nigerian judgment. The above explanation is what recognition and enforcement of foreign judgment is all about and where a judgment is entered in his favour he can pursue the judgment to a foreign jurisdiction and if the judgment satisfies the requirement it shall be enforced without a review of the case.

CHAPTER ONE

GENERAL INTRODUCTION

1.1 INTRODUCTION

Judgment, simply put, means a Courts final determination of a case which normally includes a decree and any order from which an appeal lies[1]. However, the foreign judgment (reciprocal enforcement) Act Cap F35[2] broadly defines judgment to mean "judgment or order given or made by a Court in any civil proceeding and shall include an award in proceeding on an arbitration…" The import of this definition is that judgment is not restricted to decisions of the Court, but to include the final determination of an arbitration tribunal. In this context, "Foreign judgment" can therefore be defined as a judgment delivered by a Court and arbitration tribunal other than the Court or arbitration tribunal of the forum.

Everyday, people all over the world institute actions in Courts of law, either to enforce a right or to redress an injury. This right can only be enforced or the injury redressed when the court determines the matter and not only give judgment but also enforced the judgment or alternatively, the plaintiff pursues the judgment before another judge in a different jurisdiction for its enforcement. In conflict of laws parlance, this last judicial act is called enforcement of foreign judgment. Therefore, recognition and enforcement of foreign judgment involves a court authenticating a judicial

1. Garner, A.B - Blacks Law Dictionary, 7th edition, West Publishing Company, 1999. Pg846
2. Fo reign judgment (Reciprocal enforcement) Act CAP F35 Laws of Federation of Nigeria, 2004. (Herein after referred to as F35)

decision outside its jurisdiction, and taking necessary steps to cause a defendant to comply with the terms of the judgment.

The fundamental function of recognition and enforcement of foreign judgment is to provide for the judgment creditor the fruits of the judgment to obtain for him due satisfaction, compensation, performance and compliance with what the court has granted by way of relief or remedy[3]. This conforms with the general principles of law that judgment or order of the court must be obeyed or complied with, otherwise the authority of the court would be diminished and the legal order would suffer a breakdown[4].

This area of judicial process is growing in importance. This is because the private citizen's enjoyment of the right to travel more freely from one place to another, the development of internet and e-ecommerce in an increasingly globalised set of market means, that individuals voluntarily buy goods, incur debts and suffer loss and injury across country borders. This economic relation which gives rise to social and domestic relations, there is a need for an enhanced judicial co-operation expedient, so that judgments proceeding from these relations can be recognized and enforced every where irrespective of territorial boundaries.

Recognition and enforcement of foreign judgment started as far back as the seventeenth century in England[5]. Prior to that time foreign judgment had no direct operation in the English Courts and they do not extinguish an

3. Babalola, Afe - Enforcement of Judgment: 1st edition, Inter Printers ltd 2003 P1
4. Ibid
5. Morris J.H.C. Conflict of laws 3rd Edition, Steven and Sons, London, 1984, P.106.

original cause of action[6]. A judgment creditor in the early days was expected to bring a fresh action against the defendant for enforcement of the judgment offered in his favour cases that concerned enforcement of foreign judgment were tried DE Novo with the foreign judgment serving as prima facie evidence. But by the seventeenth century, the English Courts started recognising and enforcing foreign judgment. Two reasons were advanced for their action. The first was based on the doctrine of "comity". The English judges believed that the law of nations required the Courts of one country to assist those of another, and they feared that if foreign judgment were not enforced in England, English judgment would not be enforced abroad. Therefore, in order to protect the English people's interest, they started recognsing and enforcing judgment given in other jurisdiction as long as the judgments were given by Courts of competent jurisdiction.

The second reason for the recognition and enforcement of foreign judgment by the English court was based on the doctrine of obligation[7]. By this, it means that the judgment rendered by a foreign court of competent jurisdiction imposes upon the defendant a duty or obligation to obey and discharge it. It also places an equal right on the plaintiff to enforce that obligation through the English Courts. This was clearly enunciated by **Parke B. in Russels V Smith[8] and Williams V Jones[9]** where he stated thus:

> *We think that.....the true principle on which the judgment of foreign tribunals are enforced in England is.... that the judgment of a court of competent jurisdiction over the*

6. Ibid
7. Morris J.H.C. Supra P 9 106
8. (1842) 9 M & W 810, 819
9. (1945) 13 M&W 628 at 633

> *defendant imposes a duty or obligation on the defendant to pay the sum, of which judgment is given, which the Courts of this country are bound to enforced and consequently that anything which negates that duty forms a legal excuse for not performing it is a defence to the action.*

This statement was approved by Blackburn later in **Godard Vs Gray[10] and Schibsby V Westerholz[11].** Sequel to this statement any judgment given by a foreign Court with competent jurisdiction according to the English rules of conflict of laws the judgment now becomes enforceable in England, unless it is given by reason of fraud, public policy etc and not mere prima facie evidence of the defendants liability as it used to be.

The recognition and enforcement of foreign judgment has been facilitated in different parts of the world by series of enactments providing for registration.

For example, in Britain, the enactments were contained in the administration of Justice Act[12] which was enforced in some part of the British Commonwealth providing for the reciprocal enforcement of judgment and awards. According to this Act, a judgment creditor who obtains judgment from a court within the British Commonwealth may within a certain time after the date of the judgment apply to a local court to have the judgment registered and enforced. Once the judgment is registered it assumed the same status with a judgment of the court of registration. The Act provide for the enforcement of judgment delivered by the Courts of those countries to which the Act applies. These territories are United

10. (1870) L.R 6QB 139
11. (1870) L.R QB 155
12. Administration of Justice Act 1920

Kingdom, New Zealand, Australian States but the Australian capital territory was not included.

The English foreign judgment (reciprocal enforcement) Act 1933 was enacted to secure recognition and enforcement of English judgment in foreign countries on the basis of reciprocity, provides for the compulsory registration of judgment (Excluding Arbitral Award). (Excluding Award). Unlike the Administration of Justice Act of 1920 which it was enacted to replace, it applies to all foreign judgment and not merely to judgments of Courts within the British Commonwealth. Registration under this Act is as of right and not merely at discretion as in the 1920 Act.

Aside from these enactments issues that are relevant to the enforcement of foreign judgment are also frequently regulated by bilateral treaty and multinational conventions. This include the Brussels convention on jurisdiction and enforcement of foreign judgment in civil and commercial matters 1968 which is enforced among the members of the European Union and the Hague convention on Private International law, 2004 which is presently ratified by Cyrus, Netherlands, Kuwait and Portugal.

In Nigeria as earlier pointed out, legislative interference in the area of enforcement of foreign judgment dates back to colonial era when the reciprocal enforcement of foreign judgment Act 1922[13] was enacted for Nigeria. This was followed by the foreign judgment (Reciprocal Enforcement) Act 1935. The 1935 Act never become operative as it was never brought into force in Nigeria and was omitted from the 1958 edition of

the laws of federation. The 1960 Act[14] followed the 1922 Act[15]. The most current legislation on the subject matter is Cap F35[16]. The 1922 Act was omitted from the 1990 edition which is presently the 2004 edition of the laws of the federation of Nigeria, however, this omission does not warrant the conclusion that it has seize to have effect. In the case of Ibidapo V Lufthansa Airlines[17] it was held that the mere omission of any enactment does not amount to a repeal of that omitted enactment or order. Also the Court of Appeal had the opportunity to construe 3(2) of the revised edition (Laws of the Federation) Act 1990. The Court of Appeal, after noting that the committee that revised the laws had no legislative powers so as to be able validly to repeal any otherwise existing law inter alias held:

> *The omission to be made cannot be equated with a repealing clause in an Act. For if the two were to give rise to the same result and effect, it would....have been unnecessary to have clause 3(2) in the revised edition of the Act of 1990.*

As regards the existence of the 1922 Act, sections 4,9 and 10 of Cap F35 remained redundant until the minister exercise his power under section 3(i) to extend the application of part I of F35 to any country, otherwise the provision of section 3(i) will still be applicable. **In Macaulay V R. Z.B[18]** of Austria - the Supreme Court after revising the fact of the case held that the case was brought more than 12 months after the judgment was given and

13. Cap 175, Laws of the federation of Nigeria 1958.
14. Cap 152, laws of the federation of Nigeria 1990 (hereinafter referred to as Cap 152)
15. Hereinafter referred to as the 1922 Act
16. Supra at pg1.
17. (1994) 8 NWLR., (Pt 355) at 372.
18. (2003) 8 NWLR., (Pt 852) at 282.

that no leave was applied for extension of time and therefore struck out the registration of the judgment.

1.2 STATEMENT OF THE PROBLEM

Recognition and enforcement of foreign judgment concerns the jurisdiction of a court to enforce a foreign judgment. Its guiding principles revolves around the doctrine of obligation and Reciprocity. In this regard, foreign judgment operate as a res-judicata in favour of the defendant thus, where a person has had his day in a Court of competent jurisdiction, then the judgment of that Court should be conclusive on any future case built on the same matter. If this is done, it has the advantage of:

(a) preventing waste of judicial machinery and expenses to both parties in re-litigating the case and

(b) to avoiding substantive evil of having inconsistent judgment in different jurisdiction[19].

Despite the reasons given above capturing the relevance of recognition and enforcement of foreign judgment, not many cases are reported in our law reports on the issue. This may not be unconnected with the fact that many affected parties and their lawyers are not aware of this process. Again, the technicalities involved and attendant cost of bringing application in appropriate Courts might have serve to discourage would be litigants from engaging in the process. The above problems are compounded by the fact that most textbooks that discuss the concept are foreign. Thus, statutes and cases discussed are foreign. This present not only problem to would be litigants and their lawyers in terms of proper

19. Rutter, W.A. - Conflict of law 4th edition copy right 1966 P5.

understanding of the legal issue but even to this researcher who has to grapple with the problem of localising some of the principles and rules which are only obtainable in the foreign books, cases or statutes. This, therefore, constitute the problem of this research. Consequently, careful analysis of all legal issues involved in the recognition and enforcement process will not only help to popularise the concept but also proffer solution to difficulties involved in order to ease the hardship of prospective litigants.

1.3 AIMS AND OBJECTIVES

This work is embarked upon to popularise the concept of recognition and enforcement of foreign judgment. In other words the work intends to make an exposition of the rules of recognition and enforcement of foreign judgment under private international law.

Some times successful parties to a litigation may not be able to reap the benefits from their success because the process of enforcing the judgment is difficult, either because they do not know the technicalities involved in pursuing the enforcement of a given judgment in another jurisdiction or because it is cumbersome for a judgment obtained in one jurisdiction to be enforced in another, due to constraints of Courts schedule.

It is therefore the aim of this work to explain the procedure involved in enforcing a foreign judgment so that interested parties can take advantage of that to enforce judgment delivered in their favour. In furtherance of the above, we shall examine and analysed the jurisdiction of Courts in the enforcement of foreign judgment as provided by statutes such as the

provision of the civil jurisdiction and judgment Act[20], the English judgment (Reciprocal enforcement) Act[21] and the Nigerian foreign judgment (Reciprocal Enforcement) Act[22]. The work also aims to identify problems militating against the Courts and parties in the recognition and enforcement of foreign judgment and to proffer suggestions on how the problems identified can be solved. The work also aim to be an addition to the existing literature on conflict of laws generally and this topic in particular by local authors.

1.4 SCOPE AND LIMITATIONS OF THE RESEARCH

Enforcement is the last stage of every judicial process after the right, claim or interest has been reduced into a judgment or order[23]. In this regard this work is intended to study the extra-territorial enforcement of foreign judgment given by a superior court of law as a means of ensuring that foreign judgments are enforced irrespective of the state or country where the judgment is given and that people are not made to waste energy, time and money for the purpose of re-litigating a matter that has already been decided upon and judgment given. Though judgment is defined according to CAP F35 to include judgments of arbitral tribunals, this work will be limited to judgment given by a court in civil proceeding. Geographically, the work ventured into the legal system of America, Netherlands, France, Italy, England and Nigeria for purposes of proper analysis on their legal regime, on the issue.

20. 1820
21. 1933
22. Supra
23. Babalola, Afe - Supra at Pg.1.

1.5 LITERATURE REVIEW

Recognition and enforcement of foreign judgment is one relevant area where private law differs from public law. The rationale behind the concept of recognition and enforcement of judgment in jurisdictions other than the forum where the judgment is obtained is to foster cooperation among nations. Thus, while co-operation is the rule in private law, under public law every decision of a state or institution be that a Court or other authority has no effect beyond its borders.

Furthermore, due to equality of legal system and Courts the world over, judgment given by one court is expected to serve its purpose not only at the forum but in some other states or countries thereby serving as "Res-judicata". Recognition and enforcement of foreign judgment has been dealt with in several text books but unfortunately most of them are obsolete. There are only a few of them that are fairly recent. All the same, though the concept has been dealt with by writers, attentions don't seem to have been given to the problems faced by successful litigants and the Courts in the enforcement of a judgment delivered by a foreign Court.

P.M. North in his book Private International Law described Recognition and enforcement of judgment extensively ranging from the principles of recognition, judgment in rem and inpersonam to jurisdiction of the Courts as regards movable and immovable properties and defences available to the defendant. However, he did not pay attention to the problems encountered by litigants at the time of enforcement.

The Association of American law school in their book selected readings on conflict of laws, treated this concept in the light of the full faith

and credit system as it operate in the United State of America. The book dealt with the historical background of the full faith and credit, judicial interpretation of the clause, its scope and application. Under the United State constitution judgment have such faith and credit given to them in the United states as they have by law a usage in the Court of the state from which they are taken. The book also discussed enforcement of foreign judgment under Anglo American law in the light of unsatisfied money judgment rendered in actions in personam. The scope of inquiry here did not extend to many questions relating to the Recognition or Enforcing special types of judgment such as far example, decrees other than for money or the judgment of Courts other than the Courts of Record[24].

M.P. Mpom[25] in his book, the Basic principle, of conflict of laws made an examination of some of the legal issues involved in the enforcement of foreign judgment. For example, he questioned the idea of the provision of section 3 of the Nigerian foreign judgment Act which provides for the power of the Minister of justice to extend the provision of part I of the Act to countries giving reciprocal treatment to Nigerian judgment Abroad, in his words "the principle is rather insular" this is because any country that does not reciprocate by recognising and enforcing Nigerian judgments will have its judgment recognized and enforced in Nigeria and Vice-Versa. However, he did not dwell on the problems encountered by the litigants in pursuing a judgment before a judge in another jurisdiction.

24 Association of American School - Selected Reading on Conflict of laws West pub Co. 1956 Pg 380

25. Basic Principle, of conflict of laws, 2nd edition, Wisdom Printing and graphic C.

J.H.C, Morris[26] in his book the Conflict of Laws dealt with enforcement in the light of judgment rendered inside and outside the European Economic Commission. The former according to him, are governed by common law as answered and reinforced by statutes. While in the latter case recognition and enforcement of foreign judgment are governed exclusively by the civil jurisdiction and judgments Act of 1982. He distinguished between recognition

and enforcement of foreign judgment and analysed the position of the law for recognition and enforcement of foreign judgment outside the European Economic Commission (EEC). However, he did not include other jurisdiction like Nigeria and some other Commonwealth countries and paid no attention whatsoever to the problems of enforcement of foreign judgment.

Prof. I.O. Agbede a Nigerian author in his book, Themes on Conflict of Laws did not touch very much on the issue of enforcement of foreign judgment. He concentrated on the limits of application of foreign law, public policy and conflict justice, Nigerian conflict of laws, domicile in Nigeria and conflict of tort law. He, however, commented on the application of public policy as it relates to foreign judgment. According to him, he wonder whether the rule that English Courts will not give effect to a foreign judgment which has been procured by fraud or where the defendant has not been given an opportunity to put his case in truly a rule of limitation for if the alleged fraud, for example had been brought to the knowledge of the

26. Supra at P.3

foreign Court, the judgment might have been reversed. Assuming that the foreign Court would pay no regard to these elemental notions of justice, it may well be that the subjects of such a foreign state are not likely to view such judicial practice as unjust. It may simply represent their own standard of justice. He pointed out that if England has no reasonable connection with the issue or the parties, there can be no justification, one imagines, for the importation of English standards of justice into the issue. He therefore concluded that it appears that public policy reservation serves as a corrective measure against the defects of the forum conflict rules that a rule of limitation on the application of foreign laws and decisions.

Though many text books out of which a few are cited above have dealt extensively with issues concerning the enforcement of foreign judgment, but as pointed out above little or no attention was paid to difficulties encountered by judgment creditors or successful litigants in pursuing a judgment before a judge in another jurisdiction for enforcement.

1.6 JUSTIFICATION

The justification for embarking on this research is to make an exposition of the rules governing the concept of recognition and enforcement of foreign judgment.

The need to make an exposition of the rules becomes necessary because international trade and investment is being promoted all over the world. This, as earlier pointed, has positive effect of promoting social relations amongst people worldwide who are subject of various legal systems. The world itself has been reduced into a global village,

consequently the need for enhanced judicial co-operation for a cheap, popular and ease judicial process that can ensure effective resolution of dispute pertaining trade, marriage etc need no gain saying.

However, as has been pointed in 1.4 above many successful litigants have been denied this opportunity because even when judgment is given in their favour, the process of enforcement becomes difficult either because the successful party does not know the rules guiding recognition and enforcement of foreign judgment because the technicalities involved an attendant cost of bringing application in appropriate Courts. For instance, in the European Union the requirement of due and timely service of the document instituting the proceedings in the state of origin has emerged as a significant obstacle to the enforcement of defaults judgment. In some other places a judgment creditor may have to wait several months for his application to be dealt with because of the constraints of the court schedule. All these problems tend to cause hardship to the successful litigants thereby defeating the cause of justice which is the fundamental basis of the conflict of laws of which the concept is a part and parcel.

The above underscore the justification of this work. Consequently the work will focus on analysing these and other problem associated with recognition and enforcement of foreign judgment at the end of which solutions will be proffered.

1.7 SIGNIFICANCE

One very important aspect of conflict of laws is the fact that a judgment obtained in a foreign court can be enforced in the forum by the

utilization of the internal conflict of laws mechanism embodied in the conflict rules on the subject[27]. This is to help a private person who succeeded in a litigation benefit from the fruits of his success. However, many lawyers/academicians are not aware of the rules of recognition and enforcement of foreign judgment not to talk of lay members of the public. This work therefore becomes handy and useful by making an exposition of the rules of recognition and enforcement of foreign judgment as provided under the common law and statutes such as the English foreign judgment (Reciprocal enforcement) Act[28], the Nigerian foreign judgment Reciprocal enforcement Act which was modelled after the English Act of 1933. The Brussels convention of 1968 and the constitution of the United States of America. The work would be useful to judges, Academicians, legal practitioners and students of private international law by boasting their understanding of the subject matter.

1.8 RESEARCH METHODOLOGY

The form of research method adopted in this research is doctrinal. That is the research relied on the use of material such as textbooks, journals, statutes and cases rational from library. However, other methods like oral interview were employed. The researcher visited the Enforcement Unit of the Federal Capital Territory High Court and conducted some oral interview with officials in charge of enforcement.

All authorities consulted have been duly cited and acknowledged.

27. North P.M., Cheshire's private International law, 9th Edition Buttrworths & co Edition 1974
28. Supra at Pg 5.

1.9 ORGANISATIONAL LAYOUT

This thesis is divided into five chapters. This first chapter is the general introduction. It introduces the thesis, its aims and objectives, scope of the Research, Justification, statement of the problem, literature review and organisational lay out.

Chapter two examines the significance of jurisdiction to this study i.e jurisdiction as a central element for recognition and enforcement of foreign judgment.

Chapter three dealt with the nature and distinction between recognition and enforcement of foreign judgment. It defines the principles of recognition and enforcement, what constitute enforcement generally, enforcement at common law and statues, enforcement etc.

Chapter four examines defences to Recognition and enforcement of foreign judgment. It discussed what constitute defences against enforcement of foreign judgment.

Finally, chapter five is the concluding chapter of the work, it summarises the work, makes observation on problems area, after which suggestions for improvement were proffered.

CHAPTER TWO

JURISDICTION OF THE FOREIGN COURT

2.1 INTRODUCTION

The word jurisdiction is complex and unclear and therefore very difficult to define. The term can be used in different context and is susceptible to various meanings for instance, the Black's law dictionary[29] define jurisdiction to mean a geographic area within which political or judicial authority may be exercised. This definition is restrictive because it addresses only insterstate masters not minding extra territorial situation. Cheatham[30] asserts that the jurisdiction of each country is in practice determined by the legislature of the forum without regard to extra-territoriality. In the case of Yadnat & Anor[31] jurisdiction was defined thus:

> *Jurisdiction is the right in the court to hear and determine the dispute between the parties. The power in the court is the authority to take certain orders and decisions with respect to the matter before the court.*

The above definition is also restrictive because it did not take into consideration the extra territorial situation. And the authority referred to in this definition may vary.

However, it is pertinent in conflict of laws to make a distinction between extra territorial and intra territorial jurisdiction, because the significance of the question of jurisdiction in conflict of laws lies in the extra-territorial enforcement of Foreign laws and judgments[32].

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[29] Supra at page 1.
[30] Agbede, I.O. Themes On Conflict Of Laws, Third Edition Shaneson Ltd, P. 238.
[31] (1991) 5 SCN Pg. 172
[36] Mpom, M.P, Op cit at pg 19.

The definition of jurisdiction in the American Restatement embodies this concept of extra-territoriality. It is defined thus: "the power of a state to create or effect legal interest which will be recognized as valid in other states". The validity or enforceability of foreign judgment depends upon the question as to whether jurisdiction was properly exercised in the international sense i.e under the principles of private international law. This point has been emphasised by Graveson[33] at the outset when he said:

> *the outstanding characteristics of the English system, its emphasis on jurisdiction as against applicable law is evident in both the case of jurisdiction of the English Courts and the principles on which foreign judgment are recognized.*

Therefore the importance of jurisdiction aside from relating it to Courts power to exercise jurisdiction in a given case (prescriptive jurisdiction) is the extra territorial recognition and enforcement of foreign judgment. The emphasis by English Courts on jurisdiction by English Court extends also to Nigeria and all Commonwealth countries. This is because the Nigerian foreign judgment reciprocal and enforcement Act[34] had provided under section 6 that a judgment can only be registered for enforcement if it is given by a Court of competent jurisdiction. Jurisdiction, therefore, is one of the conditions to be fulfilled

before a foreign judgment can be reognised and enforced. Thus, a central element in the recognition and enforcement of foreign judgment.

[33] R.H. Graveson. The Conflict of Laws, 6th (Edition), Sweet & Maxwell, London, 1969
[34] CAP F35 Supra

2.2 THE RELEVANCE OF JURISDICTION IN RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENT

Jurisdiction is the nerve centre of adjudication[35]. It is the basis upon which enforceability of any legal requirement lies. The most important ingredient for the effectiveness of a foreign judgment under private international law is that the adjudicating Courts should have had jurisdiction to entertain the matter. In other words the Court is expected to have jurisdiction over both the defendant and the cause of action i.e jurisdiction in personam & jurisdiction in rem. For instance, where judgment relates to immovables, it is clear that only the Court of the place where the property is situated (situs) is competent to entertain the matter. A Nigerian Court for example will not recognize foreign judgment concerning title to a land situate in Nigeria. This position is what is obtainable also under common law and the English foreign judgment (Reciprocal and Enforcement) Act 1933. Thus, in the famous case of **Buchanan V Rucker**[36], the plaintiff brought an action in England on a judgment of a Court in the Island of Tobago. The defendant had never been in the Island, nor had he submitted to its jurisdiction. There had been a substituted service valid by the law of Tobago, affected by nailing a copy of the writ on the Court cause door. Lord Ellen Borough refused to enforce the judgment. He said "can the Court of Tobago pass a law to bind the right of the whole world. Would the world

[35] Barsoun V Clemessy International (1999) 12 NLR (Pt 632) P 516.
[36] (1808) 9 East 192

submit to such an assumed jurisdiction". In **Adams V Cape Industries PLC**[37].

A modern authority, it was said that "in determining the jurisdiction of the foreign Court...., our Court is directing its mind to the competence or otherwise of the foreign Court to summon the defendant before it and to decide such matters as it has decided" and " we would.... regard the source of the territorial jurisdiction of the Court of a country to summon a defendant to appear before it as being his obligation for the time being to abide by its laws and accept the jurisdiction of its Courts while present in its territory.

A foreign Court must have jurisdiction in the international sense over the defendant, before judgment can be recognized and enforced by Courts in other forums. Where a judgment is given by a Court according to its own system of law, such judgment is conclusively binding on the defendant, however, the judgment may not be recognized or enforced by other Courts. International sense therefore means it must be in accordance to the principles of private international law.

Any judgment given by a Court without jurisdiction would amount to a nullity. Jurisdiction is therefore the fundamental requirement for the enforcement of foreign judgment. **In Sirdar Curdyat Singh V Rajah of Faridkorte**[38] the privy council held that the action brought out must fail, for Faridkorte court had no jurisdiction on any recognized principle of

[37] (1990) Ch. 433 CA
[38] (1894) A.C. 670

international law against a man who had left the territory and who was the domiciled subject of another state[39].

The fact of the case is as follows: the Rajah obtained two ex-parte judgments in two actions brought by him against the appellant for sums amounting to over 76,000 rupees, the appellant who had been treasure to the Rajah, left Faridkorte five years before these actions and did not return there again. An action founded on the judgments was later brought against the appellant in the court of above, where he was then resident. This action was therefore on a foreign judgment, since Faridkote was a native state with independent jurisdiction. Hence, the above, decision of the Privy Council.

2.3 BASES/EXISTENCE OF JURISDICTION

The bases of jurisdiction under common law are clearly stated by **Buckley I.J. in the case of Emmanuel V Symon[40]** thus:

> In an action inpersonam, there are five cases in which the court of this country will enforce a foreign judgment:

1) where the defendant is a subject of the foreign country in which the judgment has been obtained
2) where he was resident in the foreign country when the action began
3) where the defendant in the character of the plaintiff has selected the forum in which he is afterward sued
4) where he has voluntarily appeared

[39] Cheshire and North Op cit at Pg 633.
[40] (1908) I.K.B. 302, 309.

5) where he has contracted to submit judgment is obtained. he first ground given by the Judge i.e Nationality has been rejected. I**n Blohn V Dresser**[41] it is submitted that nationality perse is not, and has been rejected as, a reason which, on any principle of private international law, can justify the exercise of jurisdiction. Even though arguments have been advanced in favour of nationality on the basis that a subject is bound to obey the command of his sovereign, but that is not enough. According to Wolff, it is not the duty of another sovereign to aid the enforcement of the obligation[42]. He further pointed out that allegiance is not sufficient even in those continental countries where nationality is the criterion of the personal law.

The legal tie of nationality is not a stronghold because a person can be subject to more than one nationality, moreso the granting of nationality or withholding it is sometimes an instrument of political policy. The Nigerian foreign judgment reciprocal and enforcement Act did not mention Nationality as basis for jurisdiction.

The jurisdiction of Nigerian Courts on international matters is embodied in the High court laws of the states. These laws are based substantially on Cap 44 Laws of Western Nigeria 1959 which provides in section 8 as follows:

[41] (1962)2 QB 116
[42] Dicey and Morris, Op cit p 979

> *To the extent such jurisdiction may be conferred by the Regional (state) legislature, the High Court shall be a superior Court of record and in addition to any other jurisdiction conferred by this or any other law or ordinance shall, within the limits and subject to the provision of this law process and exercise all the jurisdiction, power and authorities which are vested on or capable of being exercised by the majesty's High Court of Justice in England.*

The High court laws of Bendel, Lagos and Northern States contain similar, enactments. The enactments contain no modification clauses, as such in Nigeria not much attempt has been done to modify these laws to suit the Nigerian circumstances. There is, therefore, the need to review these laws by making amendments in such a way that they may suit the Nigerian circumstances.

For the purposes of enforcement of foreign judgment in Nigeria, the bases of jurisdiction is contained in Cap F 35 which provides that a Registered judgment shall be set aside if the Registering Court is satisfied that the country i.e the original Court had no jurisdiction in the circumstances of the case. A foreign Court delivering the judgment is said to have jurisdiction in personam where:

a) the judgment debtor voluntarily appeared other than to protest.

b) where the judgment debtor was the plaintiff or counter claimed in the suit where the judgment is given

c) where the judgment debtor submit to the jurisdiction of the foreign court

d) where the judgment debtor was at the time of instituting the resident or being a body corporate, having its principal place of business in the country of the court.

To establish the existence of jurisdiction, three elements must be satisfied. Thus:

(a) An adequate basis for jurisdiction over persons and property involved.

(b) A competent court in which the suit is to be heard; and

(c) All parties must be afforded procedural due process, notice and opportunity to be heard.

In satisfying the requirement for proper jurisdiction, the major problem raised are as to the bases for jurisdiction and particularly what are sufficient bases for the assertion of inpersonam jurisdiction.

Under the foreign judgment Reciprocal and Enforcement Act of Britain[43] and Nigeria[44] the bases for the existence of jurisdiction can therefore be summarised as follows:

(a) Voluntary Appearance

(b) Submission

(c) Residence

[43] 1933
[44] Cap F 35 Opcit

and other internationally accepted forums where there is existence of jurisdiction are:[45]

(d) Forum chosen by the parties:

(e) Forum delicti

(f) Forum rei sitae

(g) forum solution's contratus.

2.3.1 Appearance

Appearance is one of the processes upon which jurisdiction is founded in an action in personam. A court can be said to have jurisdiction to entertain a matter where the defendant voluntarily appeared. This is provided for both under the common law and the foreign judgment Reciprocal and Enforcement Act of both Britain[46] and Nigeria[47]. In the words of Butterly J:

> *it is a settled principle that a litigant who has voluntarily submitted himself to the jurisdiction of the court by appearing before it cannot afterward dispute its jurisdiction.*

Nevertheless it is not in all cases that appearance constitutes sufficient submission to the jurisdiction of a court. A defendant is said to have submitted where he enters appearance, fought the action on its merits and takes chance of obtaining a judgment in his favour[48]. But he cannot be said to have voluntarily appeared according to the provision of section 6[49] if his appearance is solely to contest the jurisdiction of the court or seek for the release of property seized or

[45] Novel Rosner: The requirement for execution of foreign judgment in the Netherlands. Absent a Treaty. Published January 2, 2003.
[46] Dicey and Morris Op cit Pg 979.-
[47] Cap F35 Ibid
[48] Dicey and Morris Op cit

threatened to be seized. Under such circumstances the Court will not assume jurisdiction to entertain the matter. The most difficult question which arises here is the scope and effect of the provision that appearance is not to confer jurisdiction if it "was entered solely to contest the jurisdiction". **In Elefanten Schuh GMBH V Jacqmain**[50] the European Court drew the attention to the fact that French text (unlike the English, German, Italian and Dutch texts) did not have any requirement that only jurisdiction must be contested and hold that a defendant did not submit by pleading to the merits as well as contesting the jurisdiction. But only if the plaintiff and the Court seized of the matter are able to ascertain from the time of the defendant's first defence that it is intended to contest the jurisdiction if the challenge to jurisdiction was not a preliminary matter as it is under the English law, then, to avoid pleading to the merits being regarded as submission, the challenge must not occur after the making of submission which under national procedural law are considered to be first defence put up in the Court.

A judgment incurred in the above circumstances will amount to nullity, otherwise the course of justice would be defeated.

Appearance confers jurisdiction over a litigant as to all matters and issues properly raised in the law suit. Thus, a defendant who makes an appearance may be held liable not only on the plaintiffs complaint as originally filed, but also on any amendments thereto permitted by the Court. However,

[49] Supra at page 5
[50] Case 150/80 (1981) ECR 1671

this does not mean that he subjects himself also to new claims by the plaintiff[51]. This ground is also mentioned in the Brussels convention in article 18, a case on this article is that of **Hewden Staurt Heavy Granes Ltd V Leogottwald**[52] In that case A, a U.S. company sues X & Co a panamania company applies for a declaration that the court had no jurisdiction, and make a separate application for the cost of its jurisdictional application. The application for security for cost was held not to be a submission. The EC convention in article 24 and the draft of Hague convention article 5 also mentioned appearance as a basis for jurisdiction. It is, therefore an internationally accepted ground for jurisdiction.

2.3.2 Submission

A party's agreement to the jurisdiction of a court will serve as a sufficient bases for impersonam jurisdiction. This agreement is given either by making an entry of conditional appearance or by an agreement to accept service of process at a designated address, e.g. Instructing a solicitor to accept service on his behalf. English civil procedure rules provides that where a solicitor is authorised to accept service on behalf of a party, in principle process must be served on the solicitor. However an agreement to accept service is not perse a waiver. In advance of any irregularity (such as failure to serve on time).

The solicitor may accept service of proceedings on the basis that the defendant remains free to contest the jurisdiction in the same way as if the claimer had obtained permission to serve abroad and had effected service

[51] Mpom M. P. Op cit at Pg 27
[52] Unrep, (1992) C.A.

abroad[53]. **In Manta line V Sofianites**[54] the rule that where the defendant instructs his solicitor to accept service and the solicitor communicates these instructions to the claimer, the defendant will be regarded as having submitted, even if the instructions are withdrawn was clearly buttressed. Physical presence of the defendant in the forum is not a prerequisite for submission[55]. Thus, if a person takes shares in a foreign company the articles of association or statutes of which provide that all disputes shall be submitted to the jurisdiction of a foreign court and that every shareholder must "elect a domicile" at a particular place for service of process, and that in default the officers of the company may do so for him, then he is deemed to have agreed to submit to the jurisdiction of the foreign court, even if he never does elect a domicile[56]. The agreement to submit arises in connection with persons who are not ordinarily subject to the jurisdiction of the forum court. For example, a person may be domiciled in the U.K, but own property in Nigeria. Where proceedings are begun against him in Nigeria, with respect to his property, he need not appear. He is not subject to the jurisdiction because he is not physically present. However, he may on his own decide to appear before the Nigerian court in the manner aforesaid. A person did not submits to the jurisdiction if he appears merely to deny that the Nigerian court has jurisdiction.

[53] Sphere Drake Insurance Plc V Gunes Sikarta (1988) 1 Lloyd's repo. 139 C.A.
[54] (1984) 1 Lloyds rep 14.
[55] Schibsby V Westrndolz Op cit P 9.
[56] Dicey & Morris Opcit

IN RE-DULES SETTLEMENT TRUST[57], an American citizen living there but with assets in England was sued by his son for maintenance. On receipt of the summons, he protested that the English court had no jurisdiction to make any order for maintenance against him. The court of Appeal refused to exercise jurisdiction, Denning L.J. (as he then was) remarked;

> *I cannot see how anyone can fairly say that a man has voluntarily submitted to the jurisdiction of a court, when he has all the time been vigorously protesting that it has no jurisdiction, I can see no distinction at all....if he fights the case, not only on the jurisdiction, but also on the merits, he must then be taken to have submitted to the jurisdiction. He cannot be allowed, at one and the same time, to say that he will accept the decision on the merits if it is favourable to him and will not submit to it if it is unfavourable.*

Any judgment handed down against an absent defendant is not of extra-territorial validity and therefore void[58]. In the case of **Sirdar Singh V the Rajah of Faridkote**[59] the privy council held that the above action must fail because the Fardrikote court had no jurisdiction on any recognized principle of international law against a man who had left the territory and was domiciled in another state.

2.3.3 Residence (Forum Rei)

Actions in the High Courts are commenced with the issue of a writ and the service of a writ or something equivalent there to[60]. Personal process is therefore a foundation for jurisdiction. Where a writ cannot be legally served

[57] (1951) C.H. 824
[58] Cheshire and North Op cit
[59] (1894) A.C. 670 P.C
[60] Dicey and Morris Op cit

on a defendant, the Court cannot exercise jurisdiction[61]. Under private international law a Court has jurisdiction inpersonam if the defendant is resident in the forum and has been served with a writ. Residence is one of the most accepted international grounds for establishing jurisdiction. It follows essentially the maxim "actor sequitur forum rei", that is to say that the law leans in favour of the defendant. Therefore, it is natural for the plaintiff to sue in the country where the defendant resides, or in a case of multiple defendants where one of them is domiciled[62]. Residence is sufficient for jurisdiction because the defendant can be easily served with the writ which makes him subject to the jurisdiction of the Court.

Having established that Residence is sufficient for jurisdiction, the bone of contention here is, whether the mere temporary presence of the defendant in a foreign country is enough. Under English law, temporary presence of the defendant in England gives English Court jurisdiction over the defendant at both common law and statute. This position is in **pari materia** with the law in Nigeria, U.S.A and other Commonwealth countries. The argument in favour of jurisdiction on this basis is that persons who happen to be within a territorial dominion are obedient to its sovereign power, that is to say, to the jurisdiction of its court and in certain respect to its laws[63] the length of time spent there is immaterial. A person is so duly bound by his mere presence[64].

[61] Cheshire and North Op cit
[62] Ibid
[63] Ibid
[64] Ibid

Under Nigerian rules in a matter of private international law which is premised on the English law. The Court is said to have jurisdiction in an action inpersonam against any person who is present in the territorial jurisdiction of the court when a writ of summon or other originating process is served upon him. "As a general rule, the domicile, Resident and nationality of the parties are immaterial". In determining whether a local Court has jurisdiction on a non-resident/foreigner, the Nigerian Court of Appeal Lagos Division administered this principle in the case of **Barsoum V Clemessy International**[65] In this case, the appellant sued the respondent, French companies, for breach of contract which to the effect that the appellant would be entitled to a 50% commission from the payment arising from all jobs executed in Nigeria by the respondents. However, the respondents did not live up to their bidding as per the said contrast, hence the appellant sued them claiming a number of reliefs including a declaration that he was entitled to commission of 50% as referred to above, an injunction restraining the respondent from claiming more than 95% of the contract value and an order directing that the 50% be paid into an escrow account on the name of the appellant.

The statement of claim of the appellant did not disclose where the contract was entered into and where it would be performed. However, the contractual sum was to be collected in Switzerland.

The appellant was later granted leave to issue and serve the unit of summons and statement of claim out of jurisdiction (in France). He was also

[65] (1999) 12 NWLR (Pt 632) at Pg 520

granted an extension order of injunction restraining the respondents and their agents from withdrawing money from the Central Bank of Nigeria, Federal Ministry of Mines, Power and Steel and other associated bodies. Therefore, the respondents applied for the discharge of all the orders made by the Court. The main contention of the respondents was that the Court lacked jurisdiction in that the contract was neither entered into, nor to be performed, within the jurisdiction of the Court where the appellant, counter affidavit was to the effect that the contract was negotiated in Nigeria.

The trial Court declined jurisdiction and held that the proceedings should be done abroad since the respondents were in France and all the contract documents were in French. Furthermore, the payment claimed by the appellant was to be made in Switzerland.

Dissatisfied with the ruling, the appellant appealed to the Court of Appeal. The Court of Appeal after a review of the facts and statutes unanimously dismissed the appeal. Highlighting that thought in general, the Court has jurisdiction in an action in personam against any person whom is present in the territorial jurisdiction of the Court when a writ of summon or other process is served upon him. As a general rule, the domicile, residence and nationality of the parties are immaterial.

Therefore, on whether residence comprehend presence, under both English and Nigerian law one can say it does as was decided in the **English case of Carrick V Hancock**[66], the Canadian case of **Forbes V Simmons**[67] and

[66] (1895) 12 TLR
[67] (1914) 20 D.L.R 100

the **Nigerian case V Barsoum V Chemessy International**[68]. However, where the defendant is brought by force or is fraudly induced to come into the jurisdiction of the foreign court and there served with process, the United State is of the view that in such a case jurisdiction exists but should be disclaimed by the court for reasons of equity if the plaintiff is privy to the fraud or force[69]. In **Stein V Valken Huysen**[70] it was suggested that in appropriate circumstances an English writ might be set aside if the defendant was fraudulently lured into the jurisdiction.

This position the researcher believe would apply to the Nigerian Court under such circumstances, since our laws are modelled after English law.

Where a corporation is concerned, the meaning of residence or presence is not very important. This is because both the English[71] and the Nigerian[72] Acts requires that the corporation must have its principal place of business and not merely carrying on business in the foreign Court. In other words the mere presence of a representative of the corporation will not suffice. To have jurisdiction over a corporation if it is engaged in carrying on business, then it must have a permanent or definate place of business within the forum. This position is what obtain also under the common law.

Concerning the issue of office or place of business both the 1933 Act[73] and Cap F35[74] A foreign Court, is deemed to have jurisdiction for the purpose of the Act if the judgment debtor being a defendant in the original Court had an

[68] Supra
[69] Dicey & Morris Op cit Pg 981
[70] (1858) E.B. & E. 65
[71] 65 See 4 (2) a-e 1933 Act
[72] See 6(2) i-iv Cap F35
[73] Ibid

office or place of business in the foreign country and the proceedings were in respect of a transaction effected though or at that office or place. That is to say where for example, x is the director of a Nigerian company. He visits Ghana and while he is there A, a Ghanaian company takes out a summon against the Nigerian company and serve it on him. The company has no branch in Ghana it cannot be said to carry on business there. The Ghanaian example is synonymous with the case of **Littauer Glove Corporation V.F W Millington**[75] where Per Saltes J. stated thus; the test, which has been applied by Courts in other commonwealth countries, is said to be the same as that adopted at common law to determine whether a company is resident in England.

2.3.4 Forum chosen by the parties

Many contracts and other forms of legally binding agreements include a jurisdiction or arbitration clause specifying the parties' choice of venue for any litigation (called a forum selection clause). This head of jurisdiction is generally considered an internationally accepted forum not only in international conventions but also under statute.

The Brussels convention contain such a rule in article 17[76] the article provides that where parties, one or more of whom is domiciled in a contracting state, have agreed that a Court or the Courts of contracting state are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that Court or those Courts shall have exclusive jurisdiction.

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[74] Ibid
[75] (1928) 44 T.L.R. 746

This article, it is argued, refers only to the choice of a forum in the contracting state. Where the parties, have agreed to a forum outside the contracting states, it is suggested that the English Court may stay English proceedings against a defendant domiciled in the United Kingdom or in another contracting state. **In Powell Duffryn PLC V Petereit**[77], the European Court held that the concept of an "agreement conferring jurisdiction under article 17 should be regarded as an independent concept. The question arose in the contest of whether the administrator of a German company could sue an English shareholder for the returns of dividends which, it was alleged had been wrongly paid. The statutes of the company, provided in effect, that the German Court would have exclusive jurisdiction in relation to all disputes between shareholders and the company. The English company argued that the jurisdiction clause in the statutes did not amount to an "agreement" because the statutes were regulations which the shareholder could not dispute. Comparative survey of the legal systems of the contracting states showed that in some legal systems the relationship between a company and its shareholders was regarded as contractual, and in others it was classified as institutional, regulating or sui generis.

The European Court held that an autonomous interpretation of the expression "agreement conferring jurisdiction" led to the conclusion that the ties between the shareholders and a company were comparable to those between parties to a subject, and that the statutes of the company must be regarded as a contract governing relationship between the shareholders and the

[76] Supra at p6.

company. By becoming and remaining a shareholder the member submits to all the provisions of the statutes and to company resolutions, irrespective of whether he agrees with them or even know of them.

The broad effect of article 17 is to confer jurisdiction on the English Court if the parties have agreed to give jurisdiction notwithstanding that the defendant is domiciled in another contracting state, or where neither party is domiciled in a contracting state, notwithstanding that the Court of another contracting state may have, under its law, jurisdiction over the dispute.

Although the parties have the right to insert jurisdiction clause, both the statutes and conventions contain provision as to the conditions that need to be fulfilled by such agreement in order to make it valid.

2.3.5 Forum delecti

Another internationally accepted basis for jurisdiction is that of the place of commission of tort or delecti. It is accepted internationally that, not only the Court of the place where the damaging act occurred would possess jurisdiction, but also those of the place where the injury arose. In this light it shall be envisaged that in the claims arising out of environmental torts the forum of the latter court becomes relevant. The draft Hague project of a jurisdiction and execution convention contains this ground for establishing jurisdiction in its article 10. The Brussels convention in its article 5(3) refers to the fact that the claims submitted at place where the injury arose may relate exclusively to that injury and may not encompass injuries which arose in other places. In other words it is the forum where the injury arose that will have

[77] Case C. 214/89 (1992) E.C.R 1 – 1745

exclusive jurisdiction to entertain the claims. Here recourse shall not be made to injuries occurring in other forums i.e judgment on such matters can only be recognized and enforced if they are given by the Courts of the place where the injury arose and also where the damaging act occurred.

2.3.6 (f) Forum rei sitae

It is a trite law that only the court of the place where an immovable property is situated will posses jurisdiction in matters related to rights in rem concern with that property. This rule for determining jurisdiction is represented by the latin maxim lex situs which literally means the law of the place where the property is located or situated. This jurisdiction is based entirely on the conception of presence or notional presence of the res within the jurisdiction[78]. Parties willingness or otherwise of parties to submit to the jurisdiction incase of an action to right in rem is wholly irrelevant. In the Brussels convention this ground of jurisdiction is extended to cover tenancies of such property. Also section 6(2)b[79] relates to jurisdiction in rem. The section provides that a foreign judgment is registrable only if the judgment was given by the Court where the immovable is situated. But where an immovable is not situated in the country from which the judgment emanates is not registrable.

There is however some exceptions to the lex situs rule. Under this exception the forum Courts will have the right to exercise jurisdiction over cases that involves a contract or equity between the parties[80].

[78] Kanam,S.M.G: Contemporary Issues in Nigeria Law, Browntel Professional Publishers Ltd, 2007. Pg 305.
[79] Cap F35 Opcit.
[80] Ibid

In the Nigerian case of **Bata Shoe Co V Melika**[81] the federal supreme court (as it then was) held that the Lagos High court had equitable jurisdiction in an action for specific performance of a contact relating to land in Aba in the present Abia state which was outside the territorial jurisdiction of Lagos state. Other exception includes:

(1) For the purpose of administration of estate or trust the forum court shall have jurisdiction to determine the question of title to the foreign immovable.

(2) The forum court shall have jurisdiction to entertain any action in rem against a ship to enforce a maritime lien on the ship for damages done to foreign immovable property, the **Tolten**[82] an admiralty action in rem was successfully brought against the owners of a ship to recover damages for injury caused by negligent navigation to pier in Lagos Nigeria. The court of Appeal held that the lex situs rule did not apply to a case where the High court exercised its admiralty jurisdiction.

2.3.7 Forum solutionist contractors

Though parties by virtue of the doctrine of freedom to contact have the right to choose the forum where disputes arising out of their contract, should be entertained, yet judgment delivered by the court of the place where the obligation in question has been performed is also acceptable. This simply point out the fact that the forum where the contract was performed is also an internationally accepted jurisdiction for the recognition and enforcement of foreign judgment. For example the English Court has considered in two cases

[81] (1956) F.S.C 100 - 71 (1946) IAUER 79.

the question whether the parties may confer jurisdiction on the Courts of a contracting state by specifying that the performance of the obligation is deemed to be due there.

The result of the cases is that a choice of the place of performance is effective, but it must be a place where the obligation is capable of being performed. **In Zelger V Salintiri** (No1)[83]. The European Court held that if the parties to the contract are permitted by the law applicable to the contract, subject to any condition imposed by that law, to specify the place of performance of an obligation without satisfying any special condition of form an agreement (even oral agreement) on the place of performance of the obligation is sufficient to found jurisdiction in that place under Article 5(1). Also in the **MSG** case[84] the European Court acknowledged that the parties are free to agree on a place of performance for contractual obligations which differs from that which would be determined under the law applicable to the contract but it held that they are nevertheless not entrusted, with the sole aim of specifying the Courts having jurisdiction, to designate a place of performance having no real connection with the reality of the contract at which the obligations arising under the contract could not be performed in accordance with the terms of the contract.

[82] (1920) Ltd. (1928) 44. TL. 12 746
[83] Case 56/79 (1980) E.C.R. 89
[84] Case C106 195 (1997) E.C.R. 1 - 911

CHAPTER THREE

NATURE AND SCOPE OF RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENT

3.1 INTRODUCTION

Recognition and enforcement generally refers to the procedure whereby a local court accepts judgment obtained by a litigant in a foreign judicial proceeding as binding, and compels compliance by a party with that judgment.

Enforcement is the last stage of a judicial process. Where a judgment is given on a matter it cannot be said to be effective until the judgment is executed or enforced. Failure to enforce a given judgment whether at home or abroad leads to hardship and injustice. The ultimate desire of private international law (Conflict of laws) is to protect the rights acquired under foreign system of law. Where a litigant is successful and judgment is given in his favour then the judgment should be enforced irrespective of the place where the judgment is obtained. To encourage the achievement of this objective of private international law the Anglo Saxon system of law permits a plaintiff who fails to obtain satisfaction of the judgment at the forum to pursue such judgments to another forum where he can find the defendant to enforce the said judgment. This chapter deals with the details of this under common law and statute.

3.2 DISTINCTION BETWEEN RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENT

In order to be able to speak comprehensively upon the subject of the enforcement of foreign judgments one most necessarily distinguish between the enforcement of a judgment given by the Courts of a particular country from that of the Courts of another country and a recognition of this same judgment.

Generally not all judgment recognized are susceptible for enforcement, certain judgments that are declaratory in nature do not require special coercive measures to be employed by the state. So also judgments involving family law matters such as nullity or divorce decrees provided by section 81(2) matrimonial causes. Enforcement on the other hand possibly indicate a judgment having actual executive force[85]. In other words it pre-supposes the employment of state coercive power essentially on exercise of state sovereignty.

Before deciding whether to enforce a foreign judgment or otherwise, the court must enquire whether the judgment has satisfied the requirement for enforcement under various laws. For example, in Nigeria the requirements are contained in section 6(1) (2) of Cap F35. These requirements include the fact that the judgment was recorded by a court of competent jurisdiction and that the defendant has been adequately served with the notice of the proceedings. The requirements for enforcement shall be discuss in details in this chapter.

3.3 PRINCIPLES GUIDING RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENT

Recognition and enforcement of foreign judgment is guided by the principle of reciprocity and the doctrine of obligation. Reciprocity is a key

issue in the enforcement of foreign judgment without reciprocity many of the states/countries will not recognize foreign judgments brought before their Courts. The exception is only where such countries have bilateral relations and have signed treaties with the country from which the judgment emanates. As stated earlier, foreign judgment are enforced when the foreign court believe its judgment would be given the same treatment by the court of the other jurisdiction.

Examples of countries that are guided by this principle are England as provided under the foreign court judgment (Reciprocal Enforcement) Act 1933. Japan applies it under their code of civil procedure[86]. Under Chinese government reciprocity is a matter of national sovereignty, the principle of reciprocity is written on almost every Chinese law or regulation dealing with foreigners[87]. In Mexico, reciprocity is not a pre-requisite to recognition or enforcement but a defence to it. Judges have discretion to consider whether the Courts of the originating jurisdiction have given Mexico judgment sufficient reciprocity. The Mexican Courts can deny recognition if they find insufficient reciprocity[88] other jurisdictions such as South Africa, have no official policy or statute regarding reciprocity[89].

In Nigeria also, the main point of peculiarity with respect to foreign judgment Act is the issue of reciprocity. Cap F35 makes provision under section 3 for the minister to extend part of the Act to countries giving

[85] Morris J.H.C, opcit P105
[86] See 6(1) & (2)
[87] Survey on foreign recognition of U.S. money judgment July 31st 2001
[88] Ibid
[89] Ibid

reciprocal treatment to Nigerian judgment abroad. The section provides as follows:

> *The minister of justice if he is satisfied that in the event of the benefit conferred by this part of this Act being extended to judgment given in the superior court of any foreign country, substantive reciprocity of treatment will be assumed as respect the enforcement in that foreign country of judgment given in the superior Courts in Nigeria by order direct.*

a) that this part of the Act shall be extended to that foreign country; and

b) that such Courts of that foreign country as are specified in the order shall be deemed superior Courts of that country for the purposes of this part of this Act.

The implication of this provision is that the principle of reciprocity is being applied to recognition and enforcement of foreign judgment in Nigeria. The principle according to Mpom is rather insular[90]. This is because any country that does not reciprocate by recognising and enforcing Nigerian judgment will not have its judgment recognized and enforced by Nigerian Courts. To the researcher's understanding, the Nigerian legislature has erred in taking after this English doctrine. The whole essence of the existence of conflict of law is to see that justice is done to every person irrespective of where they come from.

The issue of reciprocity in matter of recognition and enforcement of foreign judgment, the researcher believe, defeats the course of justice and adhering to it will certainly lead to injustice. Little wonder that Cheshire and

[90] Mpom, M.P. Op cit at P44.

North, said, to base enforcement upon this uncertain ground will certainly leads to difficulties[91].

The second principle is based on the doctrine of obligation. This means that the judgment rendered by a foreign court of competent jurisdiction imposes upon the defendant a duty or obligation to obey and discharge it. It also places a correlative right on the plaintiff to enforce that obligation through the English Courts. This principle was clearly enunciated by Blackburn J. In the case of **Schinsby V Westernholz[92]** where it was stated thus:

> *The judgment of a court of competent jurisdiction over the defendant imposes a duty for obligation on him to pay the sum for which judgment is given, which the court in this country are bound to enforce and any thing which negate that duty or forms a legal excuse for not performing it, is defence to the action".*

This doctrine eliminates reciprocity because all the law requires here is for the applicant to prove the judgment. Once that is done the onus shift to the defendant to show cause why he should not perform the duty. In essence the principle implies a duty or obligation on the defendant to pay the sum for which judgment is given by a court of competent jurisdiction.

Secondly, there is little difficulty in prescribing the defences available to the defendant because if the grounds for liability is an obligation, then any fact which disapproves the existence of the obligation may be pleaded in bar[93]. Adherence to this principle is mostly restricted to all the commonwealth countries.

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[91] Ibid
[92] (1870) CR 6 QB 155
[93] Cheshire and North OP cit

3.4 REQUIREMENT FOR RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENT GENERALLY

When assessing the status of a foreign judgment in a particular legal system, i.e. whether the judgment is recognizable or enforceable, the court of the forum will look at a number of conditions which need to be fulfilled[94]. This requirement are used in order to decide whether recognition was feasible and where this is fulfilled, the Courts can then register the judgment for execution. These requirements are the same, both the common law and statutes. It therefore suffices to discuss the conditions under statutes.

3.4.1 Recognition and Enforcement of foreign judgment under statutes

Under the English law upon which the Nigerian laws are modelled, there are basically two measure statutes that provide for recognition and enforcement of foreign judgment given in foreign countries. They are the Administration of justice Act 1920 and the foreign judgment (Reciprocal Enforcement) Act 1933. Under these statutes foreign judgment are enforced by way of registration rather than by action. The 1920 Act applies to judgment rendered in some Commonwealth countries while the 1933 Act allows for enforcement by Registration on Reciprocal basis. The distinction between the two Acts are that under the former, the Registration of foreign judgment is at the discretion of the English Court which the judgment creditor could enforce by action at common law, whereas under the latter, the Court must Register the judgment and the judgment creditor cannot enforce it at common law.

[94] http. 11 travel.state.gov/law/info/judicial 1691 html.

In the United States of America Enforcement of foreign judgment issued by foreign court is governed by the laws of the state. Under the United States law, an individual seeking to enforce a foreign judgment, decree or order must file a suit before a competent Court[95]. The Court will then determine whether to give effect to the foreign judgment[96].

In the Netherlands, the rule is that matters relating to enforcement of foreign judgment are tried De Novo by a Dutch judge with the foreign judgment serving as prima facie evidence[97]. The laws on recognition and enforcement of foreign judgment in Netherlands are contained in Article 431 RV of the Dutch code of civil procedure 1838[98].

Looking at the situation in Nigeria there are two major statutes that are applicable to recognition and enforcement of foreign judgment, these statutes are modelled after the 1933 Act. They are the earlier cited Cap175[99] and Cap F35[100]. The statutes in Nigeria allows foreign judgment for sums of money to be registered in Nigeria and enforced directly if the judgment was obtained from a superior Court of any part of the Commonwealth Country to which the Act is applicable[101]. Whereas Cap 175 applies to the Commonwealth Countries, Cap F35 is capable of applying to all foreign countries as long as the minister of justice makes an order under section 3(1) to any foreign country which Court has given reciprocal treatment to Nigerian judgment.

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[95] Ibid
[96] Novel Rosner Supra
[97] Ibid
[98] Ibid
[99] Op cit at Pg 3
[100] Ibid
[101] Ibid

In most countries, the statutes provide for enforcement of foreign judgment by way of registration. Example of these countries[102] are England and Nigeria. To register this judgment for enforcement certain conditions must be met. The conditions are contained in section 3(2) of part I of Cap F35. According to the section, for a foreign judgment to be registerable it must have been given in a case commenced from a superior court of first instance and in addition the judgment must be final and conclusive as between the parties.

a) Final and Conclusive

A foreign judgment does not create a legal cause of action in England, and other European countries unless it is resjudicata by the law of the country where it was given. It must be final and conclusive in the sense that, it must have determined all controversies between the parties. A provisional judgment is not resjudicata if there is the possibility of a fuller investigation leading to a final decision.

A case in hand that satisfied the final and conclusive test is that of **V.A.B Petroleum V Micmoson UK Ltd[103]** "in that case, judgment had been delivered by a U.S. court in favour of the plaintiff (respondent) for the sum of 316,000 dollars. The plaintiff respondent applied and got the U.S. judgment registered as a judgment of the Lagos State High Court. The defendant appellants thereafter filed an appeal urging the Court of appeal to set aside the ruling of the lower Court which register the said judgment. They contended that in registering the

[102] 1993 Act of England Cap F35 of Nigeria, Article 431 RV Dutch Civil Procedure Code etc.
[103] Mpom Opcit at pg 47

US judgment, the lower Court erred in law because the registration was in contravention of the provision of Cap 152.

He also contended that the lower Court erred in law in registering the foreign judgment because the institution of the US nation was in contradiction of an agreement which stipulated that any dispute between the parties was to be settled otherwise than by proceeding in the U.S. Court. The Court of appeal discountenances the above contention and upheld the judgment of the lower Court. The Court of Appeal held that the Court will not make an order that will be favourable to a party with Besmirechedhands. Continuing, the court said, that, "it (it the stay) ought not to be granted where the respondent who has the judgment will suffer immeasurably ....if... the applicant's hand is soiled and is taking the court for a ride".

The Court observed that in one of his affidavits, the judgment debtor had averred that his investments in the U.S. were worth only about &20,000 but in another affidavit, affidavit, he had averred that he had a lot of investments in the US. The judgment debtor claimed in the appeal that he had not been served with any process while he was in the U.S. but the truth was that he has been duly served with the writ of summons and he personally retained the services of a U.S. firm of solicitors, it seems that he fled from the U.S. to avoid paying the judgment debt. This judgment has satisfied the final and conclusive test as earlier pointed out. This is because the other proceedings were necessary to fix liability on the defendant.

A judgment in default of appearance does not satisfy the condition of finality if it is given in a country where the defendant is allowed to apply within a limited time for its rescission by the adjudicating court[104].

It should be noted that requirement for finality means that the judgment must be final in the particular Court in which it was pronounced[105]. It does not mean that there must be no right of appeal. Neither the fact that the actual appeal is pending in the foreign country is bar to an action brought in England or Nigeria[106]. Though where an appeal is pending, the English court has an equitable jurisdiction to stay execution of the foreign judgment which it will generally exercise. If however, the effect under the foreign country of a pending appeal is to stay execution of the judgment it would seem that, in the interim the judgment is not actionable in England and Nigeria respectively[107].

b) **The judgment must be for a sum of money**

A sum must not be payable in respect of tax or other charges of a like nature or in respect of a fine or other penalty in other words the judgment must be for a fixed sum of money. A sum is not fixed if it is a sum which is variable at some future time in the future or if it is for damages and cost which are subject to assessment, and the entire amount is neither ascertained nor ascertainable. A sum is said to be ascertained by a simple arithmetical calculation.

104. Wolf Op cit Pg 264
105. Beaty V Beaty (1924) 1 KB, 807
106. Section 3 (3) Cap F35, Opcit.
107. P atrick V Sheddan (1853) 2 E & G 14

The point here is that the judgment would not be said to be final and conclusive if further ascertainment is to be carried out[108]. A Nigerian case on this point is that of Adwork (Nig) Ltd and Nigeria Airways[109]. Nigerian Airways owed Adwork the sum of about 1.4 million. Adwork obtained a judgment debt in it's Favour on May 26, 1993. The Airways was ordered to pay Adwork in Installments spanning eight months.

A settlement reached in February 1994 contained a clause which stipulated that any disagreement regarding the exchange rate to be applied in making the scheduled payment should be referred to an arbitrator appointed by the president of the law society of England in compliance with the arbitration clause entered in Nigeria, an Arbitrator was appointed before whom Adwork filed a fresh protest contesting the value of the debt payable by Nigerian Airways. After the judgment debt was handed down Adwork got the judgment of the Ikeja High Court registered in London to enable it seize Nigerian airways movable and unmovable assets in Nigeria and London. After this, Adwork then successfully commenced the process of enforcing the judgment of the Ikeja High court via the London Court.

On January 23, 1994, it seized the Airways DC 10 aircraft in London and hired an evaluator to value the plane in preparation for sale. The airways then obtained an order of the London and Ikeja Courts to pay Adworks judgment debt through the Registrar of the Ikeja High Court. The order was granted with the amendment that the airways change be made payable to Adworks lawyer. After

[108] Harrop V Harrop (1920) 3 K B 386. V.A.B.V. Micmosa U.K. Ltd supra
[109] (2002) 2 NWLR pt 645.

paying in Lagos, Airways took the receipt to the London Court to make the case that having paid the judgment debt in full, the aircraft should be released.

Adwork opposed this application and came down to Ikeja to file an application asking that the money be paid to its London lawyers. On this, the court ruled in favour of the airways and the ruling was accepted by the London Court. Airways filed an appeal against the original judgment which was withdrawn to make room for negotiations between the parties which led to settlement terms that were entered as the order of the High Court of Justice, Queens Court London.

c) **Judgment must not be for tax or penalty**

Although this section provides that the judgment must be for a sum of money, the second armbit prohibited the payment of money on tax or penalty. Therefore, foreign judgment on revenue (tax) and penal matters are excluded for enforcement. It is an established principle of the received English law that Nigerian Courts will not enforce directly or indirectly a claim by way of action a foreign revenue authority nor will an action on a foreign judgment for tax be enforced. This principle was captured by Lord Mansfield in the case of **Holman V Johnson**[110] where he stated categorically that.....no country ever takes notice of the revenue laws of another.

In Government of **India V Taylor**[111] a company registered in England but carrying on business in India, sold its business to the London government and immediately removed the money to England. After the company went into voluntary liquidation, the Indian commissioner of income tax made a demand on

[110] (1775) 1 COWP .34
[111] (1955) A.C. 491

it in the English court to pay a large sum of income as capital gain tax. Their lordship rested firmly on Lord Mansfield's dictum (Supra) and went to further approve the decision in **Buchawan Mcherg V Macvey**[112] in which it was held that:

> *In every case the substance of the claim must be scrutinized and if it then appears that it is really a suit brought for the purpose of collecting the debt of a foreign country, it must be rejected.*

This broad principle contained in this statement is applicable to Nigeria as it is carried by the provision of section 3(2) part I of Cap 152. Revenue matters are to include classified matters relating to custom duties, succession duties, municipal levies, profit, tax, stamp duty, capital gains tax, state insurance contributions income tax etc.

With respect to penal matters, it has always been the opinion of early English judges that criminal laws should not have extra territorial jurisdiction. Therefore, the rule that penal law cannot be enforced by foreign Courts must have derived its existence from this opinion. **In MC food U.A.C. for N.S.W**[113] It was held that all crime are local. Therefore, jurisdiction over a crime belong to the country where the crime is committed. The locus classicus on this is the case of **Huntington v Attrille**[114] where the privy council stated thus:

The rule has its foundation in the well recognized principle that crime, including in that term all branches of public law punishable....at the instance of the state government or of someone representing the state, are local in the sense that they are considered punishable in the Country where they are committed.

112. (1955) A.C. 134

113. (1954) L.R 89
114. (1891) A.C. 455, (1893) AC 150.

Accordingly, no proceeding even in the shape of a civil suit which has for its object the enforcement by the state whether directly or indirectly or punishment for such breaches imposed by the lex fori ought to be admitted in the court of any other country. The general reluctance by the court of the forum to enforce judgment arising from revenue and tax judgments or penal judgment as described above is based on the natural desire of each state to preserve its borders and to protect its nationals from foreign sanctions.

d) **The foreign judgment sought to be registered must be given after the order directing that direct Registration of foreign judgment be extended**

Another condition for enforcement of foreign judgment aside from being final and conclusive and for a fixed sum of money the judgment must be given after the order directing that direct registration of foreign judgment be extended to judgment obtained from that country was made by the minister or if it is a judgment to which section 10 applies. Section 10a Cap F35 provides thus:

A judgment given before the commencement of an order under section 3 of this Act i.e. applying part I of this act to the foreign country where judgment was given may be registered within 12 months from the date of the judgment or such longer period as may be allowed by a superior court in Nigeria.

In effect, the subsection permits the direct Registration of a foreign judgment given before the commencement of the minister's order extending direct registration to judgment given in a Country, if such application is brought within twelve months from the date of the judgment or such longer period as may be allowed by the superior Court to which the application is made.

3.5 MECHANISM (PROCEDURE) FOR REGISTRATION

Upon satisfying the conditions for Registration as earlier discussed the High Court which is vested with the power for Registration of foreign judgment will thereby register the judgment. The process for Registration of foreign judgment is by way of application to the competent Court. The rules of procedure for Registration are contained in Rules 1(1) 4 (2), 5,6 and 12 of the Rules of Court made pursuant to section 6 of the Reciprocal enforcement of judgment Act, Cap F35.

The provisions of this section clearly show that the procedure for registration of a foreign judgment to which the ordinance applies is by application exparte or on notice to a judge. Where the petition is exparte, the judge may direct notice to be served on the judgment debtor when the court is satisfied, it then registers the judgment and an order to that effect is drawn up and when the said order is made upon a petition on notice the order shall be served on the judgment debtor. However, where the order is made on an exparte petition, there is no provision that the same shall be served on the judgment debtor. This position is clearly adumbrated in the case of **Shona Jason Ltd V Omega air Ltd[115],** the respondent in this case entered into an aircraft lease purchase agreement with Real Aviation Limited. The agreement was dated 6th December 1996. Real Aviation limited is a company Registered in Ghana. The appellant guaranteed the agreement between the respondent and Real Aviation

[115] (2006) 1 N.W.L.R pt (960) Pg 1.

Ltd. The agreement performed by an aircraft, Boeing 707. 323 CMSN 19352 with registration number mark 99-JWR. Following a breach of the agreement between the respondent and Real Aviation Ltd, the former commenced an action against the latter and the appellant on 15/10/98 at the Queen Bench Division of the High court of England in suit No. 1997 folio no. 2194. In its judgment of November, 1998, the respondent then applied to the federal High Court praying that the judgment awarded in his favour by the English Court be registered as that of the federal High Court under Cap 152. The appellant did not file any counter affidavit in opposition to the respondent's said application. The Court heard and granted the application.

The appellant latter applied to the Court to set aside the registration of the judgment. The Court heard the appellants motion and, on the ground that it could not set aside a judgment of an English court, dismissed the motion.

The appellant, being dissatisfied with the decision of the Federal High Court, appealed to the Court of Appeal, contending that he was never served with any court process or notified of any Court proceedings by the judgment creditor.

The Court of Appeal in resolving the appeal, considered the provision of section 6(1) of cap 152 and on the procedure for registration considered the provisions of rules (1) and (2), 5, 6 and 12 of the rules of Court made pursuant to section 6 of cap 175 as clearly noted above. Garba JCA in allowing the appeal was of the view that the provision also clearly state in effect that the judgment debtor has the right to apply to have the registration of the judgment set aside

irrespective of the fact that he had notice of the petition for registration of same and did participate in proceedings leading to that registration and that he did not oppose the application at the time he said the liner its application according to law. The application itself was not to set aside the judgment of the foreign Court as erroneously is held by the lower court, but to set aside the order granting leave to the respondent to register said judgment.

The rules also require the order granting leave to Register the judgment to state time within which the judgment debtor is entitled to apply to set aside the Registration. **In Ramon V Jinadu**[116], Nnaemeka Agu J.C.A. (as he then was) set aside the judgment of the trial Court which dismissed the application that the foreign judgment be set aside because it was registered out of time.

The effect of this provision is that any judgment that is registered out of time shall be set aside.

3.6 TIME LIMIT FOR APPLYING FOR REGISTRATION OF FOREIGN JUDGMENT IN NIGERIA

The period within which a judgment can be registered is 12 months under Nigerian law section 3(1) of CAP 175 provides: "where a judgment has been obtained in the High Court of England or Ireland or in the Court of session in Scotland, the judgment creditor may apply to the High Court at anytime within twelve months after the date of the judgment or such longer period as may be allowed by the lower Court to have the judgment registered in the Court and on any such application the court may, if in all the circumstances of the case it thinks just and

[116] (1986) 5 NWLR (pt 39) Pg 100.

convenient that the judgment should be enforced in Nigeria and to the provision of this advanced order the judgment to be registered accordingly".

Although, **section 4 of cap F35** extended the period to six years within which a foreign judgment can be registered from the date of the judgment. But the problem is that the section is inoperative until an order has been made by the minister of justice. By virtue of the provision of **section 3(1) cap F35,** the provision of part I of the Act that consist sections 3, 4, 5, 6, 7, 8, 9 and 10 of the Act remains dormant or inactive until life is breathed into them by an order promulgated by the minister. Where no such order is made by the minister in exercise of his power under the section to bring into life the provisions of part 1 of the Act as earlier stated the section remains dormant. This position created confusion and the confusion emerged as a result of various judgment of the High Court which mostly applied the 1990 Act rather than CAP 175. However, alot of the cases went on appeal and the position was made clear. In other words, it was established that, the provisions of cap 175 relating to the period of twelve months prescribed for the registration of all foreign judgment in Nigeria including (Supra) those obtained in the United Kingdom remain intact. Example of some cases that went on appeal are discussed below: In other words the statutes still regulates the enforcement of foreign judgment in Nigeria. This position was made clear in the case of **Macaulay v R.Z.B**[117] of Austria in this case the defendant; a foreigner had been residing in Nigeria since 1986. He together with 2 other persons who resided outside Nigeria guaranteed a loan from the plaintiff to a company called Constante Trading Company based in

117. Supra at P 6.

Channel Island. The loan was to be repaid by the company in accordance with the terms and conditions set out in the Deed of guarantee and the company defaulted. The respondent sued the appellant and the other 2 guarantors jointly and severally in the commercial Court of the Queen's Bench Division of the High Court of England, which delivered a judgment in favour of the plaintiff on 19th of December, 1995 against them jointly and severally for the sum of Five million, five hundred thousand U.S. Dollars (U.S $5,500,000.00) with interest in accordance with the Deed of guarantee. The plaintiff by an experte application filed on the 28th of August 1977, which was granted by Alabi J of the High Court of Lagos State.

Section 3(1) of the 1922 Act, it is, that stipulated 12 months as the period within which the application for registration must be brought. Section 4(1) of Cap 152, on the other hand, prescribe six years. It thus meant that if the application was brought under Cap 152, it was in order. So, the question was whether the application was brought under section 4(1) of Cap 152 or section 3(1) of the 1922 Act.

Counsel to the respondent maintained his argument, which he had made in the two lower Courts to the effect that the substantive provisions of the 1922 Act are no longer applicable and that the 1922 Act is only relevant for the purpose of making Part 1 of Cap 152 applicable to the Commonwealth countries to which the 1922 Act extended. To the same effect, Alabi J. had in the earlier case of **Dale Power System Plc v Witt and Busch Ltd**[118] construed section 9 as follows:

118. i.e by virtue of S. 3(1), on the basis of substantial reciprocity.

(a) Part 1 of the 1960 Act shall apply to any part of the commonwealth and to judgment obtained in the Courts of those commonwealth countries.

(b) Part 1 shall apply to commonwealth countries as it applies to foreign countries and to judgments obtained in the Courts of these foreign countries.

(c) The 1922 Act shall cease to have effect

(d) The 1922 Act shall have effect to relation to the Courts of Her majesty's Dominions i.e commonwealth countries to which the 1922 Act extended as at 1st February, 1961 when the 1960 Act came into force.

It is clear that ratio (d) and (e) of this holding were conflicting and needed clarification. If the 1922 Act continues to have effect in relation to the commonwealth countries to which it was already, as at 1st February 1961, it cannot be right to say that it has ceased to have effect, for all intent and purpose. This, in my view, was the crux of the matter.

The submission of learned counsel to the Application on the other hand was to the effect that the 1922 Act is wholly applicable whenever the judgment of a country to which it has been extended is sought to be registered. This provision remains until the Minister exercises the power to extend Cap 152 to that country.

The Supreme Court unanimously reversed the decision of the two lower Courts. Umar Kalgo, JSC who delivered the lead judgment, reviewed the provisions of the two legislations and the briefs of counsels.

He also observed that the Minister of Justice has not yet exercised his power under section 3 of Cap 152 to extend the application of part 1 of Cap 152 to the U.K where the judgment in question was given in the circumstances, the learned

JSC held that the application for registration of the judgment could only have been brought pursuant to section 3(1) of the Act or by virtue of S. 10a of Cap 152. He concluded thus:

> *I am of the firm view and find accordingly that the provisions of section 3 of the 1958[119] Ordinance and section 10a of the 1990 Act[120] apply to the question of the registration of the judgment in the instant case. Each of these sections provides that the judgment to be registered under it must be registered within twelve months from the date of the judgment or any longer period allowed by the registered Court[121].*

The learned JSC then reviewed the facts to show that the application for registration in the instant case was brought more than 12 months after the judgment was given that no leave was applied for extension of time. He therefore struck out the registration of the judgment[122]

The defendant applied for the setting aside of the registration on the grounds that it was not in accordance with the relevant law and was contrary to public policy in Nigeria. The learned trial judge after listening to arguments from both counsel, dismissed the application. The defendant appealed to the Court of Appeal and lost. Whereupon he further appealed to the Supreme Court. The major ground of appeal was that the application for registration was brought more than 12 months after the foreign judgment was obtained and no leave was obtained to register the judgment after 12 months.

119. i.e 1922 Act
120. S.10a of Cap 152
121. at P.13 of the report
122. Culled from NBA Journal 2004 Vol. 2 No 4 at p. 448-449.

In Dale power PLC V Witt Busch Ltd[123] the trial High court has applied the provisions of cap 152 in registering the foreign judgment. On appeal, one of the issues raised before the Court of appeal was whether cap 175 was the applicable legislation as regards the registration of a foreign judgment obtained from the High Court of justice in England. The Court held that the trial Court was in error in applying cap 152 and that cap 175 was the applicable legislation. Also in the case of **Marine of Gen Assoc Plc V O.U. Insurance Ltd**[124], which was an appeal case against the decision of the Court of Appeal in which it reversed the ruling of the High Court for being out of time, the supreme Court in determining the appeal, applied the provisions of section 3(1) of cap 175 and sections 3(1), 4(1) 9 and 10 of cap 152 now cap F35 (2004) and in a unanimous decision allowed the appeal and reversed the ruling of the High court.

3.7 SETTING ASIDE OF REGISTERED JUDGMENT

The principles guiding setting aside of judgment are laid down generally in the statutes of many countries[125]. Most of the provision of these statutes on setting aside registration are similar. On a general note, lack of jurisdiction, judgments obtained contrary to public policy, fraud and procedural defects such as inadequate noticed, lack of opportunity to defend, render a judgment unenforceable and therefore where it is registered in error, the registration shall be set aside. In Nigeria, setting aside of registration is contained in section 6 of Cap F35. The section states that where a party against whom a registered judgment, the registration of the judgment shall be set aside if the registering court is satisfied that;

[123] (2001) 8 NWLR Pt 716 at 699
[124] (2006) 4 NWLR (Pt 971) at 622
[125] For instance England, Nigeria and other countries

(1) that the judgment was wrongly registered, in the sense that the judgment is not a judgment to which the part of the Act applies or was registered in contravention of the foregoing provisions of the two Acts. **In Dale power system Plc V Witt and Busch**[126]. The issues raised before the Court of Appeal was whether cap 175 was the applicable law. As regards the registration a foreign judgment obtained from the High Court of Justice in England. The Court held that the trial Court was in error in applying 152 and that cap 175 was the applicable legislation.

(2) that the Courts of the country of the original Court had no jurisdiction in the circumstances of the case.

(1) The judgment debtor being the defendant in the proceedings, in the original Court (not withstanding the provision for that process may have been duly served upon him in accordance with the law of the country of the original Court) receive notice of that proceedings in sufficient time to enable him to defend the proceedings and did not appear.

(2) If the judgment was obtained by fraud; or

(3) that the enforcement of the judgment would be contrary to public policy

(4) that the rights under the judgment are not vested in the person by whom the application for Registration has made.

Section 6(b) If the registering court is satisfied that the matter in dispute in the proceedings in the original court had previously to the date of the judgment in

[126] Supra

the original court been the subject of a final and conclusive judgment by a court having jurisdiction in the matter.

In furtherance to the above provision cap F35 under section 6(2) a provides that; the foreign court delivering the judgment is said to have jurisdiction inpersonam,

(1) where the judgment debtor being a defendant in the case voluntarily appears other than in protest and for the purpose of protecting or obtaining release of the property seized or threatened with seizure or of contesting the jurisdiction of the Court.

(2) if the judgment debtor had agreed with the judgment creditor to submit to the jurisdiction of the foreign Court that gave the judgment.

(3) If the judgment debtor was at the time of instituting the suit resident or being a body corporate, having its principal place of business in the Country of the Court.

(4) If the judgment debtor had an office or place of business in the foreign country where the judgment was obtained and the judgment relates to transactions effected through the office.

Jurisdiction in rem

The foreign court delivering the judgment must also have jurisdiction over the subject matter i.e jurisdiction in rem. Therefore, section 6(2) (b) provides for jurisdiction in rem.

A foreign judgment relating to immovable property is registerable if the immovable is located in the country of the court that gave the judgment conversely where the immovable property is situated outside the country of the

court where the judgment was obtained, under no circumstances will the judgment be registerable.

Section 6 (2) (c) relates to jurisdiction on hybrid causes, that is, causes that are neither exclusively in rem or in personam. For these categories the test of registerability of the judgment is whether the registering Court recognizes the bases of organising jurisdiction or not only a requirement under the Nigerian statutes but also laws of other country. For instance, under English law, in the Netherlands and the United States despite the feasibility of recognition or enforcement of foreign judgment, such judgment shall only be registered if given by a court of competent jurisdiction[127].

The condition is very important because having judgment rendered by Courts that lacked jurisdiction might encourage parties to engage in forum shopping. Thus, having their case tried before a Court whose legal system allows for the most positive results, and subsequently having the judgment enforced against the debtor or his property situated in the state addressed".

In Nigeria, with regard to the issue of adequate notice or service only service effected by way of personal service or substituted service known to Nigeria law will suffice. This position was buttressed in the case of **Ramon V**

[127] Op cit at Pg 33

Jinadu[128], in this case **Nnameka J.C.A** (as he then was) commented on the procedure for service of process, he stated, that, though the general rule under conflict of laws is that matters of procedure are those for the Court of the forum and are governed by he lex fori, the procedure in this respect means remedies for process, damages, limitation, action, evidence, parties.... etc. In this case it is not any matter of these procedure that is in issue, rather it is the registration of English judgment by the Nigeria law on the Court. In my view according to the learned judge, that can only be governed by the Nigerian law on the point. The issue here is not whether the English judgment is valid in England as not having been served in the manner it would have been served in Nigeria. It is whether, the way it was served satisfied the laws of Nigeria as to how the writ ought to be served before it is registrable in Nigeria and held that a process could only be duly served if it was served in accordance with the Lagos civil procedure 1972.

Secondly, unless the judgment debtor voluntarily appeared to the writ, the failure to effect personal service on him would render the judgment not registrable, even where the service was valid under the foreign law.

The conditions for setting aside of a registered judgment also serve as defences available to the defendant for the recognition and enforcement of foreign judgment. We shall therefore, discuss them in detail in the next chapter.

[128] Supra at P 56.

CHAPTER FOUR

DEFENCES AGAINST RECOGNITION AND ENFORCEMENT

4.1 INTRODUCTION

Despite the fact that a judgment upon which the defendant is sued has passed the test of finality, it is still open to impeachment, and may therefore not be enforced if the defendant can successfully raise the following defences:.

1. Lack of jurisdiction over the defendant
2. Judgment obtained by fraud
3. Judgment against public policy
4. Judgment contrary to Natural justice

These defences are internationally accepted and in most jurisdictions, they are raised before the execution of the judgment. Moreso, where a judgment suffering any of these defect has been registered, the registration shall be set aside upon an application by the defendant to a Court of competent jurisdiction. These defences, will now be examined in details.

4.2 LACK OF JURISDICTION

Whether the Courts of the originating jurisdiction have jurisdiction over the defendant, as determined by the conflict of law rules is an important issue in the recognition and enforcement of a foreign judgment. This is because as earlier observed jurisdiction is an essential requirement for the validity of a judgment hence, the foreign Courts must be of competent jurisdiction before their judgment can be enforced. Therefore, any judgment rendered by a Court which lack jurisdiction over the defendant shall serve as a defence to the defendant. It should be noted that most countries have different tests for

jurisdiction. Thus the states of England and Wales, Nigeria, Switzerland, South Africa, France, Italy, Spain and Mexico take a narrow view in considering whether a foreign court had jurisdiction over the defendant or not.

Noteworthy, is the fact that jurisdiction in England, Wales and indeed Nigeria must be established according to English and Nigeria conflict of laws rules. It is not sufficient that the foreign Court asserted jurisdiction based on its own domestic laws. Pursuant to the English conflict of laws rules and the provision of section (6) (2) cap F35, jurisdiction shall be established if the following requirement are met.

a) The defendant was resident or present in the country of foreign Court on the date of the commencement of the proceedings;

b) where the defendant is a corporation, it was to some extent carrying on business in the Country of the Court at a definite and reasonably permanent place at the date of the commencement of the proceedings.

It should be noted that while there are of course differences between a natural person and a corporation, determining the presence or absence of jurisdiction is a questions of fact regardless of the form of the entity. If the individual, agent, or other entity was resident or present and doing business at a definite and reasonably paramount place in the originating jurisdiction on the date of the commencement of the proceedings, then the individual, agent, or entity would likely fall within the scope of the rule, or

(a) The defendant submitted or agreed to submit to the jurisdiction of the foreign court.

Under Swiss law, jurisdiction is even more narrowly determined under the Swiss private international law (Spill). The law governing the recognition of foreign money judgment in Switzerland present that a foreign judicial authority has jurisdiction only

a) if the defendants had his domicile in the country where the decision was rendered, or in disputes involving financial interest, if the parties agreed on a forum selection clause, or

b) In dispute involving a financial interest, if the defendant brought a counter claim before that authority. Swiss law generally provides that contractual claims must be brought at the defendants place of residence or domicile.

c) If the defendant submits or agreed to submit to the foreign Courts jurisdiction. According to a Swiss District Court, defendant has unconditionally submitted to a Courts jurisdiction if the defendant leaves no doubt he is doing so. Where a defendant objects to the foreign court jurisdiction at the outset of the proceedings, then Swiss law will deem the defendant not to have unconditionally submitted to the foreign Courts jurisdiction, even if the defendant did not object again during the proceedings or appeal against the decision.

In South Africa, a Court will not recognize a foreign judgment unless the foreign Court exercised jurisdiction according to South African rules. While the South American Courts will recognize the defendant domicile as jurisdictional grounds.

Under French law, the Court will examine the jurisdiction of a foreign Court to determine whether the litigation has a real connection with the country where the foreign judgment was rendered and to see whether the French Court has exclusive jurisdiction or not. Under article 15 of the French civil code, the portion of the code relating to the recognition of foreign judgment, if the French rules governing conflict of laws do not confer exclusive jurisdiction of French Courts, the jurisdiction of the foreign Court must be recognized so long as the dispute has a significant connection with the foreign Court and the choice of Court was not fraudulent.

In Italy, the Courts have jurisdiction on matters of contract where the defendant is domiciled or resident in Italy or if the contract was to be performed in Italy. In tort matters, Italian Courts have jurisdiction only if defendant is domiciled or resident in Italy or if the harmful event occurred in Italy. In view of the forgoing discourse on jurisdiction over the defendant it can be adduced that under English and Nigeria law, the grounds upon which the Court can exercise jurisdiction which are presence and submission appear to be exhaustive. There does not seem to be any other grounds of competence. Nationality and domicile are rejected as grounds for establishing jurisdiction in matters of recognition and enforcement of foreign judgment.

However, countries like Swiss, South Africa, and Italy accept domicile and submission as their grounds for competence (jurisdiction). But the French law seems to be interested in whether the dispute has a significant or real

connection with the country where the judgment was rendered and to see whether the French court has exclusive jurisdiction[129].

4.3 JUDGMENT OBTAINED BY FRAUD

English and Nigerian Courts are precluded from enforcing a foreign judgment rendered as a result of fraud committed by one of the parties or which was rendered with the sole purpose of evading the applicable law on the fact of the matter under dispute. A party against whom judgment has been given may bring an independent action to set aside the judgment on the ground that it was obtained by fraud; but this is subject to very stringent safe grounds, so as to avoid a situation where there would be no end to litigation and to provide solemnity in judgments. The most important of these safeguard, is that the second action will be summarily dismissed unless the claimant can produce evidence newly discovered since the trial, which evidence could not have been produced at the trial reasonable diligence, and which is so material that its production at the trial would probably have affected the result.

A foreign judgment on the other hand, can be impeached for fraud even though no newly discovered evidence is produced and even though the fraud, might have been, and was, alleged in the foreign proceedings. This was first laid down and clearly buttressed in the case of **Abouloff V Oppenheimer[130]**.

In this case, the defendant argued unsuccessfully in the foreign court that the plaintiff was deceiving it but the court gave judgment for the plaintiff. In an action on the judgment in England, the defendant pleaded fraud, and the

[129] Article 15, French civil code
[130] (1882) 10 Q.B.D Pg 306

plaintiff demurred. She thereby conceded that the foreign judgment had been obtained by fraud, so that it was unnecessary to prove the fraud by evidence. The Court of Appeal allowed the defence, and held that no man can take advantage of his own wrong and therefore overruled the demurrer. The court had some difficulty in reconciling its decision with the then establish principle that foreign judgment are conclusive on the merits and cannot be impeached for error of fact or law[131].

Lord Coleridge C.D and Brett I.J solved the difficulty by holding that the issue whether a foreign court had been deliberately misled was not, and never could be one on which that court had passed[132]. Hence to examine the judgment in subsequent proceedings in England was not to re-open the merits of the foreign judgment.

Similarly in **Vadala V Lawes**[133] the technical nature of this reasoning was admitted. Here again the defendant argued unsuccessfully in the foreign court that the plaintiff was deceiving it, but the court gave judgment for the plaintiff this time the plaintiff did not demur to the defendants plea of fraud in an action in England on the foreign judgment, it therefore became necessary for the defendant, in other to establish the fraud, to address precisely the same evidence as that which had been rejected by the foreign court. The Court of Appeal allowed him to do so. Lindley I.J refused to "fritter away" the judgment in **Abouliff V Oppenheimer**; and said.

[131] Morris, J.H.C. Op cit at Pg 119
[132] Ibid

[133] (1890) 25 Q.B.B to 310 at Pg 316 - 317.

> *If the fraud upon the foreign court consist in the fact that the plaintiff has induced that court to come to a wrong conclusion you can reopen the whole case even though you will have in this Court to go into the very facts which were investigated and which were in issue in the foreign court".*

Also in **Syal V. Heyward**[134] the same principle was applied although the plaintiff deliberately refrained from raising the issue of fraud on the original action.

All the above decisions were approved and followed in the recent cases of Jet **Holding Inc V Patel**[135] and **Owens Banks Ltd V Bracco** (1992)[136] in the later case, which concerned registration of a foreign judgment under the 1920 Act, the house of Lords treated all of the above cases as binding and held that, in relation to fraud, the enforcement domestic one, does not require fresh evidence before the case can be re-opened.

However, the Court Appeal decision in **House of Spring Gardens Ltd V Waite (1991)**[137], which required the defendant to produce fresh evidence, was distinguished on the ground that the issue of fraud had been tied on Ireland in a separate and second action from the original one. Accordingly the judgment of the second action created and established that unless fresh evidence of fraud was obtained, the original action could not be re-opened.

Refusal to accord foreign judgment obtained by fraud recognition or enforcement was also demonstrated in the Nigerian case of **Ramon V Atlantic Coastline West Africa**[138]**.** Petitioner in this case sought the setting aside of an

[134] (1948) Z.K.B. 447 (C.A).
[135] (1990) I.Q.B. 335 (CA)
[136] (1992) Z.A.C. 443
[137] (1991) I.Q.B. 241 (C.A)
[138] (1977) 4 CCHJ 509 at 512

order on the ground that it ought never to have been registered under the Act, that the award was obtained by fraud and bad faith and that the sole administrator had no jurisdiction. The petition was dismissed on the ground that the particulars of the alleged fraud and bad faith imposed on the respondent were not tendered as evidence.

Also, in the Nigerian case of **V.A.B Petroleum V Micmosan U.K Ltd**[139], the judgment debtor misrepresented some facts, such as that he had not been served with any process in the US while the truth of the matter was that he was duly served with the writ of summon and had personally retained the services of the US firm of solicitors, but it appeared he fled from the US to avoid paying the debt. The Court of Appeal held that the Court will not make an order that will be favourable to a party with "besmerched hands".

Noteworthy, is the fact that fraud which vitiates a judgment must generally be fraud of the party in whose favour the judgment is obtained, but if (conceivably, at any rate) be fraud on the part of the foreign Court giving the judgment[140] as where a Court gives judgment in favour of A, because the judges are bribed by some person, not the plaintiff, who wishes judgment to be against X, the defendant. In such a case the defence of fraud tends to merge with the defence that the proceedings were opposed to natural justice[141].

Fraud as such is not a ground for refusal to enforce or recognize a judgment under part I of the 1982 Act[142] because the Lugano convention and the 1968

[139] Supra 37
[140] Price V Dewhurst (1837) 8 SIM 279
[141] Dicey and Morris, 13th Edition Sweet and Maxwel (2007) London
[142] Battifol and Lagarde W. 1, PP 409

Hague convention do not contain a defence of fraud, rather they contain a defence of public policy. In continental European law, fraud generally falls within the exception of public policy[143], and, it is for this reason, that international conventions on the recognition of judgments and arbitral awards e.g Hague convention on the recognition of divorces and legal separation omit the defence of fraud, as such **in Interdesco S.A. V Nullifine Ltd[144]** and **in Societe d'informatigue Service Realisation organisation V Ampersonal Software B.V[145]**. It was confirmed that the defence of fraud had only a very limited scope under the 1968 convention. In **Kendall and Kendall**[146], it was held that recognition of a foreign divorce decree obtained by fraud would be refused, because it was manifestly contrary to public policy within the meaning of what is now S.51(3) of the family law[147] notwithstanding that there was no separate basis for non recognition on the ground of fraud in the Act.

The general rule is that, the doctrine, that fraud vitiates does not necessarily apply to foreign judgments of every class. It is clearly applicable to a judgment In personam[148]. The right in question here, are the rights of the litigants, or their representations. Evidence raising a triable issue of fraud suffices for permission to be given to defend a claim, if the claimant applies for summary judgment on the ground that the defendant has no real prospect of

[143] (1968)
[144] (1992) I Koyd's Rep[180
[145] (1994) I.L Pr 55 (C.A)
[146] (1977) Fasa 208
[147] (1956)
[148] Vadala V Lawes Supra

successfully defending the claim[149]. The 1920 Act[150] provides that no judgment can be registered under the Act, if it was obtained by fraud, and that in **Owens Bank Ltd V Bracco[151]** it was held that the reference to fraud in 1920 Act, must be construed by reference to common law principles. It has been assumed that the same is so under the 1933 Act[152] which provides that the registration of a judgment under the Act must be set aside if the registering Court is satisfied that the judgment was obtained by fraud. This position is the same with the provision of Cap F35[153].

The above notwithstanding, it was held in the case of **Messina V Petrococcacino[154]** that the doctrine may apply as between the litigants to judgment in rem. But it is questionable whether the fraud, between the litigants, which appears to vitiate a judgment in rem affects the right of the third persons e.g a bonafide purchasers, who are ignorant of the fraud, acquire under or in consequence of the judgment a title to the Res. e.g a ship affected thereby. The reason for this question is that such third person are relying on the judgment merely as an assignment rather than as a judgment and are entitled to the benefit of the rule that an assignment movables is wholly governed in its propriety aspects by the lex situs[155].

[149] Dicey and Morris Op cit at Pg 522
[150] Administration of Justice Act
[151] Supra

[152] Section 4(1)
[153] Section 6
[154] (1872) Z.R. 4. P.C. 144.
[155] Dicey and Morris Op cit.

Blackburm J. Captured it rightly when he stated in the case of **Castrigue V Imvie**[156], that:

> *Fraud will indeed vitiate everything, though we may observe that there is much force in what (council) suggested in the course of his argument, in this case, that even if there had been fraud on the part of the litigants, or even of the tribunal, it would be very questionable whatever it could be set up against a bonafide purchaser who was quite ignorant.*

4.4 FOREIGN JUDGMENT CONTRARY TO PUBLIC POLICY

The legal concept of public policy might be briefly defined as comprising the basic legal principles that lie at the core of a legal system[157]. Nevertheless, one may notice that the broad definition leaves too much room for interpretation. In order to narrow down this legal concept with the aim of analysing precisely how does public policy intervene in the process of recognition or enforcement of foreign judgments, one would need to make certain distinctions. Firstly, the concept might find difficult interpretation in different legal fields. A certain interpretation of public policy is applied in criminal law, another in administrative law and a difficult one in private international law which is of concern to us. Under private international law, it is interpreted to encompass core legal principles of a certain country. The type of principles that may suffer no infringement through the application of foreign law or recognition and enforcement of foreign judgment[158].

The grounds for refusing to recognize and enforce foreign judgment on the basis of inconsistency with local public policy varies in accordance with time and place. Foreign judgment will not be enforced, if to do so would

[156] Novel Rosner Op cit

threaten the sovereignty and security interest of the recognising state, violate constitutional protections or offend the social public order. For example, the Nigerian Courts are precluded from enforcing judgment which is contrary to its public policy[159].

Public policy in the Nigeria context simply means the laws that vindicate the moral core of the legislation, those which have their roots in the legal perception and the good morals of the legal community. Simply put it means any judgment that offends its concept of morality, justice, objectivity, good norms, domestic and commercial conventions asserted to by all communities and practice[160]. **Onwogen JCA in Dale power system Plc V. Witt and Bustch Ltd[161]** defined public policy as:

> *Community sense and common conscience extended and applied through the state to matter of pubic morals, Health, safety, welfare and the like"*

It is also a trite law that the English Courts will not give effect to a judgment which has been procured against the English principles of distinctive policy or which has been given in a proceedings of penal nature[162]. This principle was clearly captured in Re-Macarthey[163], where a maltese Court had adjudged a putative father liable to provide his illegitimate daughter with an alimony allowance without time limit, such as minority being imposed. It was held that no action on the judgment lay in England. The reason behind this decision was thus stated:

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[157] Ibid
[158] Ibid
[159] Section 6(1) (a) Cap F35 Opcit
[160] Monkaree A. Hand notes on Conflict of Laws, 1999/2000.
[161] Supra
[162] Cheshire and North Op cit. at Pg 609.

> *The general recognition of the permanent rights of illegitimate children and their spinster mothers as recognized in malta is contrary to the established policy of this country, especially having regard to the fact that the child's interest is not confined to maturity.*

The Italian laws also preclude Italian Courts from enforcing judgments that are contrary to Italian public policy[164]. The Italian law provided that foreign judgment shall not conflict with Italian public policy. Italian case law on the definition and scope of public policy is very limited and does not seem to involved commercial cases. In those cases in which an Italian court has ruled on the issue, the practice has been to adopt a very narrow construction of public policy. It is therefore possible for an Italian judge to order the recognition of a foreign judgment which, had the judgment originated in Italy itself, would not have been issued on the basis that it isolated public policy.

In Hong Kong, the main public policy ground for refusing to enforce money judgments are restraint of trade and judgment the recognition and enforcement of which would offend local standards of morality, justice, human liberty and freedom of action[165].

Under Swiss Case law, the public policy exception must be narrowly contained, and is applied on a case by case basis. The closeness of the connection to Switzerland is an important factor in deciding the standard to be applied[166].

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[163] (1921) ICA part 522 Pg 527.

[164] Op cit at Pg 33.
[165] Ibid
[166] Ibid

There are so many public policy grounds upon which countries refuse to enforce foreign judgment. However, for the purpose of this research I shall discuss only three of them. They are as follows:

4.4.1 Judgment Awarding Multiple or Punitive Damages

A judgment for multiple damages is defined as a judgment for an amount arrived at by doubling or otherwise multiplying a sum accessed as compensation for the loss or damage sustained by a judgment creditor.

In most countries the recognition of punitive damages are considered contrary to public policy[167] the general rule is not to enforce that coMpoment of money judgment. The legal basis for this approach is analogues to the common law principle of not enforcing so-called "penalty claims" in contracts which have the effect of rewarding a plaintiff beyond the extent of the actual damages suffered. In the criminal law context, the principle is the same. The public policy rationale is to form compensation over deterrence in civil matters[168].

The bone of contention in the recognition and enforcement of foreign judgments awarding multiple or punitive damages, however, is whether it is a civil judgment commenced under private law, or a criminal law judgment, which will not be recognized. Under Swiss law, the Swiss Courts have not recognized multiple or punitive damage judgment because they were considered penal in nature[169].

[167] Ibid
[168] Ibid
[169] Ibid

However, in 1991 the Court of Appeal of Contom of Basle - Stadl held that a judgment awarding punitive damages may be characterised as a civil matter under Swiss private international law. The court held that the punitive damage coMpoment was not a criminal law punishment "but a private law punishment" and therefore worthy of recognition. The Courts reasoning was that punitive damages served the purpose of enforcing private law, and accordingly could be recognized.

Under French law, punitive damages do not exist [170] as a general principle they are against public policy under the French civil code, judgment for damages are only intended to indemnify the plaintiff for actual losses[171]
Even if the party agree on a penalty clause, the French Court may increase or decrease the penalty if it is either excessively high or excessively low. Though there are hardly any case law on this subject matter, it has been submitted that some French Courts do tend to uphold punitive damages judgments under very limited circumstances. And the reason fore this is perceived to lie in the French judiciary treatment of foreign judgment in general[172].

Since 1964, when an important case establishing the framework for recognising foreign judgments in France was established, Courts have held that French judges are prohibited from reviewing the substance and merits of a foreign judgment[173]. Thus a judgment may be upheld even if it violates French public policy so long as its overall effects are not contrary to it. Application of French public policy does not therefore, shuttle down the foreign judgment

[170] Ibid
[171] Ibid
[172] Ibid
[173] Ibid

itself, but only the effects it might produce in France. In so far as the effects are divisible a French judge may recognize some of those effects but not others. So far, for there appear to be only two cases on this point, both in the domiciles relations area. In the first case, financial support in favour of two wives of the same man was awarded even though bigamy violates French law[174]. In the second, a repudiated wife was awarded a financial settlement, even though French law does not recognize this manner of divorce[175]. It is uncertain how, if at all, the reasoning in these two cases would apply to a foreign judgment rendered in a corporate matter.

English law, also consider multiple and punitive damages as contrary to public policy[176].

The general rule is that English Courts will not enforce penal or revenue laws either directly or through the enforcement of foreign judgment[177]. However, the foreign judgment will be denied recognition only if it falls directly within the area of penal or revenue law strictly constrained. Thus, foreign judgment for cost may be recognized even though the cost would be payable into a foreign legal aid fund[178]. More significantly, it has been said in the court of Appeal that there is

> *Nothing contrary to English public policy in enforcing a claim for exemplary damages, which is still considered to be in accord with the public policy in the United States and may comprises of the Commonwealth.*

[174] Lepre V Lepre (1965) C.A. Pg 52
[175] Amitage V. Nonchen (1983) 4. F.I.R 293.
[176] Chechire and North Pg 662.
[177] U.S.A. V Harden (1963) 41. D.C.R (2d) 721
[178] Couner V Couner (1974) 1 W2LR 632

The English law went further to state that despite the general principle that penalties imposed abroad are disregarded, a civil judgment, though combined with penal judgment, may be actionable in English as creating a separate and independent cause of action.

Thus in **Raulin V Fische**r[179]. The defendant, a young American lady, while recklessly galloping her horse in the Buis de Boulogne, ran into the plaintiff, a French officer, and seriously injured him. She was prosecuted by the state for her act of criminal negligence. By French law" A person who is injured by a crime may intervene in the prevention and make a claim for damages, where upon his civil action is tried together with the prosecution and one judgment is pronounced on both matters. The plaintiff did so intervene. The defendant was convicted of the crime and ordered to pay a fee of 100 Francs to the state and 15,912 francs by way of damages and cost to the plaintiff.

It was held on these facts, in an action brought by the plaintiff in England to recover the equivalent of 15,917 francs that the French judgment was severable. That part of it which awarded the plaintiff damages was not tainted with the penal character of the rest of the proceedings, and therefore might be put in suit in England without limiting recognition of the penal judgment.

In view of the above discourse, it can rightfully be said that the concept of public policy intervenes as an obstacle for recognition or enforcement of foreign judgment only when core principles of legal system are violated, or will

[179] (1911) 2. K.B 933.

be so violated if recognition or enforcement will be granted. The mere fact that the foreign Court arrived to a different solution than that which would have been achieved by the forum court does not suffice in order to refuse recognition or enforcement.

4.4.2 Judgment deemed to have the effect of unacceptably restraining trade

The notion of promoting, not restraining trade and commerce is a fundamental tenet in most countries. Therefore a judgment that reflects an unacceptable restraint of trade is usually refused recognition or enforcement. A notable country that practice this principle is Hong Kong. Under the law of Hong Kong, restraint of trade constitutes adequate grounds for a refusal to recognize or enforce a foreign judgment. However, refusal to recognize or enforce a judgments that is deemed to have the effect of restraining trade is criticized on the grounds that a foreign Court is contrasting the laws of the originating jurisdiction with those of its own[180].

4.4.3 Judgments Deemed to be based on public law or having criminal or Qusi criminal nature.

The foregoing discussion has clearly shown that, in sensitive areas of the law, foreign Courts view the recognition of foreign judgments as a potential threat to their sovereignty. Recognition of judgments based on prosecution by foreign States run especially counter to the national desire of each state to preserve its borders and to protect its nationals from foreign sanctions. As a matter of national impact, there is a judicial bias toward differing to the

[180] Government of India V. Taylor V Gunt of London (Supra).

domestic government in respect of such matters rather than exercising legislative authority by judicial act based on foreign policy determinations. For instance the English and Nigerian laws will not recognize or enforce foreign judgment arising from revenue or tax judgments[181].

4.5 PROCEDURAL DEFECTS (NATURAL JUSTICE)

Procedural defects such as inadequate notice to the defendant, failure to grant the defendant the opportunity to present a proper defence as in the case of default judgment and lack of finality of the judgment itself, if proved by a defendant according to most legal systems served as a defence or will intervene as an obstacle to the recognition and enforcement of foreign judgment.

[181] Government of India V. Taylor V Gunt of London (Supra).

4.5.1 Inadequate notice Speaking broadly, foreign judgment will not be recognized or enforced if the defendant was not afforded adequate notice. The fundamental difference among various jurisdiction is whether adequate notice must be given in accordance with the laws of the originating jurisdiction or the recognising one[182].

Most foreign Courts e.g Netherlands, Canada, Italy, U.S, require only that the defendant be given notice in accordance with the rules for service of process in the originating jurisdiction. However, once these documents are before the Court (for example Netherlands Court) for recognition and enforcement of foreign judgment, the later has to be satisfied that the notification has been done in accordance with the Netherlands rules for serving process.

Nigeria[183], Mexico, China and South Africa places Great importance on the formalities of proper service, requiring that "personal" or actual service be effectualised. They do not recognize a judgment claiming notice either by mail or publication in the local newspaper of the foreign forum when the defendant did not leave there. For instance the provisions of other seven High Court of Lagos civil procedure rule (2004).

As regards the assessment of the service of process, there are international treaties and conventions. For instance under article 15 of Hague convention it is provided that the document should be delivered to the defendant in person or to his residence and also the document should be served

[182] Op cit at Pg 33.
[183] Section 6(2) Supra at Pg

according to the prescribed method of the convention or the internal law of the state address.

4.5.2 Lack of opportunity to defend

Generally the document instituting the proceedings has to be duly served to the defendant, allowing him reasonable time within which to present a proper defence in the foreign jurisdiction. Failure to give sufficient time to prepare defence between the time of notice and the time of hearing and failure to give a full and fair trial on the merits with a full right of the defendant to be heard are grounds for refusal to recognize and enforce a foreign judgment. These requirements serve as a defence to the defendant where they are not properly implemented.

The determination of what constitutes "sufficient time" is left at the discretion of the judges in the particular cases to decide a time limit within which the notice shall expire[184].

The above requirement is very important with regards to judgment rendered by default. Most countries do not recognize or enforce foreign default judgments on the grounds that they do not afford the defendant the opportunity to be heard.

Under English and Nigerian Courts, the judges have frequently asserted that a foreign judgment obtained in proceedings which contravene the principles of natural justice cannot be enforced in England and Nigeria

[184] Norel Rosner op cit at Pg 37

respectively[185]. However, it is extremely difficult to fix with precision the exact cases in which the contravention is sufficiently serious to justify a refusal of enforcement. In this regard Shadwall, V.C contended., "whenever it is manifest that justice has been disregarded, the court is bound to treat the decision as a matter of no value and no substance"[186], This statement is however, too wide, because there are certain circumstances when foreign judgment are enforceable notwithstanding that it patently proceeded upon a wrong view of the evidence or of a foreign law but it would not be extravagant to suggest that this is a questionable application of natural justice. Chanel, J in delivering a judgment in the case of **Robinson V Fenner**[187] where the defendant to an action on a Canadian judgment pleaded unsuccessfully the refusal of the Canadian court to admit evidence of a certain fraud, which if it had been admitted, would undoubtedly have disproved his liability, said;

> *In any view of it, the judgment appears, according to our law, to be clearly wrong, but that of course is not enough.....and whatever the expression "contrary to natural justice", which is used in many cases means....., I think that it is not enough to say that it is wrong. It is not enough, therefore to say that the result works injustice, in the particular case, because a wrong decision always thus.*

The expression "contrary to natural justice has, however, figured so prominently in judicial statements that it is essential to fix, if possible, its exact

[185] Cheshere & North Opcit Pg 663, Section 6(1) (a) (11)
[186] Price V Dewhurst (1837). 8 sim 279 at P302
[187] (1913) 2. N at Pg 835.

scope. The authorities prior to[188] in which the court repudiated a maltese nullity decree that was internationally effective according to the English rules of private international law, on the ground that its recognition would cause substantial injustice to the wife all agree that when applied to foreign judgments it relates merely to alleged irregularities in the procedure accepted by the adjudicating Court, and has noting to do with the merits of the case.

In other words, what the Courts are vigilant to watch is that the defendant has not been deprived of an opportunity to present his side of the case[189]. The whole maxim audi alteran partemis is to be of universal, not merely domestic application. The problem has now been narrowed down to two issues namely, deciding on an application in the absence of the defendant and where present, unfairly prejudiced in the presentation of his case in the Court.

With regard to the first issue, English as well as Nigerian Courts cannot generally give judgment against an absent defendant as such the Courts are always reluctance to criticize the procedural rules of foreign countries on this matter and will therefore not measure their fairness by reference to English equivalents, if the mode of citation has been manifestly insufficient as judged by any civilized standard, they will not hesitate to stigmatize the judgment as repugnant to natural justice[190]. On the second issue the general rule is that parties in the foreign proceedings should have had the possibility to state there

[188] (1963) P. 259; (1962) 3 AU E.R 419.
[189] Cheshire and North Op cit at Pg 662.

[190] Cheshire and North Op cit at Pg 664

case. In other words to be heard by an impartial judge[191]. Where a party is for example totally deprived of the right to plead, this will serve as a defence. However, the defence of unfair prejudice is not usually lightly admitted. It is not sufficient, for instance that the evidence was excluded, if the procedural rule of the forum is that parties may not give evidence on their own behalf[192]. So also, this defence will fail if the alleged unfairness consisted of something that might have been converted and removed in the foreign action. Thus in **Jacobson V Fracton.A & Co of London** agreed to buy crape de wine from B Lyons. A & Co brought an action in France for cancellation of the contract and for damages, on the ground that the deliveries of the materials were short in quantity and inferior in quality. The French Court, before giving judgment, assigned an expert to examine the material in London. The expert, who was a relative of B, made no proper examination, and though deported by the Court to take evidence, refused to hear the evidence of A & Co and their witnesses. He ultimately make a report adverse to A & Co which was found by **Roche J**, to be the uncandid production of a biased and prejudiced mind. Judgment for B was given by French court. A & Co then sued B in England for breach of the original contract. B pleaded the French judgment in bar of action, but A & Co, replied that this judgment was contrary to natural justice.

ii) In Italy, a foreign default judgment will be recognized if it was granted in accordance with the law of the originating court. However, Italian law requires the examination of the notice to the defendant in the

[191] See 36 Constitution of the Federal Republic of Nigeria 1990
[192] Scarpetta V. Lowenfield (1911). 27 T.C.R. 509.

original action, both to determine whether the originating court follows its own service and notice procedures and whether the service and notice provided satisfies due process rules applicable in Italy[193]. Similarly French Courts will not recognize or enforce foreign judgment, if the sole basis for the judgment is default for the defendant[194].

iv) Belgian law requires that foreign judgment must always be reviewed on the merits before recognition or enforcement can be granted. Therefore judgments entered by default would not be recognized[195] .

In the Netherlands, the Dutch court in their assessment of the service of process abroad often look at the language of international treaties and convention to which the Netherlands is a contracting party. For example in case of default judgment rendered against a foreign defendant Dutch Court will turn to Article 15 of the 1965 Hague convention in order to decide whether conditions laid down there have been abided by[196]. The conditions are as follows:

Where a writ of summons or an equivalent document had to be transmitted abroad for the purpose of service, under the provisions of the present convention, and the defendant has not appeared, judgment shall not be given until it is established that:

. a the document was served by a method prescribed by the internal law of the state addressed for the service of documents in domestic actions persons who are within its territory, or

. b the document was actually delivered to the defendant or to his residence by another method provided for by this convention, and that in either of

[193] Survey on recognition of US money judgment Op cit at Pg 33.
[194] Ibid
[195] Ibid
[196] Norel Rosner Op cit at Pg 37.

these cases the service or the delivery was effected in sufficient time to enable the defendant to defend.

Each contracting state shall be free to declare that the judge, notwithstanding the provisions of the first paragraph of this article, may give judgment even if no certificate of service or delivery has been received, if all the following conditions are fulfilled.

- the document was transmitted by one of the methods provided for in this convention,
- a period of time of not less than six months, considered adequate by the judge in the particular case, has elapsed since the date of the transmission of the document.
- no certificate of any kind has been received, even though every reasonable effort has been made to obtain it through the competent authorities of the state addressed.

4.5.3 Practical Obstacles to Enforcement

In addition to legal obstacles (defences) to recognition of foreign judgments discussed above, there are a number of practical and often more systematic obstacles to recognition and enforcement. These hidden obstacles may hinder recognition of foreign judgment quite apart from any substantive or procedural difficulties arising under the applicable law.

(a) Lack of Appeal process

The availability of an appeal process is an important check on the integrity of judicial decisions. Most countries as this work is able to establish permit limited right of appeal in cases of judgment involving recognition of money judgment. In such cases the judgment is treated procedurally like any other judgment in the recognising jurisdiction and is therefore subject to appeal in accordance with the laws of the recognising jurisdiction.

For example in Mexico[197], appeal is by way of a proceeding known as the "amparo". This is apparently a time - tested way for a losing party to avoid paying judgment for years and to take the opportunity, if it has not already done so, to remove or otherwise shelter assets. Thus, in Mexico appeal process is often a significant obstacle to the recognition of money judgment.

In Belgium[198], denial of recognition of a foreign judgment may be appealed as if it was an ordinary national judgment. In Italy, a denial by the court of Appeal of the recognition of a foreign judgment may be appealed to the Supreme Court, but such a review is limited to questions of law.

In Canada[199], decision in respect of the enforcement of money judgments may be appealed, but only in certain circumstances to its highest court with leave.

These hidden obstacles may hinder recognition of foreign judgment quite apart from any substantive or procedural difficulties arising under the appropriate law.

[197] Norel Rosner Op cit at Pg 88
[198] Ibid
[199] Ibid

In Spain[200], request for enforcement of money judgments are made to the Supreme Court in Madrid. If recognition is denied, there is no appeal. Therefore once recognition is granted, it is truly a final Spanish judgment.

(b) Right to Pursue Recognition

Some countries do not automatically permit foreigners seeking recognition to file suit before their Courts. Such countries requires that a governmental authority either grant permission or atleast be informed that a suit is being filed. The principle underlying such rules is to ensure that the recognising states sovereign interest are protected. Example of such countries includes South Africa, where the ministers of industry, commerce and tourism grant permission before a suit may be filed. Mexico requires that the district Anthony be informed so that the state can preserve its interest. In China, an application for recognition of a foreign judgment will not be heard unless the local court first decides that it will hear the case. In other words, a separate proceeding appears to be required before the recognition proceeding can be instituted. The court is required by law to make the preliminary determination of whether or not to accept the case within seven day-after the application is made.

There is no apparent requirement in Nigeria or English law that a governmental authority other than the recognising Court itself must either first grant permission for, or be formally informed of, an enforcement proceeding

[200] Ibid

about to be instituted in the local Courts. In Nigeria if the minister of justice is satisfied that the judgment emanates from a superior court of a foreign country which shall accord reciprocal treatment to Nigerian judgment[201] and has satisfied the necessary requirement for enforcement, then the judgment shall be enforced.

(c) Export of Proceeds

Some countries have in existence exchange control for example South Africa[202], the existence of a regime of currency control intended to prevent the flight of capital, may restrict or limit the holder of a recognized money judgment from transferring the proceeds out of the jurisdiction after the judgment is satisfied. This represents an obvious practical obstacle which must be taken into consideration when contemplating pursuing a judgment abroad in jurisdiction that has such restrictions.

(d) Devaluation/destruction of property

The essence of executing a foreign judgment is to help the judgment creditor enjoy the fruit of his success. But sometimes where judgment is registered for enforcement, the property to be attached may either be destroyed or devalued either due to inadequate storage facilities or though unnecessary delay caused by the judgment debtors lawyers who usually file appeals and would refuse to follow up or file a motion for stay of execution.

[201] Section 3 (1) Cap F 35. Opcit
[202] Ibid

(e) Security - Another practical problem against enforcement of foreign judgment or any other judgment according to the enforcement unit of the High court in the federal capital territory Abuja is lack of adequate security for the enforcement officers' security. Sometimes judgment debtors are hostile and try to cause harm on the enforcement officers.

CHAPTER FIVE

5.0 SUMMARY, OBSERVATION AND RECOMMENDATION

5.1 INTRODUCTION

This chapter contains the summary of what had been discussed in the preceding chapters. It makes certain observation as regards problems associated with the recognition and enforcement of foreign judgment and finally, proffered suggestions towards solving the identified problems.

5.2 SUMMARY

The first chapter discussed the concept of recognition and enforcement generally and also traced its historical background under both English and Nigerian law.

It is generally accepted that the powers of the court are limited by their territorial boundaries (i.e territorial jurisdiction) thus a judgment pronounced by the court of one jurisdiction may not have any force or effect beyond its own territory save for situations where other jurisdictions have agreed to allow such judgment to be enforced within their own territories. It is in view of this that the English court from the seventeenth country started recognising and enforcing foreign judgment for fear of the fact that foreign court may refuse to enforce English judgment[203]. In Nigeria recognition and enforcement of foreign judgment dates back to 1922[204] when the foreign judgment (Reciprocal Enforcement) act 1922 was enacted. As already pointed out in chapter one, two schools of thought serve over the years as the rationalization for the

[203] Morris J.H.C, Op cit at Pg 2
[204] 1922 Act, Op cit at Pg 5.

recognition and enforcement of foreign judgment. They are the theories of reciprocity and obligations.

The chapter also discussed the aims and objectives of the research, the statement of the problems, the significance of research, the justification and the methodology adopted in the course of the research work.

The second chapter discussed the issue of jurisdiction. Jurisdiction as a central element to enforcement of foreign judgment. To enforce a foreign judgment, the judgment must have emanated from a court of competent jurisdiction in the international sense. Accordingly, competence is tested in the context of residence of the defendant in and/or his submission to the foreign Court. The chapter also discussed other internationally accepted forums for jurisdiction e.g forum rei, forum chosen by the parties, forum contractus etc.

The third chapter discussed the nature and scope of recognition and enforcement of foreign judgment "Recognition and Enforcement" generally refers to the procedure whereby a local court accepts a judgment obtained by a litigant in a foreign judgment proceeding as binding and compels compliance by a party with that jurisdiction This chapter also discussed the requirement for enforcement. Where a plaintiff seeks for enforcement generally, rather than mere recognition, the judgment must be final and conclusive, for a fix sum of money and not rendered in matters of foreign revenue, penal or public laws.

The fourth chapter discussed the obstacles to enforcement of foreign judgment . It is manifestly clear that judgment obtained by fraud, against public policy or that is repugnant to natural justice are not enforceable.

Finally chapter five (this chapter) which is the concluding chapter, summarised the whole work, made some observations on some of the problems associated with enforcement and lastly proffered suggestions towards solving the problems as identified.

5.3 OBSERVATIONS

In the course of this research, some salience observations were made, the observations are hereunder discussed.

1. Foreign judgment are 'recognized' or "enforced" in most countries either on the grounds of reciprocity or bilateral relations. The 1933 Acts of England and cap F35 for instance provides for the enforcement of foreign judgment of the Courts that will accord reciprocal treaty to English or Nigerian judgments. Section 3 of F35 provides for the power of the minister of justice to extend part I of the Act to countries giving reciprocal treatment not rendered in matters of foreign revenues, penal or other public laws to Nigerian judgment abroad. The implication of this provision is that the principle of reciprocity is relevant and is being applied to recognition and enforcement of foreign judgment in Nigeria. This principle in my observation is narrow and rigid. To say that enforcement must be withheld if the judgments emanates from a country that refuses to grant similar treatment to Nigerian or English judgments negates the elementary notion of justice.

This has the consequences of causing hardship to successful litigants, depriving them of their benefits and clearly making the essence of litigation irrelevant and unnecessary.

2. It. is observed in the course of this research that jurisdiction is very important in the enforcement of foreign judgment since it is only natural that a foreign judgment has no extra territorial effect, unless and until the Courts of other jurisdiction are willing to provides assistance by recognising and enforcing such judgments. However, with the introduction of ecommerce business transactions it has become apparent that the extra territorial effect of local judgment are being tested, as Courts attempts to impose jurisdiction over websites that have a world wide audience[205].

3. It is evident from the discussion in the previous chapters that under private international law, enforcement of foreign judgment is subject to inconsistent legal regimes which tend to pose problems against enforcement. A good example of this position is the situation in Nigeria. There are two statutes governing enforcement of foreign judgment[206] i.e. Cap F35 and 175.

At international level there are some multilateral conventions on jurisdiction and enforcement of foreign judgment or money judgment which are enforce either among the European community (EC) member states, European Economic Community (EEC) European Union (EU) such as the

[205] File:11/f:1 (Efm).h.t.m.
[206] Op cit Pg 5.

Brussels convention on jurisdiction and the enforcement of judgments in civil and commercial matters as amended[207].

The Lugano convention on jurisdiction and the enforcement of judgment in law and commercial matters[208].

Inter American convention and the extra territorial validity of foreign judgments and arbitral award[209].

With the world being reduced into a global village this series of multiple laws on the enforcement of foreign judgment seems unsuitable. Hence the need to have standardized and harmonized civil procedure rules on the enforcement of foreign judgment.

It has been observed that aside from the limitations of fraud, public policy and natural justice on enforcement, certain practical problems exist as obstacles against enforcement of foreign judgment. These obstacles have not been addressed by the existing literature on this concept.

This practical problems of enforcement faced by either the Court or parties are all of which have earlier been discussed.

5.4 RECOMMENDATION

In the light of the salient issue observed above. I wish to make the following recommendation which will hopefully solve some of the problems encountered in the course of recognition and enforcement of foreign judgment.

1) Recognition and enforcement of foreign judgment should not be a matter of judicial comity or option but should be observed in order to administer

[207] . I. L.M 1413 (1990) among (EC) members states
[208] 1. LM 620 (1989) among EC and CFTA member states
[209] I.L.M 1224 (1979) among OAS member states

the best of justice. The requirement for reciprocity by most countries before foreign judgment are either recognized or enforced it appears is not suitable. It is therefore recommended. It is therefore recommended that this doctrine be completely eliminated by the countries practicing it. E.g Nigeria, China, England, Japan etc. These countries should adopt the doctrine of obligation. This doctrine as already pointed out in the first chapter of this work dates back to 1842 and it states in the case of **Russel V Symth**[210].

> *that where a foreign court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, the liability to pay that sum becomes a legal obligation that may be enforced....Justice will be deemed to have taken its cause where foreign judgment are*

2) In view of the positive and productive interactions among citizens of different nations in the form of increased commerce and wider possibilities for personal development and experience, effort is being made to reduce differences among national legal system i.e harmonization. Harmonization of the civil procedural law and acknowledgment of foreign judgment will certainly create a situation which the principles elaborated by the European convention on human rights for a fair trial will be guaranteed and will be applied in a uniform manner i.e the same principles and rules will be applied in the enforcement of foreign judgment given by different member states.

   The main fields to start the harmonization are the issues of jurisdiction notice and general enforcement of foreign judgment.

[210] Supra at Pg 3.

3) Some of the statutes governing enforcement of foreign judgment need to be reviewed so that the provision would be functional as to protect the interest of the judgment creditors. For example under Article 431 RV of the Dutch code of civil procedure 1938 which provides for fresh proceedings for enforcement of foreign judgment. According to the Article:

1. Except for what is stated in articles 985 - 994 RV, no decision rendered by foreign judgment, nor automatic deeds issued abroad can be enforced within the Netherlands.

The matters can be dealt with and settled de Novo by the Dutch judge"

The idea of justice should not be confined to national boundaries, therefore there is a need to amend or rather review this legislative provision so that justice done elsewhere should be accepted.

Another example also is the cap F35, the provisions of section 3 should be reviewed and made applicable to all countries of the world and the powers vested in section 12 thus:

> *If it appears to the minister of justice that the treatment in respect of recognition and enforcement accorded by any of the foreign country to judgments given in the superior Courts of Nigeria is substantially less favourable than that accorded by the Courts of Nigeria to judgment of the superior Courts of that country, the minister of justice may by order apply this section to that country.*

The implication of this provision is that the ministers have the power to make foreign judgment unenforceable in Nigeria if no reciprocity. The above provisions along with the provisions of sections 4, 9 and 10 of cap F 35 need to be reviewed.

4) This study has revealed myriads of practical hurdles against the enforcement of foreign judgment. To ease this hurdle I will recommend that countries like South Africa should permit the registration of foreign judgment without any permission from the government. Once a foreign judgment has satisfied the conditions laid down, then such judgment should be enforced directly as is the practice in England and Nigeria.

On preservation of property, Courts especially in Nigeria should provide suitable ware houses for the safe keeping of attached property.

Since the Courts are vested with power to make provision with respect to the fixing of the period within which an application may be made to have the registration of the judgment set aside and extension of the period so fixed" it is advisable to disallow delay by lawyers by providing strictly for a time limit within which execution should be carried out.

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