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Review Article

The overview of private international law in Nigeria

Chukwudi Paschal Ojiegbe*

A. Introduction

As an emerging economy, Nigeria attracts foreign direct investment and foreign portfolio investment as well as commercial parties and sovereign States engaged in private transactions thereby increasing the possibility of cross-border disputes, which would often require the use of private international law ("PIL") principles to resolve them.[1] PIL concerns relationships involving foreign elements that transcend national boundaries. It determines issues of jurisdiction, choice of law and the recognition and enforcement of decisions as well as issues that may arise when foreign private laws interact with the laws of the forum in which legal action is brought in matters of civil and commercial law or family law. In Nigeria, the significance of PIL is seen not only in international transactions involving foreign elements but also within inter-State transactions and disputes as Nigeria is a federation consisting of 36 States and the Federal Capital Territory Abuja, with a separate jurisdiction and laws for each State's courts as established in the Constitution of the Federal Republic of Nigeria 1999. Indeed, as Nigeria is a federation, the same general PIL approach used in international matters should equally apply to intra-State matters. However, some Nigerian lawyers, academics and judges often seem to struggle with the concept of PIL: for example, in some cases, Nigerian judges have applied PIL principles to resolve Nigerian disputes that do not contain any foreign elements or involve intra-State matters.[2]

Due to Nigeria's relationship to the United Kingdom and its membership of the Commonwealth, the common law foundations of Nigerian PIL, and some

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[1]Chukwudi Paschal Ojiegbe, *International Commercial Arbitration in the European Union, Brussels I, Brexit and Beyond* (Edward Elgar Publishing, 2020) 1.

[2]Honourable Justice HAO Abiru, *The Concept of Territorial Jurisdiction'* in IO Smith (ed), *Law and Developments in Nigeria: Essays in Honour of Alhaji Femi Okunnu, SAN, CON* (Ecowatch Publications (Nig) Ltd, 2004); Richard Frimpong Oppong, *Private International Law in Commonwealth Africa* (Cambridge University Press, 2013); R Nwabueze, *The History and Sources of Conflict of Laws in Nigeria: With Comparisons to Canada* (VDM Verlag, 2009).

relevant statutes such as those applicable in Nigeria through the Statutes of General Application in force in England as of 1 January 1900, were originally derived from English case law and United Kingdom statutes, therefore, there is some resemblance to English PIL and PIL in other Commonwealth jurisdictions. Nigeria is neither a Party to any of the Hague Conventions nor is it a Member of the Hague Conference on Private International Law ("HCCH"). There are several HCCH Conventions on PIL that cover cross-border matters in areas of civil and commercial law, and family law. If Nigeria were to become a Party to some of the HCCH Conventions, it may increase the potential for closer cross-border relationships and cooperation between Nigerian citizens/business and foreign citizens/businesses, thereby increasing international trade and investment in Nigeria. Indeed, it could further establish Nigeria as a global commercial hub for the provision of cross-border legal services whilst increasing the potential for Nigeria to compete with other notable venues as well as generating significant economic value for the country.

There seems to be a gap in the academic literature covering PIL comprehensively in Nigeria. Some Nigerian lawyers and judges appear to struggle in understanding the applicable principles to resolve disputes with foreign elements as well as disputes involving inter-State Nigerian conflicts. To a large extent, the gap is based on the fact that until 2020 there was no complete treatise on PIL in Nigeria, which would enable interested parties to fully understand the principles and application of PIL in Nigeria. As will be fully developed later, most of the Nigerian PIL is not statutory, there is a range of different sources of the law, but the case law remains the principal source. Although there have been academic writings covering aspects of PIL in Nigeria,[3] the monograph entitled *Private International Law in Nigeria* written by Dr Chukwuma Adesina Okoli and Professor Richard Frimpong Oppong[4] seeks to cover the gap in the academic literature on Nigerian PIL. This is the first comprehensive and complete book-length treatise devoted to the full spectrum of PIL matters in Nigeria which is an invaluable source of information for those interested in understanding the principles of PIL in Nigeria. This excellent monograph extensively covers most aspects of PIL and painstakingly analyses most Nigerian case law on the

[3]For commentary on some Nigerian aspects of private international law, see Nwabueze, *ibid*; EI Nwogugu, *Family Law in Nigeria*, (HEBN Publishers Plc, 3rd edn, 2014); HA Olaniyan, *Jurisdiction of Nigerian Courts in Causes with Foreign Elements* (Lagos University Press, 2013); P Okoli, *Promoting Foreign Judgments – Lessons in Legal Convergence from South Africa and Nigeria* (Kluwer Law International, 2019); R Frimpong Oppong, *Private International Law in Commonwealth Africa* (Cambridge University Press, 2013); IO Omoruyi, *An Introduction to Private International Law: Nigerian Perspectives* (Ambik Press Ltd, 2005); AA Olawoyin, "Enforcement of Foreign Judgments in Nigeria: Statutory Dualism and Disharmony of Laws" (2014) 10 *Journal of Private International Law* 129.

[4](Hart Publishing, 2020) ("the monograph").

subject. It is clearly and coherently written and offers useful guidance to academics, practitioners, judges, students, and anyone wishing to understand the principles of PIL in Nigeria.

B. Contents and structure of the monograph

Although the monograph covers most aspects of PIL in Nigeria, it does not fully cover the principles of habitual residence as a connecting factor in PIL nor PIL aspects relating to registered entities, such as the formation, internal organisation, activities and winding up of companies and partnerships. It is true that the activities of registered entities, like those of private natural persons, may transcend national boundaries thereby increasing the possibilities of cross-border issues, which would require the use of PIL principles.

The structure of this article follows the structure of the book. The first part of the monograph addresses fundamental conceptual issues in the choice of law, characterisation, *renvoi*, the nature and proof of foreign law in Nigeria as well as domicile as a connecting factor. These topics are addressed in section C of this article. The second part addresses the bases of jurisdiction and choice of court (section D). In the third part, the parties' obligations in contract and tort are explored as well as foreign currency obligations and bills of exchange (section E). The fourth part of the monograph analyses family issues, such as marriage, matrimonial causes, and children (section F). The fifth part addresses issues in property, succession, and administration of estates (section G). Issues relating to the recognition and enforcement of foreign judgments and arbitration awards are explored in part six (section H); and international civil procedure rules, remedies, taking of evidence and the service of legal process are addressed in the last part (section I). Section J of this article is a conclusion.

C. Part I – Preliminary matters

Whilst Chapter 1 contains a brief description of the development of PIL in Nigeria, Chapters 2–4 address important PIL matters such as conceptual issues in the choice of law, characterisation, *renvoi*, the nature and proof of foreign law in Nigeria as well as the connecting factor of domicile. A national court seised of a PIL matter will first determine its jurisdiction. If the court assumes jurisdiction to hear the matter, the court must characterise the matter by determining the applicable PIL rules based on the facts and circumstances of the matter. The characterisation of a matter in PIL is usually a difficult process as there are potentially different PIL rules that may apply to a matter having connections with many countries.

The question that readily comes to mind when foreign law is applicable is whether it is only the substantive internal law of the foreign country that will apply or is it all the laws of the foreign country including its PIL rules that will apply? If the latter, the foreign law may refer the matter back to the law of the

court seised of the matter as the applicable law (*renvoi*). Whether the court to which the matter is referred will accept the reference back and apply its substantive internal law without reference to its PIL rules or whether the court should follow its PIL rules and further refer to the foreign law to determine the matter shows how problematic characterisation can be *vis-à-vis* the application of foreign law and *renvoi*. The authors suggest three solutions that a Nigerian court faced with a *renvoi* problem may adopt. First, the Nigerian court should only apply the substantive internal law of the foreign country without reference to its PIL rules. Secondly, the Nigerian court could accept any reference back from the foreign law and apply Nigerian internal law ("single renvoi"). Thirdly, the Nigerian court could take the foreign law to mean the law which the court of that foreign law would apply if it were seised of the matter. The problem with these three solutions is that when the solutions are made available at the same time to be applied at the discretion of the Nigerian courts, it may give rise to uncertainty as each court seised of a similar *renvoi* problem may apply a different solution with the potential to reach a decision different to that of another court seised of a similar *renvoi* problem. To encourage certainty and predictability in the dispute resolution process, single renvoi should be the preferred solution applicable to all Nigerian courts seised of a *renvoi* problem.

As to the connecting factors, the authors discuss the principles of domicile in Nigerian law. Domicile is an important connecting factor particularly for matrimonial proceedings as a Nigerian court will only have jurisdiction when the petitioner is domiciled in Nigeria. The monograph discusses three main types of domicile, namely domiciles of origin, choice and dependence.[5] Domicile of origin is the domicile that is acquired by every individual at birth either through the individual's father's place of permanent residence if the father is alive at the time of the individual's birth or through the mother, where the father is dead at the time of the individual's birth or where the child is illegitimate by birth. Domicile of choice is acquired through physical presence in a place where a person intends to reside and make that place a permanent home. Domicile of dependence is derived from another person's domicile. There is a Nigerian case that held that there is no domicile of dependence but rather that there are only two types of domicile, namely domicile of origin and domicile of choice.[6] This case seems to neglect the fact that in Nigeria a woman acquires the husband's domicile upon marriage and the woman's domicile of dependence continues whilst the marriage subsists. This shows that even though Nigerian law prohibits discrimination based on sex and gender, there is still a differentiation between a married

[5] *Ibid* 37–44.

[6] *Bhojwani v Bhojwani* (1995) 7 NWLR (Pt 407) 349, 364 (Uwaifo JCA). For contrary Nigerian cases recognising domicile of dependence in Nigeria, see *Osibamowo v Osibamowo* (1991) 3 NWLR (Pt 117) 85, 93 (Awogu JCA); *Koku v Koku* (1999) 8 NWLR (Pt 616) 672, 679.

man and a married woman in the context of domicile under PIL, and this seems to be, at least partly, a consequence of traditional and cultural beliefs in Nigeria which attach to marriage.

A married woman's domicile of dependence based on her husband's domicile raises some important constitutional law issues regarding the prohibition from discrimination from sex and gender as enshrined in Section 42 of the Constitution of the Federal Republic of Nigeria 1999. Whilst drawing on the position of Kenya and South Africa, the authors rightly argue at page 279 of the monograph that the position in Nigeria should evolve to recognise that an adult married woman can acquire an independent domicile of choice during the marriage. Indeed, times have changed, and the true position of a married woman is different in this modern-day society. Therefore, based on equality and, following the 1999 Constitution prohibiting discrimination based on sex and gender, a married woman's domicile should not be dependent on the domicile of the husband. A married woman should be able to acquire an independent domicile of choice during the marriage.

Although the authors rightly point out that domicile as a connecting factor is continually losing its relevance as there is now a move in many legal systems, including continental European countries, towards the principles of habitual residence as a principal connecting factor, they fail to discuss whether the principles of habitual residence should be used as an alternative to domicile in Nigerian PIL. One would have expected a monograph on Nigerian PIL to extensively discuss whether habitual residence should have a place in Nigerian PIL having regard to its extensive use in various of the HCCH Conventions. Particularly, the authors could have discussed issues related to habitual residence such as its principles and characteristics, acquisition, loss, and the habitual residence of children. It is not enough for the authors of the monograph to suggest that a special place should be given to a person's habitual residence in Nigerian PIL without a detailed analysis of this topic.[7]

D. Part II – Jurisdiction

As Nigeria is a federal country, PIL issues relating to jurisdiction can arise at both the inter-State and international levels. Either the parties to the dispute or the Nigerian courts (*suo moto*) can raise the issue of jurisdiction at any time, and even before the Supreme Court (apex court) for the first time. The authors thoroughly analyse most Nigerian case law on this subject showcasing the inconsistencies in the decisions of the appellate courts. In some cases, they argue that the courts were quick to decline jurisdiction based on incorrect principles of law and procedural technicalities. The authors were very bold to criticise the ability of the parties or the Nigerian courts (*suo moto*) to raise the issue of jurisdiction any

[7]Okoli and Frimpong Oppong (n 4) 46.

time during the proceedings and even at the Supreme Court for the first time. They rightly argue that raising the issue of jurisdiction at any time may lead to protracted delays in the dispute resolution process. In support of the criticism, it is submitted that raising the issue of jurisdiction at any time can cause uncertainty, extra cost, inconvenience, and delays in the court proceedings as a recalcitrant party may adopt a wait and see approach to see what the outcome of a case may be and only raise the issue of jurisdiction on appeal in the event the decision is unfavourable to that party. Therefore, it is submitted that where a party intends to raise the issue of jurisdiction, the party should do so by filing a conditional appearance and challenge the jurisdiction of the court. Where the party files an unconditional appearance as well as filing the defence, they should not be allowed to raise the issue of jurisdiction as the action of filing the unconditional appearance and defence should be considered as submitting to the jurisdiction of the court.

Nigerian courts, within very broad limits, generally recognise and give effect to forum selection clauses (jurisdiction and arbitration clauses) unless the party that instituted the proceedings in alleged breach of the forum selection clause advances a strong cause to the contrary. There are statutory provisions in Nigerian law that limit the enforceability of forum selection clauses by Nigerian courts, such as the Hamburg Rules, the Civil Aviation Act, and the Admiralty Jurisdiction Act ("AJA"). For example, section 20 of the AJA nullifies any agreement which seeks to oust the jurisdiction of the Federal High Court if the subject matter relates to admiralty matters under the AJA. Contrary to the views expressed by some senior courts in Nigeria that section 20 of the AJA is unambiguous,[8] the authors argue that it is poorly drafted and should be repealed on the basis that section 20 of the AJA limits the enforceability of forum selection clauses. The key question is whether forum selection clauses are ouster clauses for the purposes of section 20 of the AJA. Although there are conflicting positions of Nigerian judges on whether forum selection clauses are ouster clauses,[9] the position of forum selection clauses under PIL is that whilst the existence of the original jurisdiction of the court is recognised, the forum selection clause persuades that court to exercise its jurisdiction by staying the proceedings in favour of the forum chosen by the parties. By so doing, that court will be recognising and giving effect to the parties' forum selection clause, thus acknowledging the importance of the doctrine of party autonomy and the principle of *pacta sunt servanda*. It should be noted that forum selection clauses are not absolute as the court is not obliged to give effect to the parties' agreement to select a forum, however,

[8] *LAC v AAN Ltd* (2006) 2 NWLR 49, 71–73, 77; *M V Panormos Bay v Olam (Nig) Plc* (2004) 5 NWLR 1, 13.

[9] *Ventujol v Compagnie Francaise De L' Afrique Occidentale* (1949) 19 NLR 32*; Conoil Plc v Vitol SA* (2018) 9 NWLR 463, 489; *Sonnar (Nig) Ltd v Partenreedri MS Norwind* ("*Sonnar*") (1987) 4 NWLR 520.

the courts generally recognise and give effect to forum selection clauses unless there are strong reasons for non-recognition and enforcement of the forum selection clause. For example, the court might conclude that there are strong reasons not to uphold such a clause where the applicable law to the court seised of the matter limits the enforceability of the forum selection clause, or when the recognition of a forum selection clause will cause injustice to a party or deprive a party of the opportunity to have its matter resolved.[10]

E. Part III: Obligations

It is well known that the doctrine of party autonomy emphasises that the courts should, within very broad limits, recognise and give effect to any agreements by which the parties designate the forum to resolve their dispute as well as the law that will govern their rights and obligations. This enhances certainty and predictability as the parties will know the forum and the applicable law that will apply in the event a dispute arises. It is, of course, important to note that forum selection clauses are entirely different from choice of law clauses. The parties are free to choose the applicable law: the designated law need not have any connection with the location of the contracting parties or the subject matter of the contract.

Nigerian courts, subject to certain limitations, generally recognise and give effect to the law chosen by the parties. However, difficulty and uncertainty may arise with determining the applicable law when commercial parties enter into a contract that has connections with different countries without the parties expressly choosing the applicable law. In most cases, the courts may determine the applicable law on the basis that the contract should be governed by the law of the country with which it is most closely connected. In some cases, even though forum selection clauses and choice of law clauses are conceptually different, the courts may conclude that the express choice of forum by the parties without expressly choosing a different law to govern their rights and obligations suffices to establish a strong presumption that the express choice of forum by the parties indicates that the law of the chosen forum should apply.[11]

Whereas commercial parties can agree on the applicable law at the time of concluding the contract, the position seems to be different in tort situations as the parties rarely choose the applicable law. In other words, where a tort occurs, it is very difficult for the parties to agree to the applicable law having regard to the nature of the injury or damage as the tortfeasor will mostly be interested in the law that limits his or her liability and the compensation he or she

[10] *Sonnar* (1987) 4 NWLR 520; *Ubani v Jeco Shipping Lines* (1989) 3 NSC 500.
[11] *Basoroum v Clemessy International* (1999) 12 NWLR 516, 526; *Resolution Trust Corporation v FOB Investment & Property Ltd* (2000) 6 NWLR 246, 260; Okoli and Frimpong Oppong (n 4) 274.

would pay, as opposed to the law that benefits the victim's interest. Indeed, the determination of the applicable law absent the parties' choice in both contract and tort raises important PIL matters. It could lead to unhelpful legal uncertainty, unpredictability, inconvenience, extra costs, and delay in the dispute resolution process.

In Nigeria, no legislation specifically deals with the choice of law issues in contractual or tort situations at either the inter-State or international level. There is a paucity of decided Nigerian cases on the subject. Against this background, the authors suggest that legislation be enacted to address choice of law matters in Nigerian PIL. They referred to The Hague Principles on Choice of Law in International Commercial Contracts,[12] as well as the EC Rome I and Rome II Regulations,[13] as possible bases for the future development of the codification of choice of law matters in Nigerian PIL. Whilst it is true that enacting choice of law legislation in Nigeria will provide certainty and predictability in the dispute resolution process, enacting legislation in identical terms to EU legislation (the Rome I and II Regulations which reflect a strong civil law influence) in Nigeria may prove problematic as it would be a significant change to Nigerian law and would be controversial if not ineffective for that reason.

The question of foreign currency obligations generally arises in PIL when parties enter into a contract that has connections with more than one country or in cases where the contract sum is a foreign currency. For example, do the courts or arbitral tribunals, where the dispute is to be resolved, have the jurisdiction to award damages in a foreign currency or must the currency be converted into the local currency of the forum to resolve the dispute by the courts or arbitral tribunals? If the court or arbitral tribunal has the jurisdiction to award damages in a foreign currency, what will be the applicable exchange rate? Is it the rate applicable at the time the contract was concluded, on the date of the court judgment/arbitral award or on the date of the execution of the judgment? Indeed, the answer to these questions is important to commercial parties in planning their transaction, performing the contract, as well as knowing the set of rules that will govern their obligations. In Nigeria, the previous position expressed by the Supreme Court was that Nigerian courts have no jurisdiction to give judgments in foreign

[12]The Hague Principles on Choice of Law in International Commercial Contracts 2015 are designed to promote party autonomy in international commercial contracts by acknowledging that the parties to a contract are best positioned to determine which set of legal norms is most suitable for their transaction.

[13]The Rome I Regulation governs the applicable law for contractual obligations in civil and commercial matters: Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L177/6. The Rome II Regulation governs the applicable law for non-contractual (including tortious) obligations in civil and commercial matters: Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L199/40.

currency.[14] Given present-day realities as well as the need to meet the parties' expectations, the current position is that Nigerian courts can award judgments in foreign currency as was subsequently held by the Supreme Court[15] and the rate should be the rate applicable on the date of the execution of the judgment.

F. Part IV – family

Family matters in PIL is a sensitive subject embedded within wider societal norms. The subject should be carefully dealt with to avoid the likelihood of causing disagreements between people from different religions and culturally diverse backgrounds as opinions differ on topics such as the concept of marriage, civil unions and partnerships, divorce, child conception and birth, surrogacy, child legitimacy, adoption, and abduction of children. In Nigeria, the validity of a marriage is dependent on the type of marriage contracted by the parties. Marriages contracted under statute (often termed "statutory marriage"), customary law or Islamic law are all valid marriages in Nigeria. A monogamous marriage contracted under statute is "a marriage which is recognised by the law of the place where it is contracted as a voluntary union of one man and one woman to the exclusion of all others during the continuance of the marriage."[16] A statutory marriage contracted with a person who was previously married to another person under customary law is invalid. In the same vein, a customary marriage that is contracted with a person who was previously married to another person under the statute is invalid. However, where the same parties were previously married under customary law (or statute) and then wish to be married under the statute (or customary law), such a subsequent marriage between the parties is also valid and will be recognised by the Nigerian courts. Only a marriage contracted between a man and a woman is recognised as a valid marriage in Nigeria. Same-sex marriage, civil unions or other related same-sex relationships are prohibited in Nigeria by the Same Sex Marriage (Prohibition) Act 2013. Although one may argue that the refusal to recognise same-sex marriages, civil unions and other related same-sex relationships in Nigeria is discriminatory and a human rights concern, the authors were very careful to state that:

> Nigeria's refusal to recognise same-sex relationships – whether celebrated domestically or abroad – is a reflection of its public policy and socio-cultural and religious heritage. Viewed in this light, it can be argued that conceptualising issues of same-

[14] *Aluminium Industries Aktien Gesellschaft v Federal Board of Inland Revenue* ("*Aluminium Industries*") (1971) 2 NCLR 121.
[15] *Koya v United Bank for Africa Ltd* (1997) 1 NWLR 251, 276–89 (Ogundare JSC); *Momah v VAB Petroleum Inc* (2000) 4 NWLR 534; *BB Apugo & Sons Ltd v Orthopaedic Hospitals Management Board* (2005) 17 NWLR 305, 337–38.
[16] Interpretation Act Chapter 192 Laws of the Federation of Nigeria 1990, s 18.

> sex relationships exclusively as a human rights concern, without taking into account the socio-cultural and religious context in Nigeria, is a misplaced endeavour.[17]

Under section 2(2)-(3) of the Matrimonial Causes Act 2010 ("MCA"), domicile is an important connecting factor particularly in matrimonial proceedings as a Nigerian court will only have jurisdiction when the petitioner is domiciled in Nigeria. The MCA also governs matters relating to settlement, maintenance, and custody of children of the marriage. Other statutes play an important role in matters relating to the welfare, rights, and maintenance of children. For example, the Child Rights Act, which has been domesticated in 24 States in Nigeria, provides for the maintenance of a child. A similar provision is also contained in the African Charter on the Rights and Welfare of the Child as well as in the United Nations Convention on the Rights of the Child, to which Nigeria is a signatory. The best interests of the child is always the primary consideration. Indeed, Article 3 of the United Nations Convention on the Rights of the Child provides that: "in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

Finally, there is no legislation in Nigeria that deals with surrogacy arrangements; neither is there any international treaty regulating matters of surrogacy arrangements despite the attention it has generated across the globe. Indeed, it seems there is no clear consensus from which to begin to articulate the substance of any such international treaty on matters of surrogacy. Besides, Nigeria is neither a Member of the HCCH nor is it a Party to any of the Hague Conventions dealing with family matters and, as such, cannot benefit from the extra protection afforded to children under the Hague Conventions.

G. Part V – Property, succession and administration of estates

Succession and the administration of the estate of the deceased person are mostly determined having regard to whether the deceased died testate or intestate. Under Section 3 of the Wills Act of 1837, which is part of the statutes of general application in Nigeria, a person is free to dispose of, devise or bequeath his or her property in any manner at the time of his or her death. This provision created internal conflict with the customs applicable in some parts of Nigeria. Accordingly, some States in Nigeria modified Section 3 of the Wills Act to state that a testator is free to devise, dispose of or bequeath his or her property subject to the customary law applicable to the testator. Notwithstanding the above, the authors state that in matters of testate succession:

> … It is submitted that a testator can change the personal law they are ordinarily subject to (to any other law) for the purpose of succession to their properties.

[17]Okoli and Frimpong Oppong (n 4) 274.

> This is an effective way of deviating from a customary law that a testator does not want to be bound by, and instead, disposing of his or her property as he or she pleases.[18]

As discussed below, this statement seems to be problematic when analysed in the light of the current Wills Laws of some Nigerian States. The authors fail to provide examples as to how a person can change his or her personal law for testate succession even though they provided examples of how a person can change his or her personal law in intestate succession. Personal law in the context of succession means:

> … the law the deceased was normally subject to when he was alive. It is peculiar to him and his family unit and could be distinct from the law prevailing or predominant in the area or locality of the deceased. In most cases, it dovetails into and is assimilated by the law prevailing or predominant in the area or locality of the deceased.[19]

In the context of intestate succession, the authors state that a person who died intestate can change the personal law during his or her lifetime for the succession and administration of his or her property either in the normal way or by contracting a statutory marriage. Where a party who is ordinarily subject to customary law or Islamic law contracts a statutory marriage, the law that will be applicable will no longer be the customary law, but rather the applicable statute, the Administration of Estate Law. There are several conflicting decisions of the Nigerian courts on this subject although the decision in *Cole vs Cole*[20] seems to be the *locus classicus* on the change of personal law in Nigeria for the distribution of the estate of a person who dies intestate.[21] Of course, it is also possible that a person can change his or her personal law in a normal way. This happens where a person, during his or her lifetime, breaks ties with his or her customary law and relocates to reside in another place and adopts and/or agrees to be subjected to the customs and laws of that new place. An important question is whether the above-stated examples of the ways a person who dies intestate can change the personal law for intestate succession equally apply to testate succession? If this question is answered in the affirmative, then how can one reconcile the position where a deceased man from Benin ordinarily subject to Benin customary law, contracts a statutory marriage during his lifetime and disposes of the *Igiogbe*[22] in his Will to a person other than his eldest son? Under Section 3

[18] *Ibid* (n 4) 310.
[19] *Mojekwu v Mojekwu* (1997) 7 NWLR 283, 300; see also Okoli and Frimpong Oppong (n 4) 317.
[20] (1898) NLR 15.
[21] See Okoli and Frimpong Oppong (n 4) 318–324 (analysing most of the conflicting cases of the superior courts in Nigeria).
[22] Under Benin customary law in Nigeria, the "*Igiogbe*" is the principal house in which the deceased lived in his lifetime and died, and the house always passes by way of inheritance

of the Wills Law of Benin and, particularly, the decision of the Nigerian Supreme Court in *Idehen vs Idehen*,[23] it seems that the device of the *Igiogbe* will be voided as the wording "subject to any customary law relating thereto ... " in Section 3 of the Wills Law is a limitation on what the testator could do with his property. Therefore, it seems that for the States that still apply the Wills Law, the only example of intestate succession relating to a change of personal law that may apply to testate succession is the change of personal law to another personal law.

H. Part VI – Foreign judgments and arbitration awards

The authors argue that there are two regimes for the recognition and enforcement of foreign judgments in Nigeria, namely the common law regime and the statutory regime.

Although it is not entirely clear whether there exists in Nigeria a common law regime for the recognition and enforcement of foreign judgments, the authors argue that a foreign judgment could be recognised under the common law regime.[24] This seems to be problematic as the meaning of a foreign judgment under the common law regime is not entirely clear. For example, it is not clear whether judgments from foreign tribunals, quasi-judicial and administrative institutions, or regional and international courts such as the Court of Justice of the Economic Community of West African States (ECOWAS) Court of Justice and the Court of Justice of the European Union, fall within the category of foreign judgments for the recognition and enforcement in Nigeria. Another problem with the poor definition of a foreign judgment under the common law regime is that a foreign judgment is treated as creating a debt.[25] The issue with the classification of a foreign judgment as debt is that it excludes the possibility of recognising all other forms of non-monetary judgments of a foreign court, including but not limited to non-monetary interim and interlocutory judgments.

It is necessary to point out that a foreign judgment is not recognised and enforced as a matter of course in Nigeria. The judgment creditor must prove the existence of the foreign judgment either by producing a copy sealed with the seal of the foreign court or where there is no seal, the judgment must be signed by the judge that delivered the judgment or a certified copy of the judgment produced. There are uncertainties relating to the bases for the recognition and enforcement of foreign judgments under the common law regime,

on the distribution of his estate, to the eldest surviving son after the performance of the second burial ceremonies. Paul O Itua, "Succession Under Benin Customary Law in Nigeria: Igiogbe Matters Arising" (2011) *Journal of Law and Conflict Resolution* 117–129.

[23](1991) 6 NWLR 382.

[24]The authors reach this conclusion by relying on the case of *Alfred C Toepfer Inc v Edokpolor* (1965) NCLR 89; Okoli and Frimpong Oppong (n 4) 345–359.

[25]*Alfred C Toepfer Inc v Edokpolor* (1965) NCLR 89; *Wilbros West Africa Inc v Mcdonnel Contract Mining Ltd* (2015) All FWLR 310.

however, it seems that the bases for recognition and enforcement of a foreign judgment are founded on the comity of nations, jurisdictional reciprocity, and the need to facilitate international trade and commerce.[26]

There are two main statutory regimes for the recognition and enforcement of foreign judgments in Nigeria, namely the Reciprocal Enforcement of Judgments Act 1922 ("the 1922 Act") and the Foreign Judgments (Reciprocal Enforcement) Act 1960 ("the 1960 Act"). These two regimes only apply to the recognition and enforcement in Nigeria of judgments delivered outside Nigeria. They do not apply to facilitate the recognition and enforcement in Nigeria of judgments given by any Nigerian court regardless of whether the judgment is to be enforced in a State which is different from the State where the judgment originates from. Instead, the Sheriffs and Civil Process Act regulates the procedure for the execution of a judgment given in a State in Nigeria which is presented in another State in Nigeria for recognition and enforcement. The Sheriffs and Civil Process Act contains provision for the appointment and duties of sheriffs, the enforcement of judgments and orders, and the service and execution of the civil process of the courts throughout Nigeria.[27]

Concerning the two statutory regimes for the recognition and enforcement of foreign judgments in Nigeria, there are inconsistent decisions of the Nigerian courts on the scope of the two statutory regimes. For example, is the 1922 Act repealed because of the enactment of the 1960 Act? What is the main applicable statutory regime for the recognition and enforcement of foreign judgments in Nigeria? Can the 1922 Act and the 1960 Act be jointly applied as has been held by some Nigerian courts?[28] In *Macaulay vs Raiffeisen Zentral Bank Osterreich AG*,[29] the Nigerian Supreme Court held that the 1922 Act is still applicable and was not repealed by the enactment of the 1960 Act. One of the main reasons for determining the applicable statutory regime for the recognition and enforcement of foreign judgments in Nigeria is that there are material differences in the scope of the 1922 Act and the 1960 Act. For example, whereas the time limit within which a foreign judgment can be registered under the 1922 Act is 12 months subject to the discretion of the court where recognition and enforcement are sought to extend the time limit, the 1960 Act allows for the registration of a foreign judgment within 6 years with no discretion of the courts to extend the time limit. Under the 1960 Act, the Minister for Justice is required, if he or she is satisfied that substantial reciprocity will be accorded to judgments of superior courts in Nigeria in that foreign country, to give an order directing that the

[26] *Alfred C Toepfer Inc vs Edokpolor* (1965) NCLR 89; *Grosvenor Casinos Ltd v Ghassan Halaoui* (2009) 10 NWLR 309.
[27] Sheriffs and Civil Process Act Chapter 407 Laws of the Federation of Nigeria 1990.
[28] *Shona-Jason (Nig) Ltd v Omega Air Ltd* (2006) 1 NWLR 1; *Consolidated Contractors (Oil and Gas) Company SAL v Masiri* (2011) 3 NWLR 283, 300.
[29] (2003) 18 NWLR 282.

1960 Act be extended to the superior courts of that foreign country. Accordingly, the authors rightly argue that the cases:

> … which applied the 1960 Act in the absence of an order of the Minister of Justice were reached per incuriam, irrespective of whether the provisions of the 1960 Act (such as Section 10(a)) were applied together with the provisions of the 1922 Ordinance to a designated or non-designated country under the 1922 Ordinance, or whether the provisions of the 1960 Act were applied alone as the applicable statutory regime. That said, if the Minister's order is made, the cases which have interpreted the 1922 Ordinance would also be useful in interpreting the 1960 Act, where the provisions of the 1922 Ordinance and the 1960 Act in question are similar.[30]

The foreign judgment must be a judgment of the superior court of a designated foreign country for the recognition and enforcement under both the 1922 Act and 1960 Act. The authors argue that the 1922 Act and the 1960 Act do not apply either to foreign judgments given on appeal from a court that is not designated or to a judgment of a designated superior court that affirms the decision of a non-designated lower court.

Since the 1922 Act and the 1960 Act apply to the judgments of a designated foreign superior court, one wonders whether the meaning of "foreign judgment" includes a judgment of the designated superior court recognising and enforcing arbitration awards? Unfortunately, the answer is yes as judgment is defined in the 1960 Act as:

> Judgment means a judgment or order given or made by a court in any civil proceedings and shall include an award in proceedings on an arbitration if the award has in pursuance of the law in force in the place where it was made become enforceable in the same manner as a judgment given by a court in that place, or a judgment or order given or made by a court in any criminal proceedings for the payment of a sum of money in respect of compensation or damages to an injured party.[31]

Indeed, this raises some issues in the context of arbitration that are difficult to reconcile. Although both the 1922 Act and the 1960 Act contain grounds for refusal of recognition and enforcement of foreign judgments, the main difficulty is that, unlike the 1922 Act and the 1960 Act, the Arbitration and Conciliation Act which incorporates the provisions of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the New York Convention") and makes the New York Convention applicable in Nigeria, contains more robust provisions for the recognition and enforcement of foreign arbitral

[30]The authors also argue that the 1922 Act and the 1960 Act cannot be jointly applied. They analyse the conflicting decisions of most Nigerian superior courts on the subject. They distinguish the scope of both statutory regimes, the 1922 and 1960 Act, correctly stating that the order of the Minister of Justice must be made before any of the provisions of Part I of the 1960 Act can apply. See Okoli and Frimpong Oppong (n 4) 366–378.
[31]Foreign Judgments (Reciprocal Enforcement) Act 1960.

awards including exhaustive grounds to refuse the recognition and enforcement of foreign arbitral awards in Article V of the New York Convention. Unlike the New York Convention, the grounds for a refusal to recognise a foreign judgment under the 1922 Act and the 1960 Act are not exhaustive. This creates uncertainty and unpredictability in international commercial arbitration in Nigeria as commercial parties may rely on unlimited grounds to object to the recognition and enforcement in Nigeria of foreign arbitral awards incorporated as a judgment of a foreign court. The New York Convention even requires the award creditor to submit the original arbitration agreement and the original award before the recognising court. The courts in which recognition and enforcement of an arbitral award are sought may even raise the issue of non-arbitrability of the dispute and public policy defence on its motion at the recognition and enforcement stage of the award in line with Art V(2)(a) and (b) of the New York Convention to refuse the recognition and enforcement of the arbitral award. If a Nigerian court is required to recognise and enforce, under the statutory regimes, the foreign judgment of a designated superior court of a foreign country incorporating an arbitral award, is the Nigerian court limited only to the grounds for refusal of recognition and enforcement contained in the 1922 Act and 1960 Act, or can the Nigerian court review the foreign judgment together with the agreement to refer the dispute to arbitration and the original award in line with Art IV and V of the New York Convention? In other words, can the New York Convention be applied together with the 1922 Act and 1960 Act for the recognition and enforcement of foreign judgments that incorporate an arbitral award? Indeed, one could question whether a foreign judgment of a designated superior foreign court incorporating an arbitral award is truly a judgment of that court when the judgment does not emanate from the foreign court deciding on its authority and the issues between the parties. The basic fact is that even though arbitrators exhibit similar characteristics to national courts, they do not have the same status as national courts.[32] Although the statutory regimes for recognising and enforcing foreign judgments can be used to recognise and enforce foreign arbitral awards in Nigeria,[33] it is submitted that the recognition and enforcement, under the statutory regime, of the judgment of a designated foreign court incorporating an arbitral award defeats the purpose of the New York Convention, which applies to govern the recognition and enforcement of foreign arbitral awards in Nigeria. It is, therefore, recommended that the provisions of the statutory regimes for the recognition and enforcement of foreign judgments in Nigeria should be amended to clarify that a judgment of a designated foreign court incorporating an arbitral award does not come within the definition of a foreign judgment for the

[32]Ojiegbe (n 1) 98–99.
[33]*Emerald Energy Resources Ltd v Signet Advisors Ltd* (2021) 8 NWLR (Pt 1779) 579; *Tulip (Nig) v NTMSAS* (2011) 4 NWLR (Pt 1237) 254; Okoli and Frimpong Oppong (n 4) 422.

recognition and enforcement in Nigeria under the statutory regimes. A party wishing to enforce in Nigeria such a foreign judgment incorporating an arbitral award should seek to have the original arbitral award recognised and enforced under the Arbitration and Conciliation Act.[34] Accordingly, it is submitted that a foreign judgment should refer solely to the judicial decisions of the designated superior courts of a foreign country without including a decision of that court incorporating an arbitral award. Therefore, to qualify as a "foreign judgment" for the recognition and enforcement under the statutory regimes, the decision or the judgment must emanate from the designated superior court of a foreign country deciding on its authority the issues between the parties. This includes the decision of the designated superior court of a foreign country affirming the decision of a non-designated lower court of that country. The basic fact is that, unlike an arbitral tribunal, the non-designated lower court is a court that is established by law; it has a permanent existence; it exercises binding jurisdiction over the parties; it is bound by rules of procedure and applies the rule of law.[35] Therefore, the decision of the designated superior court of a foreign country that affirms the decision of a non-designated lower court of that country should fall within the meaning of "foreign judgments" for the recognition and enforcement in Nigeria under the statutory regimes.

In addition to the statutory regime, the authors argue that there is a common law regime for the recognition and enforcement of foreign arbitral awards in Nigeria.[36] Under the common law regime, the authors rely on the case of *Edokpolor v Alfred C Toepfer* to conclude that foreign arbitral awards can be recognised and enforced by a common law action in Nigeria.[37] The pertinent question is what rules including defences will apply to guide the courts in the recognition and enforcement of foreign arbitral awards under the common law regime? It is, of course, imperative to point out that the decision in *Edokpolor v Alfred C Toepfer* was delivered at a time when Nigeria was not a Party to the New York Convention.[38] Although the decision in *Edokpolor v Alfred C Toepfer* may not have been reversed, it is open to question whether foreign arbitral awards will continue to be recognised and enforced under the common law regime given that Nigeria is now a signatory to the New York Convention. The importance of the New York Convention is that it provides a harmonised set of

[34]Arbitration and Conciliation Act Cap 18 LFN 2004.
[35]Case C-393/92 *Municipality of Almelo and others v NV Energiebedrijf Ijsselmij* [1994] ECR 1–01477 [21]; Case 14/86 *Pretore di Salò v Persons unknown* [1987] ECR 1–02545 [7]; Case 338/85 *Fratelli Pardini SpA v Ministero del Commercio con l'Estero and Banca Toscana* (Lucca branch) [1987] ECR 1–02041 [9].
[36]Okoli and Frimpong Oppong (n 4) 415–417
[37]*Edokpolor v Alfred C Toepfer* (1965) NCLR. See Okoli and Frimpong Oppong (n 4) 415–417.
[38]The decision in *Edokpolor and Alfred C Toepfer* was delivered in 1965 and Nigeria became a Party to the New York Convention in 1970.

rules that apply to all the Contracting States to the Convention. Indeed, the New York Convention facilitates the enforcement of arbitration agreements and the recognition and enforcement of foreign arbitral awards. Finally, Nigeria is also a party to the International Centre for Settlement of Investment Disputes ("ICSID"), and has enacted legislation to implement the provisions of the ICSID.[39]

I. Part VII – International civil procedure

The final part of the monograph addresses issues relating to international civil procedure rules and remedies such as anti-suit injunctions, anti-arbitration injunctions, freezing orders and security for costs in support of foreign proceedings. Part VII also addresses issues relating to the service abroad of legal process or a document emanating from a Nigerian court, and the service in Nigeria of a legal process or document emanating from a foreign court or tribunal. Indeed, international civil procedure rules and remedies are important in PIL as they can prevent the potential for parallel court proceedings and irreconcilable decisions between the Nigerian court and the foreign court. Remedies, particularly freezing orders, also support the parties in cross-border litigation by ensuring that the judgment debtor can satisfy any judgment thus preventing the judgment debtor from selling or dissipating their assets from beyond the jurisdiction of the court thereby frustrating the administration of justice. Furthermore, the service of legal documents and the obtaining of evidence are important processes in international litigation as the service of process abroad will, under Nigerian law, give jurisdiction to the court; without such service, the court will have no jurisdiction over the claim. Unfortunately, Nigeria is not a party to any of the international conventions that address issues in this area.

J. Conclusion

In the light of the foregoing discussion, one can reasonably conclude that the monograph contributes to the knowledge of the law by exploring the issues in Nigerian PIL and recommending novel solutions that could assist Nigerian legislators and the judiciary in the future reform of the law. Nigeria will indeed benefit from increased international trade, investment, and additional revenue if Nigeria were to become a Party to some of the Hague Conventions or if Nigeria were to adopt robust legislation covering PIL issues. This would provide legal certainty and predictability to parties involved in cross-border transactions and disputes that have connections with Nigeria as the parties would want to know what rules will apply to govern their rights and obligations as well as the recognition

[39]International Centre for Settlement of Investment Disputes (Enforcement of Awards) Decree 1967.

and enforcement of decisions on the issues between the parties. Indeed, as Nigeria is an economic superpower in Africa with significant potential for increasing cross-border relationships, international trade and investment, the findings in this monograph will be beneficial to the international market particularly to foreign citizens, businesses, academics, judges, lawyers, policymakers, students, and anyone wishing to understand the principles of PIL in Nigeria, as well as to anyone interested in carrying out comparative research in PIL. The monograph will certainly have a long shelf-life and will make a positive impact on PIL matters in Nigeria.

Disclosure statement

No potential conflict of interest was reported by the author(s).