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Jurisdiction and Applicable Law in Transnational Dispute Resolution before the Nigerian Courts

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In the course of judicial resolution of cases with connections straddling two or more countries, two of the important preliminary issues that often arise are (1) whether the court in which the relevant action has been commenced can properly exercise subject-matter jurisdiction over the dispute, or in personam jurisdiction over the parties, or both, and (2) which country's law should be applied to the dispute. These are separate albeit increasingly interconnected questions; in most cases, each deserves a separate and clear determination by the courts whenever it is raised. Occasionally, in the course of addressing the question of jurisdiction in particular, the court will touch upon and, possibly, decide the other equally important issue of the law applicable to the transaction giving rise to the dispute. Indeed, one of the factors that courts increasingly take into consideration in deciding whether they can, or should, assume jurisdiction over a case arising out of a transaction exhibiting a foreign connection is whether the forum law is the applicable law of the transaction.[1]

The Nigerian courts have a notable history of adjudicating transnational disputes. A considerable number of such disputes are those arising out of commercial transactions between Nigerian, or Nigerian-based, merchants and their foreign business counterparts. In most cases, the commencement of action in the Nigerian courts is instigated by the Nigerian party to the transaction, understandably perhaps because of the obvious advantages of proximity and familiarity with the

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1. *See* J.J. Fawcett, *The Interrelationships of Jurisdiction and Choice of Law in Private International Law*, 44 CURRENT LEGAL PROBS. 39 (1991).

legal system. Increasingly, however, the contractual documents setting out the terms of international commercial transactions, including those involving Nigerian merchants, often contain clauses expressing the parties' agreement as to the applicable law of the transaction (choice of law clause) and the forum for the settlement of disputes (forum selection clause or jurisdiction clause). Frequently, in international commercial contracts with Nigerians, the choice of law and jurisdiction clauses will provide, not for the application of Nigerian law or the resolution of disputes in the Nigerian courts, but for the application of the law of a foreign country and for the resolution of disputes in the courts of that same country. Nevertheless, sometimes, and regardless of these clauses, a party seeking redress in respect of an international transaction commences action in the Nigerian courts.

This article examines the bases upon which the Nigerian courts assume jurisdiction for the resolution of disputes with transnational connections, and the disposition of the Nigerian courts towards the enforcement of jurisdiction clauses in international commercial agreements. It also examines the way in which the courts determine the law applicable for the resolution of such disputes, in particular, when the parties themselves have an agreement specifying the applicable law.

I. Jurisdiction over Transnational Disputes or Matters

A. Subject-Matter Jurisdiction

In Nigeria, as in most common-law countries, the court that normally adjudicates international commercial disputes at first instance is the High Court. Nigeria is, however, a federal country consisting of thirty states and a Federal Capital Territory. Accordingly, each state has its own High Court that exercises jurisdiction generally within the geographical expanse of the particular state.[2] The Federal Capital Territory also has a High Court of its own that exercises jurisdiction within the Territory.[3] Each of these courts is constitutionally declared to be a court of unlimited jurisdiction,[4] which means that there is no limit to the type

2. *See* Nig. Const. (Constitution of the Federal Republic of Nigeria, 1979) §§ 6(2) and 234(1); Nwabueze v. Obi Okoye, [1988] 4 N.W.L.R. 664, Nat'l Bank v. Shoyoye, [1977] 5 S.C. 181, 191.

3. *See id.* §§ 234(1), 263. In addition, Nigeria has a Federal High Court whose territorial jurisdiction covers the entire country. *See id.* § 228. However, the subject-matter jurisdiction of the Federal High Court is confined to certain designated matters mostly of a domestic nature, though the matters designated under at least one heading may exhibit foreign elements or connections. *See* Nig. Const. (Suspension and Modification, Decree No. 107 of 1993) § 230(1)(d) (amending Nig. Const., 1979). Also, the Admiralty Jurisdiction Decree No. 59 of 1991 notably expands the jurisdiction of the Federal High Court, endowing it with jurisdiction—probably exclusively—in respect of rather widely defined "admiralty matters."

4. Section 236(1) of the 1979 Constitution provides inter alia that "the High Court of a State shall have unlimited jurisdiction to hear and determine any civil proceedings in which the existence or extent of a legal right, power, duty, liability, privilege, interest, obligation or claim is in issue."

of subject matter or the amount of pecuniary claim that the court can adjudicate.[5] Thus, almost any type of claim arising out of transnational activity can be brought in the High Court. Therefore, perhaps the more difficult jurisdictional question is whether the particular High Court in which the action is commenced can exercise jurisdiction over the parties to the dispute before it.[6]

B. Jurisdiction over Persons

The in personam jurisdiction of the High Court is not constitutionally set out but is often defined by the various High Court laws and rules of court, with reference to the jurisdiction of the High Court of Justice of England. For instance, section 10 of the High Court Law of Lagos State provides as follows:

> The High Court shall, in addition to any other jurisdiction conferred by the Constitution of the Federation or by this or any other enactment, possess and exercise . . . all the jurisdiction, powers and authorities which are vested in or capable of being exercised by the High Court of Justice in England.[7]

Following the traditional rules of in personam jurisdiction observed by the English courts and the additional rules contained in Nigerian law, the bases upon which the Nigerian courts will assume jurisdiction over a person can be summarized as follows.

1. *Presence of the Parties within the Jurisdiction*

The primary basis at common law for the exercise of in personam jurisdiction by the English courts, ergo the Nigerian courts,[8] is the service upon the concerned party (invariably the defendant) of the writ of summons.[9] This service can easily be achieved if the parties to a case are present within the area of territorial jurisdiction of the court. Furthermore, the rule has long been established that if the parties to a case, especially the defendant, are present within the territorial jurisdiction of a court, the court can exercise general jurisdiction over them even

5. This, however, is qualified by the provisions of the new section 230 of the 1979 Constitution, which declare the jurisdiction of the Federal High Court to be exclusive with respect to the designated subject matters. *See* NIG. CONST. (suspension and modification, 1993) § 230.

6. Another question that might arise relates to which of the High Courts within the country should adjudicate. This matter is one of internal interstate conflict of laws, which this article does not address. *See generally* T. Osipitan, *The Crisis of Jurisdiction under the 1979 Constitution: States v. Federal High Courts*, 1983 NIG. CURRENT L. REV. 231; I. Olu. Agbede, *Judicial Jurisdiction in Nigeria: Inter-State Situations*, 1972 NIG. B.J. 39; *see also* I. Olu. Agbede, *Conflict of Laws in a Federation: The Nigerian Experience*, 7 NIG. L.J. 48 (1973).

7. Cap. 52 Laws of the Lagos State of Nigeria § 10 (1973); *see also* Nigerian Ports Auth. v. Panalpina World Transp. (Nig.) Ltd., 1973 N.C.L.R. 146.

8. *See, e.g.*, J. OLAKUNLE OROJO, NIGERIAN COMMERCIAL LAW & PRACTICE (1983).

9. *See* R.H. GRAVESON, CONFLICT OF LAWS: PRIVATE INTERNATIONAL LAW 111 (7th ed. 1974); P.M. NORTH & J.J. FAWCETT, CHESHIRE & NORTH'S PRIVATE INTERNATIONAL LAW 179-445 (12th ed. 1992); NORTON ROSE ON CIVIL JURISDICTION AND JUDGMENTS 158 (A. Briggs & P. Rees eds., 1993).

if they are foreigners or if the cause of action arose in a foreign country.[10] Even if the presence of a party within the court's territorial jurisdiction is temporary, for example as a visiting foreign resident, insofar as the party is properly served with the court's writ within the jurisdiction, the court can exercise general jurisdiction over the party[11] in accordance with what can be described as the transient presence rule.[12]

In the case of natural persons, presence obviously means physical presence within the jurisdiction. On the other hand, the presence of a corporation within the jurisdiction may be established in a number of ways.[13] A company incorporated in Nigeria, which thus has a registered place of business there,[14] is obviously present within the jurisdiction while it remains so incorporated. It is therefore subject to the general jurisdiction of the Nigerian courts.[15] An interesting issue is whether "foreign companies" can in any circumstances be deemed to be present in Nigeria for jurisdictional purposes. A foreign company is defined as a company incorporated outside Nigeria.[16]

Except with regard to a few exceptional cases involving foreign companies en-

10. *See* Sirdah Gurdyal Singh v. The Rajah of Faridkote, 1894 App. Cas. 670, 683-84; Carrick v. Hancock, 12 T.L.R. 59 (1985) (Eng.).

11. Maharanee of Baroda v. Wildenstein, [1972] 2 All E.R. 689, [1972] 2 Q.B. 283 (Eng. C.A.); Colt Indus. v. Sarlie, [1966] 1 W.L.R. 440, [1966] 1 All E.R. 673 (Eng.). However, the transient presence of the defendant must not have been fraudulently induced as this could amount to an abuse of process. *See, e.g.*, Watkins v. North Am. Land & Timber Co., 20 T.L.R. 534 (1904) (Eng.); Lewis v. Wiley, 53 O.L.R. 608, 609 (1923) (Can.).

12. Some people believe that the transient-presence rule has been statutorily abolished in the Eastern States of Nigeria by state legislation (e.g., High Court Law, Cap. 68 Laws of Anambra State of Nigeria § 23 (1979). *See* I. OLU. AGBEDE, THEMES ON CONFLICT OF LAWS 247 (1989). It is submitted, however, that the language of the relevant pieces of legislation does not lend itself to this interpretation. First, the provision does not expressly abolish the rule. Secondly, the provision does not seem to be exhaustive of the jurisdiction of the court.

13. A foreign company may be deemed present in another country if it establishes a place of business (branch office) there, or if it does business there through an agent. *See* Saccharin Corp. Ltd. v. Chemische Fabrik von Heyden, [1911] 2 K.B. 516 (Eng. C.A.); *cf.* Okura v. Forsbacka Jenverks, [1914] 1 K.B. 715 (Eng. C.A.). A foreign company may also be deemed present in another jurisdiction if it nominates, in accordance with the relevant companies' provisions, somebody within that jurisdiction to receive documents and processes on its behalf. *See* Rome v. Punjab Nat'l Bank (No. 2), [1989] 1 W.L.R. 1211; *see also* J.J. Fawcett, *A New Approach to Jurisdiction over Companies in Private International Law*, INT'L & COMP. L.Q. 645 (1988).

14. Every company incorporated in Nigeria is required to maintain its registered office in the country. *See* Companies and Allied Matters Act, Cap. 59 Laws of the Federation of Nigeria §§ 27(1)(b), 35(2)(b) (1990).

15. Section 78 of the Companies and Allied Matters Act provides that a court process shall be served on a company in the manner provided by the rules of court, while any other document may be served on a company by leaving it at, or sending it by post to, the registered office or head office of the company. *Id.* § 78. The rules of court generally provide that a writ may be served on a company by giving the same to a director, secretary, or other principal officer of the company, or by leaving it at, variably, its "office" or "registered office or principal place of business within the jurisdiction." *See, e.g.*, Order 6, HIGH CT. OF LAGOS STATE R. CIV. P. 11; Order 12, HIGH CT. R. CIV. P. FOR STATE HIGH COURTS [hereinafter UNIFORM HIGH COURT RULE] (designed for uniform use by state High Courts throughout Nigeria).

16. *See* Companies and Allied Matters Act § 650(1).

gaged in government contracts and other engagements of a public nature,[17] every foreign company intending to carry on business in Nigeria is required to incorporate in Nigeria in accordance with Nigerian law.[18] Further, until its incorporation, such a foreign company shall not have a place of business or an address for service of documents or processes in Nigeria. A foreign company seeking local incorporation may, however, have a "place of business" in Nigeria for the sole purpose of receipt of notices and other documents "as matters preliminary to the incorporation."[19] It is very doubtful that the establishment of a place of business for the sole purpose of receipt of documents relating to preincorporation matters would empower the courts to exercise general jurisdiction over the foreign company before its incorporation in Nigeria, especially as the purpose for maintenance of the place of business should not include the service of process in Nigeria.[20]

Once a foreign company is incorporated or, more properly, incorporates a new entity in Nigeria, that new entity is obviously present in Nigeria and subject to the general jurisdiction of the Nigerian courts. It is, however, also very doubtful that the Nigerian courts can, by reason of the local incorporation and without more, exercise general jurisdiction over the foreign parent company of what is now a subsidiary company. Indeed, the Nigerian Supreme Court has held that a foreign company does not become resident or carry on business in Nigeria merely by owning the share capital of a Nigerian company.[21] The utility of the provision insisting upon local incorporation of foreign companies is thus questionable from a jurisdictional viewpoint, as can be demonstrated by the following hypothetical facts.

Trade-a-Lot Plc is a company incorporated in Ruritania. It manufactures cars in Ruritania. It incorporates in Nigeria a local subsidiary, Trade-a-Lot (Nigeria)

17. The exception from the necessity of local incorporation applies to foreign companies invited by the Nigerian Government to execute specific projects in Nigeria, foreign companies in Nigeria for the execution of specific individual loan projects on behalf of a donor country or international organization, foreign government-owned companies engaged solely in export promotion activities, and engineering consultants engaged on a specialized project with any of the governments (federal or state) within Nigeria. *See generally* Companies and Allied Matters Act §§ 56-58. Even such companies, when so exempted, are deemed to have the status of an unregistered company. *See id.*

18. *Id.* § 54.

19. *Id.*

20. Compare this with the English decision in South India Shipping Ltd. v. Export-Import Bank of Korea, [1985] 2 All E.R. 219 (Eng.), in which a foreign banking company that maintained an office in London for the sole purpose of building public relations and information gathering was held to be subject to the general jurisdiction of the English courts. The effect was that the bank could be sued in England with respect to any subject matter irrespective of where the cause of action arose. *Id.*

21. *See* Aluminum Indus. Aktien Gesellschaft v. Federal Bd. of Inland Revenue, [1971] 2 N.C.L.R. 121 (centering upon the tax assessment of an overseas company that held practically all the shares of its Nigerian subsidiary); *see also* Deverall v. Grant Advertising Inc., [1954] 3 All E.R. 389, 392 (Eng.) (holding that in a suit against a foreign company in England, it was improper to serve process on a U.K. subsidiary of the company, as the carrying on of business by the subsidiary in England did not, on its own, mean that the foreign company had established a place of business in England). *But see* J.J. Fawcett, *Jurisdiction and Subsidiaries*, 1985 J. BUS. L. 16.

Ltd., with a view to building up its Nigerian market. Before the Nigerian subsidiary was incorporated, the cars manufactured by the company were often imported by other Nigerian businesses, acting of their own accord, which then sold them in Nigeria. As a result of a design fault in the cars, a Nigerian purchaser of one of them sustains otherwise avoidable serious injury.

In this hypothetical situation, Trade-a-Lot Plc neither being itself incorporated in Nigeria nor selling the cars through agents in Nigeria—as the Nigerian importers are not its agents—is not subject to the general jurisdiction of the Nigerian courts. The aggrieved Nigerian party can only commence action against it in Nigeria by invoking the long-arm jurisdiction of the Nigerian courts, that is, by obtaining the leave of the Nigerian courts to serve the writ or notice thereof outside the jurisdiction. Such leave, however, is not automatic as it is granted under a discretionary power of the court. In addition, many countries will refuse to enforce a foreign judgment obtained following the exercise of long-arm jurisdiction, particularly if the defendant did not take part in the proceedings leading to the judgment.[22]

It might indeed be more beneficial juridically to permit foreign businesses the option of establishing branch offices locally as an alternative to the present mandatory requirement of local incorporation. A foreign company establishing a branch office in Nigeria, as opposed to an incorporated subsidiary, could be required to submit to the Corporate Affairs Commission (equivalent to the English Registrar of Companies) the names of a person or persons to whom court processes and other business documents should be delivered, together with a Nigerian address for the delivery of those documents.[23] Such a provision will not necessarily diminish the ability to exercise desired control over foreign companies within the present legal framework. Further, such a provision is likely to help convey the message that the Nigerian business environment offers opportunities and flexibility for foreign businesses and investment.

2. *Service of the Court's Process outside the Jurisdiction*

Allusion has been made to the long-arm jurisdiction of the Nigerian courts. This is one of the bases upon which the courts can exercise jurisdiction in respect of a dispute involving a defendant not present within the jurisdiction. While the court may lack general jurisdiction over the defendant in the case, the exercise of jurisdiction by the court is predicated upon a specific connection between the subject matter of the dispute and the forum. The connections that will be sufficient to enable the court to exercise this long-arm jurisdiction are often stipulated in

22. The United Kingdom is such a country. *See* Administration of Justice Act, 1920, § 9(2); Foreign Judgments (Reciprocal Enforcement) Act, 1933, § 4(2).

23. *Cf., e.g.*, Companies Act, 1985, §§ 691, 695 (U.K.) Incidentally, it appears that a similar facility was provided by the (now long repealed) company law that was applicable in Nigeria prior to 1968. Companies Act, Cap. 37 Laws of the Federation of Nigeria and Lagos. *See also In Re* Gresham Life Assurance Soc'y (Nig.) Ltd., 1973 N.C.L.R. 215.

the rules of court.[24] For example, a court may allow its writ to be served on the defendant outside the jurisdiction if, inter alia, the subject matter of the action is land situated within the jurisdiction; or the action is founded on the commission of a tort within the jurisdiction; the action is brought in relation to a contract (a) made within the jurisdiction, or (b) governed by Nigerian law, or (c) the breach of which has occurred in Nigeria irrespective of where it was made.[25]

The court's jurisdiction is obtained by service upon the defendant of the court's writ or notice thereof in a foreign jurisdiction. The proposed plaintiff must apply for and obtain leave of the court to serve the defendant with the process outside the jurisdiction. The leave is not automatically granted as the court has discretion whether to give leave for service of its process outside the jurisdiction.

3. *Submission to the Jurisdiction of the Court*

Another basis for the exercise of jurisdiction over a foreign defendant is the submission of that defendant to the jurisdiction of the court. One way in which this may occur is if the defendant takes steps to defend, on the merits, an action improperly commenced against him. If an action is commenced against a defendant not present within the jurisdiction, usually on the basis of long-arm jurisdiction, the defendant may either challenge the jurisdiction of the court, or in situations of particular confidence ignore the proceedings altogether.[26] If, however, the defendant does anything that can be construed as amounting to the intimation of an intention to defend the action, then he could be deemed to have submitted to the jurisdiction of the court and judgment may be properly entered against him.[27] For instance, if the long-arm jurisdiction of the court has been improperly invoked—say leave of the court was not obtained before the writ was served outside Nigeria[28]—then the court's jurisdiction has not been properly established

24. The rules of the different state High Courts in Nigeria, setting out the grounds upon which leave to serve the court's process outside the jurisdiction may be granted, are virtually identical. *See, e.g.*, Order 7, HIGH CT. OF LAGOS STATE R. CIV. P.; Order 12, UNIFORM HIGH COURT RULES pt. B.

25. *See* Bank of the North Ltd. v. K.G. Polland, 1969 N.N.L.R. 7.

26. A defendant not resident within the jurisdiction, and who does not have assets within the jurisdiction, may be best advised to ignore proceedings commenced against him on the basis of long-arm jurisdiction. This is more so if the courts in the jurisdiction in which his assets are situated do not generally grant recognition and enforcement to judgments obtained following the exercise of such long-arm jurisdiction.

27. *See, e.g.*, Ezomo v. Oyakhire, [1985] 1 N.W.L.R. 195; *see also* A.A. Kuforiji, *Voluntary Submission in Actions In Personam: The Nigerian Solution*, 1984 NIG. CURRENT L. REV. 194.

28. The rules of court of the state High Courts require that leave of the court be obtained before the court's writ of summons, or notice of it, can be served outside Nigeria. *See, e.g.*, Order 12, UNIFORM HIGH COURT RULES 13, 14; *see also* F. NWADIALO, CIVIL PROCEDURE IN NIGERIA 224 (1990). It appears that leave of the court is not required, however, for service of the writ of the High Court of one state in another state within Nigeria as that is a matter covered by federal legislation. Sheriffs and Civil Process Act, Cap. 407 Laws of the Federation of Nigeria (1990) (providing in § 96(2) that a writ to be served in another state can be served in the same manner as if it were served in the state in which it was issued).

over the defendant. However, if the defendant to such an action takes steps amounting to an intention to defend it, he will be deemed to have submitted to the jurisdiction of the court.[29]

Perhaps the most important examples of submission by a foreign defendant to the jurisdiction of the courts arise from the widespread practice of inserting forum selection clauses in international commercial contracts. The presence of a forum selection clause in a contract may have the effect of (a) conferring jurisdiction, by virtue of submission, on a court that otherwise would not have had jurisdiction, or (b) depriving courts that would otherwise have had jurisdiction of the ability to exercise such jurisdiction, especially if the clause expressly confers exclusive jurisdiction on the chosen court.

If, by a forum selection clause, the parties to an international commercial transaction agree to litigate any disputes in the Nigerian courts, then the courts can exercise jurisdiction over the parties by virtue of the submission even if neither of them, especially the defendant, is normally resident or present within the jurisdiction. This situation would be one of prior submission to the jurisdiction of the court, as opposed to submission after the action has already been commenced; it must follow a fortiori that the court can properly exercise jurisdiction in such cases. Moreover, the rules of court often specifically provide that the parties to a contract may agree that the court shall have jurisdiction to entertain any action in respect of such contract.[30]

Forum selection clauses are more controversial when, in reliance upon them, one party attempts to have a case otherwise properly commenced within the jurisdiction stayed and referred to a foreign court. Like courts in other jurisdictions, the Nigerian courts jealously guard their jurisdiction and would hesitate to decline the assumption of jurisdiction over a matter that is properly before the court. Thus, the courts will not automatically apply a clause in a contract that confers jurisdiction on a foreign court. This approach is not, however, peculiar to Nigerian courts. Early American opinion opposed the enforcement of clauses that conferred jurisdiction on foreign courts at the expense of the American courts.[31]

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29. It is not certain, however, whether the Nigerian courts will treat failure to obtain leave in such circumstances as a mere irregularity that can be waived, or as an incurable defect that would nullify the writ. This uncertainty arises from the analogous comparison of the inconsistency of the decisions relating to noncompliance with statutory rules and rules of court affecting service of process outside the state jurisdiction of a court but within Nigeria. *Compare* Ezomo v. Oyakhire, [1985] 1 N.W.L.R. at 195, *with* Sken Consult. Ltd. v. Ukey, [1981] 1 S.C. 6; Nwabueze v. Okoye, [1988] 4 N.W.L.R. 664; Adegoke Motors Ltd. v. Adesanya, [1989] 3 N.W.L.R. 250; *see also* M.I. Jegede, *Service of Process Outside Jurisdiction, in* FUNDAMENTALS OF NIGERIAN LAW 107 (M.A. Ajomo ed., 1989); Niki Tobi, *Effect of Non-Compliance with the Rules of Court, in* FUNDAMENTALS OF NIGERIAN LAW 124 (M.A. Ajomo ed., 1989).

30. *See* Order 7, HIGH CT R. CIV. P. OF LAGOS STATE 2.

31. Since the decision of the U.S. Supreme Court in The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972), U.S. courts are now far more likely to give effect to a clause conferring jurisdiction on a foreign court in the absence of undue influence or overweening bargaining power. *See generally* Joseph D. Becker, *Choice-of-Law and Choice-of-Forum Clauses in New York*, 38 INT'L & COMP. L.Q. 167 (1989).

One of the reasons why the courts in the earlier cases were not inclined to enforce jurisdiction clauses in favor of foreign courts or tribunals is that such clauses were perceived as a ploy to oust the jurisdiction of the court. This certainly was the approach adopted in an early Nigerian case that, in view of subsequent judicial developments, is no longer likely to be followed. The case, *Ventujol v. Compagnie Française de L'Afrique Occidentale*,[32] involved a contract between the parties signed in France, written in the French language, and providing for the submission of disputes to the Tribunal de Commerce of Marseilles. The contract was to be performed in Nigeria. The plaintiff sued in Nigeria for breach of the contract. The defendants argued that the Nigerian court had no jurisdiction. The court held that it had jurisdiction to entertain the case because the contract, though entered into in France and probably subject to French law, was to be performed in Nigeria where the defendants had agents who were served with the summons.[33] More significantly, the court held that the jurisdiction clause, providing for the submission of disputes to the French tribunal, was an agreement to oust the jurisdiction of the court and thus of no effect.[34]

The present approach of the Nigerian courts to forum selection clauses in favor of foreign jurisdictions is radically different from the position in the *Ventujol* case. While the courts will still not regard such a forum selection clause as ousting the jurisdiction of the court, they now give due regard to the intention of the parties and will more readily give effect to a clause conferring jurisdiction on a foreign judicial authority. A notable example is the case of *Adesanya v. Palm Line Ltd.*,[35] where the court, quoting from the English case of *The Fehmarn*,[36] stated that "where there is an express agreement to a foreign tribunal, clearly it requires a strong case to satisfy this court that the agreement should be overridden and that proceedings in this country should be allowed to continue. *However, in the end it is, and must necessarily be a matter for the discretion of the court, having regard to all the circumstances of the particular case.*"[37]

The most authoritative decision on forum selection clauses in Nigeria currently is the Supreme Court case of *Sonnar Nig. Ltd. v. P.M.S. Nordwind*.[38] In essence, the decision of the court was an adaptation and incorporation into Nigerian law, with addition, of the rules and factors to be taken into account, as enunciated

32. 19 N.L.R. 32 (1949) (Nig.).

33. *Id.*

34. *Id.* at 32-33.

35. 1967 L.L.R. 18 (Law Reports of the High Court of Lagos State).

36. [1957] 2 All E.R. 707, *aff'd*, [1958] 1 All E.R. 333 (Eng.). Courts in other Commonwealth African states, also borrowing from *The Fehmarn*, have adopted rules that are strikingly similar. *See, e.g.*, C.I.L.E.V. v. Chiavelli, [1968] 1 Afr. L.R. (Comm.) 329 (Ghana); The Despina Pontikos [1974] 3 Afr. L.R. (Comm.) 329 (Kenya).

37. *Adesanya*, 1967 L.L.R. at 20 (emphasis by the court).

38. 1987 N.W.L.R. 520; *see also* Inlaks Ltd. v. Deutsche Afrika Linion Wormann Linies, 1983 F.H.C.L.R. 188. For further analysis of the *Sonnar* case, see A. Akin-Olugbade, *Nigerian Courts and Forum Selection Clauses in Private International Contracts*, 4 J. INT'L BANKING L. 159 (1990).

by Brandon J. in the English case of *The Eleftheria*.[39] The basic principle reiterated is that the court is not bound to stay its proceedings in favor of a chosen foreign court, but has the discretion to do so, which should be exercised by granting a stay unless strong cause for not doing so is shown, the burden of proof resting on the plaintiff.[40]

Brandon J., in *The Eleftheria*, listed the factors to be taken into consideration as including the following:

(a) In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the [forum court] and foreign courts. (b) Whether the law of the foreign court applies and, if so, whether it differs from [forum] law in any material respects. (c) With what country either party is connected, and how closely. (d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages. (e) Whether the plaintiffs would be prejudiced by having to sue in the foreign court. . . .[41]

To these factors the Nigerian Supreme Court added an extra factor to be taken into account in deciding whether to give effect to a jurisdiction clause: "(f) Whether the granting of a stay would spell injustice to the plaintiffs as where the action is already time-barred in the foreign court and the grant of a stay would amount to permanently denying the plaintiffs any redress."[42]

This factor reflects a feature of the proceedings before the court where the right of the plaintiffs in the case to an action or a remedy was time-barred in the country of the chosen forum but not in the Nigerian courts where the action was commenced.[43]

II. Applicable Law in Transnational Dispute Resolution

Granted that the court has jurisdiction over a particular transnational dispute, another important preliminary issue that may have to be resolved is the law applicable for the determination of the parties' rights and liabilities. Since the case necessarily has connections with more than one country, a court may need to decide which of the connected countries' law is applicable in the circumstances.

39. 1970 P. 94, 99-100 (Eng.).
40. *Id.* at 99-100.
41. *Id.* at 100.
42. *Sonnar*, 1987 N.W.L.R. 520, 539.
43. It has been noted that the case reflects another important point, that the principles that the Nigerian courts apply in relation to forum selection clauses are reassuring to international businessmen since they are of an internationally comparable standard. Consequently a judgment obtained in the Nigerian courts in such circumstances is likely to be granted recognition and enforcement without difficulty in foreign jurisdictions. *See* Akin-Olugbade, *supra* note 38. It should be pointed out that the shift by the courts towards the enforcement of forum selection clauses may be impaired by contradictory statutory developments. For example, the recent Admiralty Jurisdiction Decree No. 59 of 1991 provides in § 20 that in admiralty matters any agreement that seeks to oust the jurisdiction of the court shall be null and void. How the courts will interpret the provision remains to be seen.

Another possibility, stemming from the doctrine of *depeçage*,[44] is that the laws of more than just one country may be applicable.

Occasionally, the question of the applicable law is addressed in the course of a jurisdictional debate, particularly if the court has been invited to decline the assumption of jurisdiction or to stay the proceedings either on the basis of a forum selection clause in favor of another jurisdiction or on the basis of the doctrine of forum non conveniens.[45] This is, however, only occasional as the court may well come to a decision to assume jurisdiction without necessarily deciding the law applicable to the substantive merits of the case before it.

In a number of cases the Nigerian courts have been specifically requested to take into consideration the applicable law in the course of the determination of a jurisdictional issue. Rather curiously, a decision is often reached in such cases on the jurisdictional question without a concurrent decision on the applicable law and without an indication of what that law is likely to be. In *Adesanya v. Palm Line Ltd.*[46] there was a preliminary objection to the jurisdiction of the court on the basis of both a forum selection clause and a choice of law clause selecting the courts and law respectively of a foreign country. While the court ruled that it would assume jurisdiction irrespective of the forum selection clause, there was no decision on the other important issue of the applicable law. It is not clear if the case proceeded to a substantive hearing on the merits nor, in that event, if the question of the applicable law was then raised and determined.

In this respect, the case of *Sonnar Nig. Ltd. v. P.M.S. Nordwind*[47] is strikingly similar to the *Adesanya* case. Again, preliminary questions were raised as to the jurisdiction of the court on the basis of both a forum selection clause and a choice of law clause each pointing to a foreign country. Again, the court decided the jurisdiction issue without a determination of the applicable law. Whether that issue will be raised and determined in a substantive hearing of the case remains to be seen.

Another quite interesting, if not disturbing, realization is that cases with foreign connections are often tried and decided on the basis of Nigerian law without questions being raised as to the possibility that another system of law might be the applicable law. This trend raises the question of whether the Nigerian courts implicitly adopt, at least prima facie, a lex fori principle. If not, the question then arises whether such cases might possibly be held to have been decided per

44. On the question of *depeçage*, see W.L. Reese, *Depeçage: A Common Phenomenon in Choice of Law*, 73 COLUM. L. REV. 58 (1973); Aubrey L. Diamond, *Harmonization of Private International Law Relating to Contractual Obligations*, 199 R.C.A.D.I. 241, 252, 259-61, 285-87 (1986).

45. *See* Fawcett, *supra* note 1. On the doctrine of forum non conveniens generally, see A.G. Slater, *Forum Non Conveniens: A View From the Shop Floor*, 104 LAW Q.R. 554 (1988); David W. Robertson, *Forum Non Conveniens in America and England: "A Rather Fantastic Fiction,"* 103 LAW Q. REV. 398 (1987).

46. 1967 L.L.R. 18.

47. 1987 N.W.L.R. 520.

incuriam if, for instance, an overlooked rule of Nigerian private international law would have directed the court to apply another country's law. It is therefore desirable to examine the Nigerian private international law rules for determining the applicable law of a case disclosing foreign elements.

A. Determining the Applicable Law: An Implicit Adoption of the Lex Fori Principle or Judicial Unawareness?

It has often been judicially pronounced that the Nigerian courts apply the common law rules of private international law originally developed by the English courts.[48] Academic writings also reiterate the same position.[49] Accordingly, conventional opinion has always been that under Nigerian law, if a case contains some foreign element, the court must ascertain and apply the proper law.[50] The proper law is described by Lord Simonds as "the system of law by reference to which the contract was made or that with which the transaction has its closest and most real connexion."[51]

It is indeed true that, at least in respect of some types of transnational disputes, the Nigerian courts do endeavor to ascertain and apply the proper law as between the competing legal systems. The classic example is the case of *Zaidan v. Mohssen*,[52] in which one of the central issues was which law governed the distribution of the immovable intestate property in Nigeria of a Lebanese domiciled person, who died while resident in Nigeria. The court acknowledged that the lex situs is normally applicable to such a situation. But, in this case, the relevant lex situs (Nigerian law) contained two possibilities: to apply either Nigerian legislation or the personal customary law of the deceased (Lebanese Moslem law). The court held that the deceased's personal law, the Moslem customary law of Lebanon, was the applicable law because the deceased had normally conducted his affairs in accordance with that law and had, inter alia, married according to that law.[53]

However, when it comes to the resolution of disputes arising out of international commercial transactions, which clearly exhibit foreign connections, the Nigerian courts often automatically apply Nigerian law without any noteworthy analysis as to the proper law. That few, if any, Nigerian cases set out the rules for determining the proper law in international commercial disputes buttresses this

48. *See* Benson v. Ashiru, 1967 N.M.L.R. 363; Nigerian Ports Auth. v. Panalpina World Transp. (Nig.) Ltd., 1973 N.C.L.R. 146, 172; Barzasi v. B. Visinoni Ltd., 1973 N.N.L.R. 1. The courts held in these cases, rather regrettably, that English private international law rules designed to apply to situations involving more than one country apply to interstate situations within Nigeria.

49. *See, e.g.*, Istvan Szazy, Conflict of Laws in the Western, Socialist and Developing Countries 65-71 (1974); Agbede, *supra* note 12, at 8; I.E. Orji, *The "Mocambique Rule" in Nigeria: Conflict of Laws*, 3 Calabar L.J. 154, 156 (1990).

50. *See, e.g.*, Orojo, *supra* note 8, at 1141.

51. Bonython v. Commonwealth of Austl., 1951 App. Cas. 201, 219; *see also* Amin Rasheed Shipping Corp. v. Kuwait Ins. Co., 1984 App. Cas. 50, 60-62.

52. [1973] 11 S.C. 1.

53. *Id.* at 19-21.

point. Quite a few examples can be cited of cases, obviously exhibiting foreign connections, decided without an adequate proper law analysis.

In *Nahman v. Wolowicz*[54] the plaintiff, a resident of England, lent a sum of money to the defendant, also resident in England, but apparently domiciled in Nigeria. The debt was to be repayable in Nigerian currency. The loan agreement was made in England and there was also a subsequent acknowledgment of the debt in England. The plaintiff sued the defendant before the Nigerian courts for breach of the loan agreement and moved for summary judgment. The defendant challenged the jurisdiction of the trial court on the basis that as the acknowledgment of the debt was made in England, only the courts of that country had jurisdiction to try the case. The trial court ruled that it had jurisdiction and entered judgment for the plaintiff. This ruling was upheld by the Nigerian Court of Appeal.

The Court of Appeal's leading judgment, delivered by Umaru Kalgo J.C.A., contained no discussion or analysis of which, as between Nigerian and English law, was the proper law of the transaction. It appears that there was an underlying assumption that Nigerian law applied. Indeed, the only private international law question raised in the case was the issue of the jurisdiction of the court. On this point the learned judge held that the fact that the loan was to be repaid in Nigerian currency showed an implied intention that the contract was to be performed in Nigeria and was "a clear intention to give the Nigerian Court jurisdiction to entertain the matter."[55]

A concurring judgment by Niki Tobi J.C.A. also omitted to make any proper law analysis, but similarly held that the Nigerian courts, concurrently with the English courts, had jurisdiction over the matter.[56] However, he made some rather interesting general observations on private international law. According to his Lordship:

> The basic aim of Private International Law, is to resolve conflicts of municipal or domestic laws at the international law [sic]. It is good law that all sovereign nations zealously and jealously guide and guard their sovereign status or sovereignty in international law. But because no country can operate in isolation or an island of its own, international diplomacy and international trade and commerce necessitate the formulation of rules of Private International Law, to resolve any conflicts in the different municipal laws.
>
> The principles of Private International law cannot be invoked for fun *qua* conflict of laws. Before a party can call upon a court of law to invoke the principles of Private International Law, the onus is on the party to prove that there exists real and not apparent conflict between two sets of municipal law. It is only when that burden is discharged that the principles of Private International Law can play the role of an umpire to resolve or reconcile the conflict. Otherwise, no.[57]

54. [1993] 3 N.W.L.R. 443.
55. *Id.* at 455.
56. *Id.* at 458-60.
57. *Id.* at 459-60.

It is certainly interesting, if somewhat doubtful, that a principle of law invoked before the court will be invoked for fun. However, an important highlight of the learned judge's statement, made obiter incidentally, is the reference to the existence of real and not apparent conflict of municipal laws before the invocation of the rules of private international law. Does this mean that, in a case with obvious connections to more than one country, a litigant must necessarily show substantive differences in the competing municipal laws before he can successfully invoke private international law rules? If that were so, the result would be that the court must first embark on an analysis of the substantive laws of at least two municipal systems before deciding on the proper law for the dispute before it. This course would obviously be an unnecessary waste of time and effort.

If the learned judge's comments had been made with reference to a proper law debate, the obvious conclusion would have been that the Nigerian courts apply a presumption that the forum law applies and that only when substantive differences with a competing foreign law are proven can private international law rules be invoked. It is, however, interesting to note that the statement was not made in the context of a proper law analysis at all, but in the context of deciding whether, bearing in mind the private international law rules relating to jurisdiction, the court could hear the particular case in point. It was a statement made in defense of the court's jurisdiction and, arguably, was designed to discourage the invocation of private international law rules to challenge that jurisdiction. Bearing all these factors in mind, the case in point is therefore rather unhelpful in ascertaining the rules employed by the Nigerian courts on the question of proper law.

Another interesting case is the Court of Appeal decision in the case of *Société Generale de Surveillance S.A. v. Rastico Nigeria Ltd.*[58] The plaintiff, a Nigerian enterprise, entered into a contract to purchase "Concentrate Tomato Paste" from a Swiss company. The goods were to be shipped from Italy to Lagos. The pre-shipment inspection was carried out by the defendants, S.G.S. Italy, as S.G.S. had been appointed by the Nigerian government as Inspecting Authority pursuant to federal legislation. The inspection fees were paid by the plaintiff. Curiously, the inspection itself appears to have been carried out in Greece. The defendants issued Clean Reports of Finding. Upon arrival in Lagos, however, the goods were found to be unfit for human consumption whereupon the plaintiff commenced action against the defendants for damages. The plaintiff based its case on a breach of statutory duty, that is, a duty owed as a result of the federal legislation under which the defendants were appointed.

The court of first instance held that the defendants were liable to the plaintiff both in contract and in tort. On the question of proper law, the court held that on the contractual issue "it accords more to reason and common sense that

58. [1992] 6 N.W.L.R. 93.

since the S.G.S. was involved with the Federal Government [of Nigeria], their relationship should be governed by one known law at the time of the agreement and that should be the Nigerian law of contract.''[59] The court also found Nigerian law to be applicable to the tortious aspect of the case on the basis that the tort was committed in Nigeria as the Clean Reports of Findings only had effect when they reached Nigeria.[60]

The Court of Appeal reversed the decision of the trial court. It held that bearing in mind the way the case was pleaded and argued, the defendants could not be held liable on any of the headings of claim. The court held that as the plaintiff had not pleaded the existence of a contract between itself and the defendants, it could not succeed on the basis of a breach of contract.[61] It also held that while it is arguable that the defendants did owe a duty of care to the plaintiff, the plaintiff had failed to prove that the defendants had breached that duty, as it had not been proved that the goods inspected by the defendants were the same as those that arrived at the Nigerian port.[62]

The main point is that despite the transnational dimension and complexity of the case, the Court of Appeal hardly addressed the issue of proper law. The court merely contented itself with a passing reference to the trial judge's comments on the point.[63] This approach again raises the suspicion that Nigerian courts simply apply Nigerian law to transnational commercial disputes before them without due consideration to the conflict of law issues that attend such cases. The important consequent question arising from the constant failure of the courts to address the question of proper law in transnational disputes is whether that omission is deliberate because the Nigerian courts apply the lex fori in choice of law cases, or whether they are making a serious erroneous omission to take heed of a forum conflict rule that requires the courts to ascertain and apply the proper law regardless of whether it is the law of the forum. What are the Nigerian private international law rules in respect of the question of proper law?[64]

59. *Id.* at 103.

60. *Id.*

61. *Id.* at 108-09.

62. *Id.* at 111-12. While there are questions as to plaintiff counsel's handling of this case, some of the Court of Appeal's holdings are, to say the least, rather baffling. While the defendants were required to carry out the requisite inspection in Italy, they performed the inspection in Greece and issued a certificate stating that the goods had been shipped from an Italian port. This is at least evidence of negligence, if not of outright fraud, on the part of the defendants.

63. *See Rastico Nigeria Ltd.*, [1992] 6 N.W.L.R. at 103.

64. This question and the ensuing discussion do not address the situation where a statute dictates the system of law that the courts should apply to some types of transactions or disputes. Such a statute may be a purely domestic legislation that reflects a matter of particular concern to the legislating country. An example of this is the Nigerian Petroleum Decree of 1969. *See* I.O. Agbede, *Forum Law and Petroleum Concession Contracts: Comments on Choice of Law Provision of Decree 15 of 1969*, NIG. CURRENT L. REV. 122 (1986). Other such statutes may be a domestic incorporation of principles agreed upon in an international instrument. *See* Orojo, *supra* note 8, at 1142.

As noted earlier, there are judicial pronouncements that the Nigerian courts apply the common law rules of private international law. In *Benson v. Ashiru*, Brett J.S.C. noted that "[t]he rules of the common law of England on questions of private international law apply in the High Court of Lagos."[65] The common law, received in Nigeria as a system,[66] is indeed one of the "legal sources"[67] of Nigerian law.[68] What then are the common law rules of private international law that the Nigerian courts ought to apply in determining the proper law of international commercial disputes?

B. PARTIES' EXPRESS CHOICE OF PROPER LAW

Common law recognizes the doctrine of party autonomy in respect of commercial transactions. Accordingly, it is open to parties to such a transaction to agree and express in their contract the system of law by which they desire the contract to be construed and governed. In the absence of bad faith, a clause expressing such agreement (a choice of law clause) will be respected and upheld by the courts. In *Vita Food Products v. Unus Shipping Co. Ltd.*[69] the court held that a clause expressing the parties' choice as to the proper law will be upheld provided the choice is bona fide and legal and provided no reason exists for avoiding the choice on the grounds of public policy. Similarly, in *Miller & Partners Ltd. v. Whitworth Street Estates Ltd.*[70] Lord Reid stated that parties are entitled to agree what is to be the proper law of their contract, and that there is no reason why, subject to some limitations,[71] they should not be so entitled.

There is one instance of outright declaration of adherence by the Nigerian

65. *See* Benson v. Ashiru, 1967 N.M.L.R. 363, 365.

66. *See* W.C. EKOW DANIELS, THE COMMON LAW IN WEST AFRICA 123 (1964).

67. The expression "legal source" as used here means the fountain of authority of a rule of law. *See* AKINTUNDE O. OBILADE, THE NIGERIAN LEGAL SYSTEM 55 (1979). In a wider sense, the common law can be described as the historical origin or foundation of Nigerian law, for the Nigerian legal system belongs to the common law legal family. *See* Gbenga Bamodu, *Transnational Law: Unification and Harmonization of International Commercial Law in Africa*, [1994] 2 J. AFR. L. 125.

68. *See* OBILADE, *supra* note 67, at 69-82; Gaius Ezejiofor, *Sources of Nigerian Law, in* INTRODUCTION TO NIGERIAN LAW 1, 7 (C.O. Okonkwo ed., 1980); A.E.W. PARK, THE SOURCES OF NIGERIAN LAW (1963).

69. 1939 App. Cas. 277 (P.C.) (appeal taken from Nigeria). Incidentally, this is a decision of the Judicial Committee of the Privy Council, which was at the apex of the hierarchy of Nigerian courts until 1963. In view of this, some would probably argue that the decision is still binding on most Nigerian courts with the specific exception of the Supreme Court. *See e.g.*, OBILADE, *supra* note 67, at 128, 133; Ezejiofor, *supra* note 68, at 27. The preferable view, however, is that any decision of the Privy Council, whether given before or after 1963, ceased to be binding on the Nigerian courts from 1963 unless it has been specifically incorporated into Nigerian law by the Nigerian courts. *See, e.g.*, Eliochin v. Mbadiwe, [1986] 1 N.W.L.R. 47, 61; Lijadu v. Lijadu, [1991] 1 N.W.L.R. 627, 647-48.

70. 1970 App. Cas. 583, 603.

71. Limitations may be placed upon the parties' ability to conclusively determine the proper law by, inter alia, the public policy or mandatory rules of the forum. *See* The Hollandia, [1983] 1 App. Cas. 565; Golden Acres Ltd. v. Queensland Estates Pty. Ltd., 1969 L.R. 378.

courts to the principle that the parties are free to agree upon the proper law. In *Adesanya v. Palm Line* Adefarasin J. (as he then was) stated, in reliance upon English authorities, that "where the parties expressly stipulate that the contract shall be governed by a particular law, that law will be the proper law of the contract provided the selection is bona fide and there is no objection on grounds of public policy even where the law has no apparent connection with the contract."[72] There is also evidence that the courts will honor the parties' choice of proper law in appropriate circumstances. In *Kaycee (Nig.) Ltd. v. Prompt Shipping Corp.*[73] the bill of lading in a contract of carriage contained a clause that the contract was to be governed by English law and referred in another clause to the Carriage of Goods by Sea Act 1924. The Nigerian Supreme Court, considering that the English enactment was *in pari materia* with equivalent Nigerian legislation, proceeded to apply the provisions of the Hague Rules[74] that both legislations were meant to implement.[75]

The Nigerian Supreme Court certainly has not lacked the opportunity to pronounce on parties' agreed choice of proper law. In the *Sonnar* case referred to earlier,[76] preliminary objections were raised to the trial court's jurisdiction on the basis of both a forum selection clause and a choice of law clause. In that case the court's decision centered on the validity and enforcement of the forum selection clause. The court made no decision in respect of the choice of law clause. Notwithstanding, if the matter of the choice of law clause is specifically raised by counsel and a decision thereon insisted upon, the Court is likely to follow the English decisions as being at least persuasive authority.

C. Inferred Choice of Proper Law

In cases where the parties to a contract have omitted to agree upon the proper law in their contract, the traditional common-law approach is that the court must first endeavor to ascertain the parties' tacit choice. The assumption appears to be that some of the clauses in the contract, or other factors present in relation to it, are prima facie indications of the system of law that the parties desire to be the proper law. A contractual clause by which the parties submit to the jurisdiction of the courts of a particular country may be regarded as prima facie evidence that they also intend the law of that country to apply.[77] A clause providing for

72. *Adesanya*, 1967 L.L.R. 18, 19.

73. [1986] 1 N.W.L.R. 180.

74. Hague Rules (Carriage of Goods by Sea Act, 1971 (Eng.)) Relating to Bills of Lading 1921.

75. The case, however, has been the subject of critical comment with respect to the manner in which it equated Nigerian law with English law. *See* L.N. Mbanefo, *Application of Foreign Law—A Minefield?*, 1986 Nig. Current L. Rev. 183.

76. *See Sonnar*, 1987 N.W.L.R. 520.

77. N.V. Kwik Hoo Tong Handel Maatschappij v. James Finlay & Co., 1927 App. Cas. 604, 608-09; Mackender v. Feldia A.G., [1966] 3 All E.R. 847 (Eng.).

arbitration in a particular country may have the same effect.[78] Other factors that have been regarded as demonstrating the parties' intention as to the proper law include: a clause that the contract is deemed to be made in a particular country; the legal terminology employed in the contract; the currency in which payment is to be made; and the location of the subject matter of the contract.[79]

The question remains whether in the absence of an express choice the parties did in fact intend any particular system of law to be the proper law. Thus, it may be argued that the inferred choice of proper law ascribed to the parties may be merely an artificial inference and an imposition by the court. Be that as it may, the inference of the parties' implied choice is based on presumptions that have sometimes proved helpful to the courts.[80]

D. Objectively Determined Proper Law

If the court cannot ascertain the parties' choice of proper law, express or implied, it applies the system of law with which the transaction is most closely connected.[81] This decision is based upon an objective consideration of the factors that connect the transaction to particular systems of law, the court selecting the system that is most closely connected to the transaction following a presumption that "that is what . . . reasonable businessmen would have decided."[82] Whether or not the law of closest connection is that which, in fact, the parties would have agreed upon, this approach is possibly the most reasonable and practical. It is indeed arguable that, once the parties to a contract have omitted to agree upon the proper law, the courts should immediately proceed to ascertain and apply the law with which the contract is most closely connected unless the contract shows clear evidence of intention that a different system of law should apply.

In order to determine the system of law with which the contract is most closely connected, the courts must take into account all of the circumstances. The factors to be taken into consideration include: the place in which the contract was concluded, the place in which it is to be performed, the place of residence or business of the parties, and indeed some of the factors usually taken into account to determine the parties' tacit choice of proper law. The opinion has been expressed that these factors should be weighed on a qualitative rather than a quantitative basis.[83]

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78. Norske Atlas Ins. Co. v. London Gen. Ins. Co., 43 T.L.R. 541, 542 (1927) (Eng.); Hamlyn & Co. v. Tallisker Distillery, 1894 App. Cas. 202, 212; Miller & Partners Ltd. v. Whitworth Street Estates (Manchester) Ltd., [1970] 1 All E.R. 796 (Eng.).

79. *See generally* J.G. CASTEL, CANADIAN CONFLICT OF LAWS 532-34 (2d ed. 1986); 2 PHILIP WOOD, LAW AND PRACTICE OF INTERNATIONAL FINANCE 1-11 to -12 (1980).

80. *See, e.g.*, Compagnie d'Armement Maritime S.A. v. Compagnie Tunisienne de Navigation S.A., 1971 App. Cas. 572.

81. *In re* United Ry. of Havana & Regla Warehouses Ltd., 1960 Ch. 52 (C.A.) *aff'd sub nom.* Tomkinson v. First Pa. Banking & Trust Co., 1961 App. Cas. 1007; The Assunzione, [1954] 1 All E.R. 278 (Eng.).

82. *See* CASTEL, *supra* note 79, at 536.

83. 2 WOOD, *supra* note 79, at 1-12.

Accordingly, more weight would necessarily have to be attached to certain factors than others. It has been observed, for example, that if the place of contracting is the same as the place of performance the court may find it impossible to apply any other law to the contract, as it would seem that that place is the most interested in applying its law to the transaction in question.[84]

Contemporary thinking appears predominantly in favor of immediately proceeding to ascertain the law with the closest connection to the contract in the absence of express choice by the parties. The EEC Convention on the Law Applicable to Contractual Obligations of 1980 (the Rome Convention), applicable in Member States of the European Economic Community[85] (now known as the European Union), enjoins the courts to apply the system of law chosen by the parties. In the absence of such choice, the courts must apply the law with which the transaction is most closely connected.[86] The Nigerian courts might find it helpful to adopt a similar approach, but with an allowance made for the possibility that even in the absence of express choice of law, occasionally there might be overwhelming evidence that the parties themselves intended a particular system of law to apply.

E. Effect of Omission to Ascertain the Proper Law

Having set out the rules of private international law that the Nigerian courts ought to apply in respect of the question of proper law occurring in international commercial disputes, the next question to arise relates to the consequence of failure by the court to address the proper law question at all. Is a decision of the court delivered following the automatic application of Nigerian law without a determination of the proper law a valid judgment or a decision given per incuriam?

The court in *Morelle v. Wakeling*[87] stated that a decision is given per incuriam when it is "given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court [concerned]."[88] In *Young v. Bristol Aeroplane Co. Ltd.*[89] the court similarly stated that a decision is given per incuriam when it is given in ignorance of a statute or a rule having the force of a statute.

84. Castel, *supra* note 79, at 538.

85. It is applicable in the United Kingdom by virtue of the Contracts (Applicable Law) Act, 1990 (Eng.).

86. *See* Rome Convention on the Law Applicable to Contractual Obligations art. 4, *opened for signature*, June 19, 1980, 1980 O.J. (L 266) 1.

87. [1955] 2 Q.B. 379, 380 (Eng. C.A.).

88. A similar opinion was expressed in Huddersfield Police Authority v. Watson, [1947] 2 All E.R. 193, 196 (Eng.), in which it was said that a decision is given per incuriam "when a case or a statute has not been brought to the attention of the court and they have given the decision in ignorance or forgetfulness of the existence of that case or that statute."

89. [1944] K.B. 718, 729 (Eng. C.A.).

The ensuing question, accordingly, is whether the common law rule of private international law that a court should apply the proper law in cases with foreign connections is a rule of such binding force that the ignorance of it would make the court's decision per incuriam. It is doubtful that this is the case. In common law jurisdictions, including Nigeria, questions of foreign law are questions of fact that must be specifically pleaded[90] and proved before the courts,[91] as the courts are not obliged to take judicial notice of foreign law.[92] In the absence of proof of foreign law the court is entitled to assume that the relevant foreign law is the same as forum law.[93] Therefore, if the parties or counsel in a case with foreign connections do not raise the possibility of the application of foreign law, the court is entitled to proceed on the basis of forum law. It has been argued, for instance, that "[w]here the Nigerian court is the forum the parties have the choice either of proving foreign law as a question of fact or ignoring foreign law and applying Nigerian law."[94] And, in a similar vein: "Foreign laws are not, by any means, invariably applied in all cases in which a transaction contains foreign elements."[95]

While a decision given without a proper law analysis in a case with foreign connections is not necessarily given per incuriam if the issue is not raised, the Nigerian courts should take the earliest opportunity to specifically set out the rules applicable in such cases. This clarification would ensure certainty in the law and would also put an end to speculation as to whether or not the Nigerian courts adopt the oft criticized[96] lex fori approach in choice of law cases.

III. Summary

Problems of private international law will often arise in the adjudication of cases with foreign connections. Accordingly, it is important that the courts develop clear and simple rules that will facilitate the resolution of such problems. Equally important is that the courts do not treat the subject of private international law as being on such an exalted pedestal that it should only be approached with trepidation.

This article attempts to set out the private international law rules applicable in the Nigerian courts in respect of two particular topics: jurisdiction of the court and the applicable law in transnational dispute resolution. The rules on jurisdiction

90. Peenok Investments Ltd. v. Hotel Presidential Ltd., [1982] 12 S.C. 1, 102-04.

91. Ogunro v. Ogedengbe, [1960] 5 F.S.C. 137.

92. *Id.* The Nigerian superior courts, even if their territorial jurisdiction is confined to a particular state, are enjoined to take judicial notice of the laws of other states within the Federation of Nigeria. *See* Evidence Act, Laws of the Federation of Nigeria, 1990, ch. 112, § 74(1); *Ashiru*, 1967 N.M.L.R. 363; *Peenok*, [1982] 12 S.C. 1.

93. *See Ogunro*, [1960] 5 F.S.C. 137.

94. Mbanefo, *supra* note 75, at 183.

95. AGBEDE, *supra* note 12, at 89.

96. *See, e.g.* Fawcett, *supra* note 1, at 55-58; CASTEL, *supra* note 79, at 42-44.

are by and large certain and uncontroversial. Yet some measure of uncertainty still surrounds what rules the courts will apply on the question of the applicable law, if only because the Nigerian courts have made no definitive pronouncements on the subject. The courts, particularly the Supreme Court, should take the earliest opportunity to set out conclusively how the law applicable in transnational dispute resolution should be determined. It can be predicted, with reasonable confidence, that there will be a confirmation that the courts do not apply the lex fori approach and that the courts' duty is to ascertain and apply the proper law in accordance with the principles enunciated above.