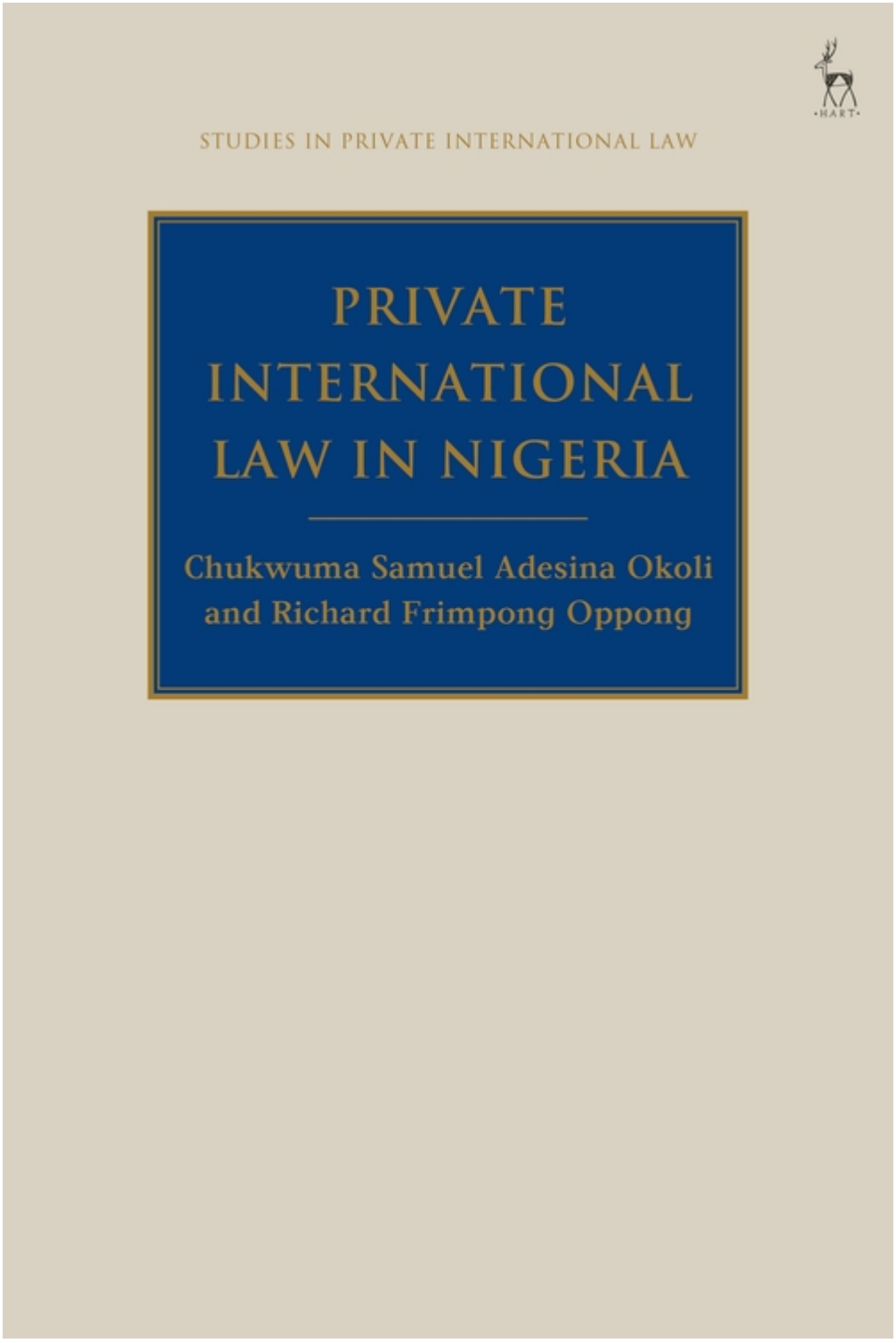
Presence as a basis for International Jurisdiction of a Foreign Court under Nigerian Private International Law

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This is the third online symposium on Private International Law in Nigeria *initially announced on this blog. It was published today on Afronomics.org. The first introductory symposium was published here by Chukwuma Samuel Adesina Okoli and Richard Frimpong Oppong, and second symposium was published by Anthony Kennedy. More blog posts on this online symposium will follow this week.*



Introduction

The Nigerian private international law (hereinafter PIL) regime is significantly influenced by the common law. As a result, the common law plays a major role in providing the applicable rules on the recognition and enforcement of foreign judgments.[1] Like in many other common law jurisdictions, Nigerian courts recognize and enforce foreign judgments only if, in the eyes of Nigerian PIL, the foreign court had jurisdiction to render the judgment in question.[2] The

recognized bases of jurisdiction are submission, residence and presence of the defendant within the foreign country.[3] This is also the position in other common law countries such as South Africa[4], Australia[6]and Malawi.[7]

As a result of the foregoing, Nigerian courts would refuse to recognize and enforce a judgment of a foreign court where the defendant was not present/resident in the foreign country and did not submit to its jurisdiction.[8] It must be emphasized that once the court finds that none of the above grounds is established, then the foreign court is deemed not to have possessed jurisdiction r*egardless of any connection that the parties or the transaction in issue may have had with the foreign country.*

Nigerian and Canadian PIL

Okoli and Oppong have observed as follows:

"It is open to question whether the existing recognised bases of international competence – residence, presence, and submission – are adequate for the current international climate of increased trade, movement of persons, and transnational relationships. From a comparative perspective, Canadian courts have applied the real and substantial connection test. This basis requires that a significant connection exist between the cause of action and the foreign court. Such a connection could include the fact that the cause of action arose in the jurisdiction of the foreign court, or that jurisdiction was the place in which the contractual obligation was to be performed. The 'real and substantial connection' test has not found favour outside Canada, and the test has been the subject of academic criticism."[9]

Under Canadian PIL, the traditional common law principles are recognized such that a foreign court will be deemed to have jurisdiction if the defendant submitted to the jurisdiction of that court[10] or where the defendant was resident[11] or present[12] in the territory of the foreign court. In addition to these bases, the foreign court's jurisdiction will be recognized where there was a real and substantial connection between the matter and the foreign court.[13] The real and substantial connection test entails that a Canadian court can recognize and enforce a foreign judgment that was delivered in circumstances where the defendant was not physically present in the jurisdiction when served with the

originating process, as long as a real and substantial connection between the case or the parties and that foreign jurisdiction exists. This is therefore an additional ground of jurisdiction to the traditional common law grounds obtaining in Nigeria and other common law jurisdictions.

While Nigerian courts insist on the physical presence/residence of the defendant in the foreign territory[14]Canadian courts will go further to determine if there was a real and substantial connection between the matter and the foreign forum. This paper discusses the differences in the two approaches in view of their impact on the interests of justice between the parties, and suggest, with reasons, that Nigeria and the rest of the common law should derive lessons from Canadian PIL.

Discussion

This paper acknowledges that the requirement of presence of the defendant in the territory of the foreign court at the time of service ensures that the proceedings are conducted in accordance with the principles of natural justice. If the defendant was not present, the necessary originating processes may fail to reach him, or at least in good time, so as to have sufficient time to defend his case.[15]

However, the fact that in Nigerian a court may be satisfied that the foreign court had jurisdiction merely by virtue of the defendant's presence therein, without more, is not satisfactory. Firstly, such an approach enables recognition of a foreign judgment that was rendered by a court that was not connected, or at least sufficiently connected, to the case, and therefore an inappropriate court. As a result, the international jurisdiction of a court that has no connection at all with the case or the parties would be established simply because the defendant happens to have been present within that country, no matter how brief the stay may have been in that country. This may encourage forum shopping.[16] The plaintiff may deliberately institute proceedings in a court that is not connected to the case and therefore inappropriate, knowing that the resulting judgment will be accorded recognition and enforcement in Nigeria. Actually, it is this paper's view that if this is to be followed to its ultimate logical conclusion, then any country in the world has jurisdiction to render a judgment capable of recognition in Nigeria and other common law countries as long as the originating process was served on the defendant within its territory regardless of how little, if any, is that

jurisdiction's connection to the case.[17] We do not believe that such a result is consistent with the ends of justice.[18]

Secondly, the insistency on the presence of the defendant in the foreign court practically means that an unscrupulous defendant is at liberty, at the first hint of a dispute, to prevent the plaintiff from getting a judgment capable of recognition in England merely by leaving the natural and appropriate jurisdiction in which the plaintiff may institute proceedings against him. Much as the plaintiff may still initiate the proceedings against the defendant and service be effected in accordance with the procedure for service out of jurisdiction, this paper's view is that as long as the plaintiff would be unable to secure recognition and enforcement of that judgment on the ground of the defendant's absence from the jurisdiction, the plaintiff's right to access to justice and legal remedies would be infringed.[19]

Actually, in our view, the injustice occasioned by the insistence on the presence of the defendant as a necessary and sufficient condition as far as jurisdiction is concerned, may be suffered not only by the plaintiff but also by the defendant. The plaintiff, as stated in the preceding paragraph, may be unable to enforce a judgment that was obtained in a country that is very appropriate forum as long as the defendant was not present, notwithstanding his right to access to justice and effective remedies.[20] On the part of the defendant, a Nigerian court may recognize and enforce a foreign judgment rendered by a court that was not in any material way connected to the case.[21] It is our view that considerations such as these necessitate a revision in the common law approach to presence as a ground of jurisdiction for purposes of recognition and enforcement of foreign judgments.[22]

Under Canadian PIL, a foreign judgment will be enforced against a defendant who was not present within the territory of the foreign forum provided that there was a real and substantial connection between the matter and the forum.[23] Further, it must be noted that the Canadian court will ensure that the rights of the defendant were protected and that the proceedings were conducted in accordance with the principles of natural justice.[24] Put precisely, the courts will require the judgment creditor[25] to satisfy them that the defendant was aware of the proceedings against him through proof of service. The real and substantial

connection test therefore enables the plaintiff to have the judgment enforced in circumstances where the court properly exercised jurisdiction even if service was not effected on the defendant within the foreign court's territory. In this case, the plaintiff's fundamental right to access to justice and legal remedies as well as the defendant's right to be duly served with the originating process and to have sufficient time to defend his case are both served.[26]

There are two points that need to be made here. Firstly, under Nigerian PIL, provision is made for service outside jurisdiction if the defendant is not present within the jurisdiction and the case is sufficiently connected with Nigeria and it is the appropriate forum for hearing the case.[27] It can be argued, therefore, that if Nigerian law recognizes that there are circumstances under which courts can properly exercise jurisdiction against a defendant who is not within the jurisdiction and was actually served out of jurisdiction with originating process, why should they not accept that other courts can also exercise jurisdiction under the same circumstances and therefore be able to recognize and enforce judgments rendered by foreign courts under similar circumstances?[28]

Secondly, it must be stated that Nigerian courts are able to decline jurisdiction, when called upon to hear a case, if upon considering all relevant factors, they form the view that another forum exists with jurisdiction and is the more appropriate forum.[29] However, when a judgment is brought for recognition in Nigeria, Nigerian courts would not examine the appropriateness of the foreign court and would recognize that judgment even if the case was not in any way connected to that jurisdiction as long as the defendant's presence is established. Why should the Nigerian courts, and indeed the courts in other common law jurisdictions, be able to recognize that jurisdiction should be exercised when it is appropriate to do so in the interest of justice when they are asked to hear a case, and then take a very different approach when it comes to recognition of foreign judgments so that they end up recognizing judgments rendered by forums that would be deemed appropriate?[30]

It is submitted that refusal to recognize and enforce foreign judgments by common law courts on the basis of the defendant's absence from the foreign court, even when the matter was sufficiently connected to that foreign court, is an affront to the ends of justice in international litigation and is not in accordance with the realities of international commercial life. The approach of the Canadian courts through the adoption of the 'real and substantial connection' test is

commendable. This paper laments that Nigeria and other common law jurisdictions have not joined Canada in this positive direction. An opportunity arose in Malawi, another common law jurisdiction, to modernize her international civil procedure when the Courts (High Court) (Civil Procedure) Rules (2017) were enacted. There is no provision at all with regard to recognition and enforcement of foreign judgments, which leaves the common law regime unchanged. One can only express regret at this missed opportunity.

Conclusion

It has been seen that presence of the defendant in the foreign jurisdiction is a basis of jurisdiction of the foreign court for a judgment rendered by that court to be recognized and enforced in Nigeria. In Canada, it is also a recognized basis of the jurisdiction of the foreign court but a foreign judgment may be recognized even when the defendant was not present in the foreign country as long as a real and substantial connection exists between the matter and the foreign jurisdiction.

This paper is of the view that the insistence of the common law on the presence of the defendant in the foreign country leads to injustices in circumstances where recognition is accorded to a judgment having been delivered in a foreign forum that was not appropriate, on one hand, or when a foreign judgment is refused recognition where it was rendered by an appropriate court merely on the basis of the defendant's absence from the foreign jurisdiction, on the other hand. It is therefore submitted that Nigeria and the rest of the common law should join Canada in applying and developing a test that prevents presence or absence of a defendant from undermining the ends of justice in international litigation and, in particular, in the recognition and enforcement of foreign judgments.

[1] See Richard Frimpong Oppong *Private International Law in Commonwealth Africa* (Cambridge University Press) 2013 p. 313.

[2] Nigeria law has both a statutory and common law regime for the enforcement of foreign judgments. In this paper, the focus is exclusively on the common law regime. Further, this paper focuses on jurisdiction as a condition of the recognition and enforcement of the foreign judgment and the other conditions (such as finality of the foreign judgment) are not addressed.

[3] Oppong (n1) 320.

[4] *Richman vBen Tovim*, SCA [2006] 148, [2007] (2) SA 283

[5] *Burham vSuperior Court of California*, 495 US 604; and Born, Rutledge and Kluwer International Civil Litigation in United States Courts (2011) 1120.

[6] *Herman vMeallin* (1891) 8 WN (NSW) 38.

[7] Malawi also has both a statutory and common law regime for the recognition and enforcement of foreign judgments.

[8] Submission is established either through choice of forum agreements or where he defendant pleads to the merits of the case without contesting jurisdiction which the court otherwise did not have.

[9] Chukwuma Samuel Adesina Okoli and Richard Fimpong Oppong *Private International Law in Nigeria* (Bloomsbury publishing) 2020 p 353.

[10] *Richardson v Allen* (1916), 28 D.L.R. 134 (Alta S.C. (A.D.))

[11] *First Hawaiian Bank v Smith*, [1999] A.J. No. 643, 245 A.R. 148 (Alta Q.B.).

[12] *Royal Bank of Canada v Industmarine Ltd*., [1982] B.C.J. No. 2365. The constitutionality of mere presence as a ground of jurisdiction is however a controversial issue in Canada.

[13] *Morguard Investment Ltd v De Savoye*, [1990] S.C.J, No.135, 76 D.L.R. (4^{th}) 256 (S.C.C.). This is a landmark and revolutionary decision that marked a departure from the refusal of recognition of foreign judgments if the defendant was absent from the jurisdiction of the court that delivered the judgment. The court felt that time had come to take a different approach to recognition and enforcement of foreign judgments. Indeed the principles laid down in this case have been confirmed in the subsequent case law of the Supreme Court of Canada, most notably, in *Beals v Saldanha* (2003) 3 SCR 416.

[14] Assuming that the defendant did not submit to the jurisdiction of the foreign court

[15] See Castel Conflict of Laws Cases, Notes and Materials (1968) 956 where the

author actually states that the question of whether a court should have jurisdiction to entertain actions against absent defendants and give judgments which though effective territorially can be recognized in other jurisdictions is a policy issue not for the courts, thereby suggesting (it is submitted) that the court should be slow to render recognition to such judgments except where by legislation they are empowered to do so.

[16] See Tilbury, Davies an Opeskin Conflict of Laws in Australia (2002) 139 where the learned authors write: "A party engages in forum shopping when it seeks to litigate its case in a forum has little genuine connection with the court or the parties. Both plaintiff and defendant may influence the forum in which a case is tried, but the plaintiff is usually better able to do so".

[17] See Collins (ed) *Dicey, Morris and Collins on the Conflict of Laws* (2012) 693 who seem to justify mere presence as a ground of jurisdiction on the basis of the temporary allegiance owed by the defendant to the local sovereign.

[18] See Ehrenzweig *The Transient Rule of Personal Jurisdiction; The "Power" Myth and Forum Conveniens* in *Jurisdiction and Private International Law* (2014) 565.

[19] It is therefore respectfully submitted that this may amount to a denial of the right to legal remedies and redress by preventing the plaintiff from enforcing the judgment. See generally *Grosvenor Casinos Ltd v Ghassan Halaoui* (2009) 10 NWLR 309.

[20] See TC Hartley *International Commercial Litigation Texts, Cases and Materials in Private International Law* (2015) 406. The learned author states that actually as far as English courts are concerned, if the defendant was absent from the jurisdiction in question, the fact that a contract was breached in that foreign country or that the tort was committed there does not suffice to confer jurisdiction on the foreign court.

[21] This means that the plaintiff may benefit from his forum shopping.

[22] Indeed the consideration of the injustices occasioned by the traditional common law principles convinced the Supreme Court of Canada to adopt the real and substantial connection test.

[23] See n 13.

[24] If the plaintiff fails to show that the principles of natural justice were adhered to the court will refuse recognition of the foreign judgment.

[25] Usually the plaintiff

[26] It is the submission of this paper that this is the approach that is in accord with the nature of private international law because it is based on the recognition that the parties will not always be physically present in the same jurisdiction when causes of action arise between them. The real and substantial connection test, in the view of this paper, is a recognition of this reality.

[27] See, for example, High Court of Kaduna State (Civil Procedure) Rules 2007, Ord. 8, r. 1)

[28] In other words, why should Nigerian court be able to exercise jurisdiction when they are not ready to recognize the judgments rendered by foreign courts under the same circumstances?

[29] The doctrine of *forum non conveniens*. On this doctrine in general see *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460.

[30] In other words, why should the Nigerian court recognize that there are circumstances under which they may not be the appropriate forum for the trial of certain cases and decline to do so, and fail to recognize that the same may be the case in other jurisdictions and only regard mere physical presence of the defendant in the foreign territory as conclusive, no matter how improper the exercise of jurisdiction may have been in the foreign court?