Recognition and Enforcement of Foreign Judgments at Common Law

CHIGOZIE NWAGBARA, LL.M
Law Author & Lecturer,
Faculty of Law, Nigeria Police Academy,
Wudil, Kano State, Nigeria
Email: hichibaby@yahoo.com; +2348033335091

ABSTRACT
This paper focuses on Recognition and Enforcement of Foreign Judgments at Common Law just as its title portrays. It starts by addressing the issue of jurisdiction which is the most important factor for any suit before the issue of Recognition and Enforcement can follow. It is a fact that if a judgment is given in any case by a court that lacks competent jurisdiction, that judgment will be null and void, and of no effect. Still, no competent Court of jurisdiction will recognize and help with its enforcement. The theory underlying Recognition and Enforcement of foreign judgments was discussed in the introductory part of this paper. Recognition and enforcement of judgments in personam and judgments in Rem were also discussed while the two concepts of in personam and in rem were clearly distinguished. The paper talked about finality of judgment by discussing the defence of res judicata which says that a party shall not re-visit any case that has determined all issues and become conclusive. Defences available to the defendant were listed and discussed in this paper, and relevant cases were reported and cited where necessary, not just on this topic, but on most topics addressed in this all encompassing paper. Efforts brought about by the Hague Convention of Court Agreements 2005 were listed, and the paper humbly recommends the contents for adoption by countries of the World that are so interested and who have got a lacuna on that subject. The doctrine of Territoriality was lastly suggested as a tool for reduction of problems of recognition and enforcement of foreign judgments in Private International Law. The Common Law position has always been known to be very rigid and hard in most cases, but there is no doubt that justice can still be achieved to a large extent in the context in which it was addressed and discussed in this paper.

Keywords: Recognition of Foreign Judgments, Enforcement, Jurisdiction, Common Law, Judgment in Personam, Judgment in Rem, Common Law, Defendant, Claimant, Cause of Action, Territoriality, The Hague Convention on Choice of Agreements 2005

INTRODUCTION
Where a Claimant fails to obtain satisfaction of a judgment in the country where it has been granted, the question arises as to whether it is enforceable in another country where the defendant is found. Definitely, going by the principle of Territoriality or Territorial Sovereignty, a judgment delivered in one country cannot, in the absence of International Agreement, have a direct operation of its own force in another. Levy of execution, for instance cannot issue in England in respect of a judgment delivered in Nigeria or New York.

THE THEORY UNDERLYING RECOGNITION AND ENFORCEMENT
The doctrine of obligation was laid down in 1842 and it says that where a foreign court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, the liability to pay that sum becomes a legal obligation that may be enforced in this country by an action of debt. Once the judgment is proved, the burden lies on the defendant to show why he should not perform the obligation. In the case of

Schibsby v. Westenholz\textsuperscript{3}, it was held that the judgment of a court of competent jurisdiction over the defendant imposes a duty or obligation on him to pay the sum for which judgment is given and which the courts in this country are bound to enforce. In such case, a new right has been vested in the creditor and a new obligation imposed on the debtor at the instance of the foreign court. 

The doctrine of obligation has been criticized on the ground that it is more concerned with explaining in theoretical terms why we recognize and enforce foreign judgments than with explaining in theoretical terms which foreign judgments should be recognized and enforced. The Supreme Court of Canada considered the latter. It has referred to a more clearly defined concept of comity which is concerned with justice, necessity and convenience. It held in Marguard Investments Ltd v. De Savoye\textsuperscript{4} that comity in the legal sense is neither a matter of absolute obligation on the one hand, nor of mere courtesy and goodwill upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws. This allows for the adoption of Rules in the light of modern conditions. I am fully in support of this view too. Old common law rules that were based on an outmoded view of the world that emphasized Sovereignty and Independence often at the cost of fairness to its citizens have rightly been rejected.

RECOGNITION AND ENFORCEMENT AT COMMON LAW

The Common Law doctrine is that a foreign judgment, though creating an obligation that is actionable in England cannot be enforced in England without the institution of fresh legal proceedings. However, if a fresh action is brought in England on the foreign judgment, that action is subject to the Civil Procedure rules, and the Claimant may, for example, apply for summary judgment under Part 24 on the basis that the defendant has no defence to the Claim. For example, a foreign judgment cannot be enforced by the appointment of a Receiver without such a fresh action in England.

JURISDICTION OF THE FOREIGN COURT FOR JUDGMENTS IN PERSONAM

A judgment in personam determines the existence of rights against a person\textsuperscript{5}. The most important condition for the effectiveness of a foreign judgment in personam in England is that the adjudicating Court should have had jurisdiction in the International sense over the defendant. A foreign Court may give a judgment conclusively binding on the defendant according to its system of law, except if the judgment does not create a Cause of Action that is actionable in England\textsuperscript{6}. Therefore, under the English Law, the foreign Court must have been entitled to summon the defendant and subject him to judgment.\textsuperscript{7} Personal jurisdiction in England under the traditional rules depends on the right of a court to summon the defendant. Apart from special powers conferred by statute, it is obvious that since the right to summon depends on the power to summon, jurisdiction is in general exercisable only against those persons who are present in England\textsuperscript{8}. If the defendant is absent from a country and has no place of business there, then, whether he is a citizen or an Alien, he would be taken to be immune from the jurisdiction, unless he has voluntarily submitted to the decision of the Court\textsuperscript{9}. The burden of proof is on the person seeking to enforce the judgment of a foreign Court to establish that the court had jurisdiction in the international sense over the defendant.

WHAT ARE THE CRITERIA OF JURISDICTION IN THE INTERNATIONAL SENSE?

1. Residence, Presence of the defendant in the foreign country at the time of the suit — here, the defendant could be an Individual or a Corporate defendant.

   a. Individual defendant — the residence of the defendant within the foreign country is definitely sufficient for jurisdiction\textsuperscript{10}. What is not clear is whether the mere presence of the defendant in the

\textsuperscript{3} (1870) LR 6 QB 155 @ 159
\textsuperscript{4} (1991) 76 DLR 256; Beals v. Saldanha (2003) SCC 72 (Supreme Court of Canada)
\textsuperscript{5} Cheshire, North & Fawcett @ p. 516; Grant v. Easton (1883) 13 QB 302
\textsuperscript{6} Cambridge Gas Transportation Corporation v. Official Committee of Unsecured Creditors of Navigator holdings Plc (2006) UKPC 26 @ [13]; (2007) 1 AC 508
\textsuperscript{7} Sirdar Gurvadal Singh v. The Rajah of Faridkote (1894) AC 670; Cheshire, North & Fawcett @ p. 516
\textsuperscript{8} Pemberton v. Hughes (1899) 1 Ch 781 @ 790; Salvesen v. Austrian Property Administrator (1927) AC 641 @ 659
\textsuperscript{9} Employers’ Liability Assurance Corporation v. Sedgwick, Collins & Co (1927) AC 95 @ 114
\textsuperscript{10} Harris v. Taylor (1915) 2 KB 580 @ 589; Cheshire, North & Fawcett @ p.517
\textsuperscript{11} Emmanucl v. Symon (1908) 1 KB 302 @ 309; Schibsby v. Westenholz (1870) LR 6 QB 155 @ 161. Residence without presence at the date of commencement of proceedings is seemingly enough. Adams v. Cape Industries Plc (1990) Ch 433 @ 518
foreign country for a short time will suffice. But in my view, it will suffice depending on what the defendant came to do in the foreign country within that short period of time. If what he came to do has any significant connection with the case, it surely suffices. But if he was around for a long period of time, then, it is taken that he contracts to a network of obligations created by the Local Law and the Local Courts.

According to Cheshire, North & Fawcett,12 this duty of obedience results from mere presence in the territory, and therefore, the length of time for which the presence continues is immaterial. The presence must be voluntary, not by compulsion, duress or fraud. It has also been held that the date of service of process in the foreign country is probably the relevant one for determining if the defendant is abroad, rather than the date of issue of proceedings. It is also not the date the Cause of action arose.13

b. Corporate defendant – the circumstances in which a company can be said to be resident or present in a foreign country were set out by the Court of Appeal of England in Adams v. Cape Industries Plc16 in which case it was held that it has to be shown that (i) the Corporation has its own fixed place of business there (the headquarters or a branch) from which it has carried on the Corporation’s business for more than a minimal time, or a representative has carried on the corporation’s business for more than a minimal time from a fixed place of business. The fixed place may not be the branch or headquarters of the Corporation; and (ii) the corporation’s business is transacted from that fixed place (especially if the fixed place in this case is a branch of the corporation). It has to be ascertained that the Representative is really carrying on the business of the Corporation and not his own personal business. A subsidiary of the corporation may normally act just for itself and not for the Overseas parent.

2. Submission to the foreign Court – submission in this case could be by virtue of being the Claimant in the foreign action or by agreement to submit. If a person submits voluntarily (even if it turns out unsuccessfully) his case as a Claimant to the decision of a foreign tribunal, he cannot afterwards aver that he was not subject to the jurisdiction of that tribunal if sued upon the judgment in England. On the other hand, agreement to submit arises where the defendant has previously contracted to submit himself to the foreign jurisdiction. In Feyerick v. Hubbard,18 a domiciled British subject resident in London agreed to sell his patent rights to a Belgian, the contract of sale containing a provision that all disputes should be submitted to the jurisdiction of the Belgian Courts. However, if the agreement was entered into under undue influence, it will not constitute submission. The defendant cannot raise in England the issue of undue influence if this defence was available to him in the foreign proceedings and he failed to raise it there.

There is also submission by voluntary appearance where the defendant submits to the jurisdiction of the foreign court by voluntary appearance if he has fought the action on its merits and taken his chance to get a judgment in his own favour. A person’s submission in respect of a claim against him can also be taken as submission first, in respect of claims concerning the same subject matter, and secondly, in respect of related claims which might properly be brought against him under the foreign court’s Rules of procedure, either by the original claimant or by others who were parties to the proceedings e.g co-defendants who subsequently brought a Cross – Claim at the time he submitted. Voluntary submission also involves the following:

a. An appearance to fight on the merits as just discussed
b. An appearance to protest against jurisdiction

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13 See Carrick v. Hancock (1895) 12 TLR 59 where it was held that a domiciled Englishman appeared after a Writ was served on him in Sweden while he was on a short visit to that country. It was held that despite his fleeting stay in Sweden, an action on the judgment lay against him in this country. But in my own view, the length of time is a necessary factor.
14 Cheshire, North & Fawcett @ p. 518
16 (1990) Ch 433 @ 530 - 531
17 Emmanuel v. Symon (1908) 1 KB 302; Copin v. Adamson (1874) LR 9 Exch 345 @ 354
18 (1902) 71 LJ KB 509
19 Israel discount bank of Newyork v. Hadjiipateras (1984) 1 WLR 137, CA
20 The Atlantic Emperor (no. 2) (1992) 1 Lloyd’s Report 624 @ 633; Pattini v. Ali & Dinky International SA (2006) UKPC 51 @ [39]; Cheshire, North & Fawcett @ 521

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c. Arguing on the alternative

d. Appeals against judgments in default

e. Taking procedural steps in the foreign country

Apart from factors of residence by the defendant in a foreign country and where the defendant submits to the jurisdiction, other grounds that can make a foreign judgment actionable in England include -

1. Political Nationality - according to Cheshire, North & Fawcett, nationality perse has been rejected as a reason which, on any principle of Private International Law, can justify the exercise of jurisdiction. Nationality, to me, is sufficient to justify the exercise of jurisdiction on any matter once the defendant is a national of the country where the court is sitting. This is because a person is more closely related and connected with his or her nationality than with any other factor. The only exception to the desirability of nationality being the basis for jurisdiction is where the defendant has expressly consented to submit to another jurisdiction in respect of the contract entered into, and which eventually turns out to be the subject of the dispute. In such situation, nationality cannot be the basis for jurisdiction over the particular Matter.

2. Domicile – domicile may or may not suffice as a ground for jurisdiction depending on the contractual agreement. In the absence of any such agreement, a person’s domicile will definitely be taken as a possible ground for jurisdiction, provided it does not do injustice to the merits of the case.

3. Locality of Cause of Action – it is not sufficient that the Cause of Action, as for instance, a breach of contract or the commission of tort occurred in a foreign country. This is the common law position. But then, if there is no other factor agreed by the parties as the basis for jurisdiction, then, it must be very correct to state that the locality of the cause of action has got jurisdiction to entertain the matter. Seriously speaking, in normal situations, the locality of the cause of action is a most significant factor for the basis of jurisdiction, and it is rather in exceptional cases that the place where a contract is breached or where a tort is committed cannot have the jurisdiction to entertain the matter.

4. Choice of Governing Laws – it has been held by the Supreme Court of New South Wales that an agreement to submit to the jurisdiction of the English Courts is not to be inferred from an agreement to make English Law the governing Law of a contract. In my view, an agreement to submit to the jurisdiction of the English Courts can be inferred if it is made orally. But if it is expressly written, then, it remains an express agreement and does not have to be inferred or implied. At the same time, an agreement to submit to jurisdiction cannot later be rescinded, except if it is discovered that it will do injustice to the party that should rightly benefit from the action. But if the party that is entitled to benefit mistakenly or wrongly submits to the jurisdiction which makes him lose out in the case, the, nobody and not even the other party can be blamed for his loss.

5. Possession of property – it has been held by the English Court of Appeal in Emmanuel v. Symon that neither the fact of possessing property in a foreign country nor the fact of making a partnership contract there relating to the property is sufficient to render the possessor amenable to the local jurisdiction. The truth however, is that the common law has always been extremely rigid and harsh, and there is no doubt that the lex situs governs any transaction involving property. This is definitely the rightful and current position in most cases, both in Law and in Fact.

6. Foreign judgment based on service out of jurisdiction – since the basis of enforcement is that a judgment imposes an obligation on the defendant, it follows that there must be a connection between him and the Forum sufficiently close to make it his duty to perform that obligation. In Schibsby v. Westenholz, a judgment had been given by a French Court against Danish subjects resident in England. The defendants were notified of the Proceedings in the customary manner which involved
forwarding the summons to the consulate of the country where the defendant resided with instructions to deliver it to him if practicable. The defendants failed to appear and judgment was given against them. It was held that no action lay on the judgment. As far as I am concerned, if the defendants did not submit to the jurisdiction of the French Court, expressly or impliedly, then, no action really laid on the judgment. But if they submitted to its jurisdiction, their being resident is irrelevant and immaterial, provided that proof of service was effected, they would be bound by the judgment of the French Court. Hence, it is clear that in every case or contractual agreement, the issue of jurisdiction must be addressed by the parties if their agreement or contractual obligation is to have any legal force or effect. It is wrong to address the issue of jurisdiction only when an agreement or contractual obligation has ended up as a dispute in the Law Court or even outside the Law Court. If the question as to which Court will assume jurisdiction over a matter that did not occur in its Forum and where none of the parties are citizens or subjects of the Forum, it must consider the rights of its own citizens, the law being sought to be enforced (whether that law is applicable in its Forum and does justice to its citizens, or even if there is a lacuna of such law in its Forum). Where there is a lacuna, the Court of the Forum should examine the law to be applied, and ensure it will be just to the citizens of the Forum and the Independent status of its country before it decides to apply the law to fill the lacuna in its own country. No Foreigner or Outsider should force any country sitting in its Forum to apply any Law against its wishes and which may be detrimental to the rights of its citizens and independent status of its country. No stranger should dictate to any house Owner to do anything that will not favour that house owner or his rights in his own home. It is unheard of.

**The Real and substantial Connection Test**

In my humble view, the real and substantial connection test to be applied in the determination of any issue must depend on the circumstances and facts of the case, including the intention of the Parties to the suit before the Matter became a subject of controversy. Certain facts already cannot be disputed for it is trite law and a Fact that the lex situs is the appropriate law that governs any matter bordering on an immovable property such as house or land. Nationality of a person can also be the substantial and real connection test, depending on the facts of a particular case. Where a contractual obligation arises between parties in a country in which neither of them is a national, it may most likely be appropriate to apply the law of the country where the contractual agreement was entered, and of course, where the Cause of action arose, provided that the law of that particular country finds it convenient to sit over the Matter and pass a judgment.

However, with respect to recognition of judgments, once the parties to any case have voluntarily submitted to the jurisdiction of any court in any particular country, it follows as a matter of necessity that the judgment of that court must be recognized by the parties to the case, and its enforcement must not be a subject of controversy. Its enforcement must be easily carried out because the parties impliedly subjected themselves to the outcome of the case by submitting themselves to the jurisdiction of that particular court. To make enforcement easy, parties should always ensure that if a property for instance, is the subject matter of a dispute, the lex situs sits over the matter. This should be so especially if the property is to change hands/ownership after judgment has been obtained. It will enable the party holding the property to easily surrender as the court that sat over the case will ensure that relevant Law Enforcement Agencies are nearby to help in enforcing the judgment where the defendant may refuse to give up his property in a case where for instance, it is being used in settlement of his debt.31

Where the Matter is decided in a separate jurisdiction from where the property is situate, the Plaintiff may suffer and get frustrated as a result of excessive cost of logistics, and of course, may get to the property location at a time when nobody will be there to attend to him with respect to any enquiries he may want to make over the property which has been awarded to him by the judgment of the court. It is

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31 In my view
desirable to obtain a judgment in a particular Forum, recognize the judgment and also be able to enforce it in the same country or particular locality in which the Forum Court sits. This is simply to say that a party that should benefit from any contractual agreement or a suit should be able to convince the other party that the issue of jurisdiction must be effected by a particular Forum where it will be easy for him to obtain a favourable judgment without bias, recognize the judgment, and also be able to effect and enforce the judgment. If he ends up not addressing that issue before reaching a contractual agreement with the defendant, any other law applied may not favour him, and he would have himself to blame for his loss.

JUDGMENTS IN REM
A judgment in rem has been defined as a judgment of a court of competent jurisdiction determining the status of a person or thing (as distinct from the particular interest in it of a party to the litigation); and such a judgment is conclusive evidence for and against all persons, whether parties, privies or strangers of the Matters actually decided. More recently, a judgment in rem has been defined as the judicial determination of the existence of rights over property. In contrast, a judgment in personam determines the existence of rights against a person. However, there is no reason why a judgment should be characterized either wholly in rem or wholly in personam.

The Subject matter of a judgment in Rem
The res which may form the subject matter of a judgment in rem is not confined to physical things. Thus, the word res as used in this context includes those human relationships such as marriage which do not originate merely in contract, but which constitute what may be called Institutions recognized by the State. A foreign court which issues a decree of divorce or nullity of marriage (for instance) will, if competent in respect of jurisdiction, be deemed to have pronounced a judgment in rem that is conclusive in England and binding on all persons.

The Effect of a Judgment in Rem
The effect for instance, of a condemnation in the Admiralty court in prize proceedings is to vest the ship in the captors and thus to alter its status. Such a judgment differs fundamentally from one in personam. A judgment in rem settles the destiny of the res itself and binds all persons claiming an interest in the property inconsistent with the judgment even though pronounced in their absence. A judgment in personam, although may concern a res, merely determines the rights of the litigants inter se to the res. The former looks to the individual rights of the parties, the latter is directed solely to those rights.

Recognition of Judgments in Rem – The Jurisdictional Requirements
A foreign judgment which purports to operate in rem will not attract extraterritorial recognition unless it has been given by a court internationally competent in this respect. Under the English law, the adjudicating court must have jurisdiction to give a judgment binding all persons generally.

Judgments relating to immovables
Where the judgment relates to immovable, it is very clear that the court of the situs is competent. Therefore, the English Courts will not recognize foreign judgments concerning title under a Will to a land in England. This position in my view is very correct, and is one of the best views of the Common Law position in respect of the subject of this paper.

32 In my opinion
35 Cambridge Gas Transportation Corporation case supra
36 Pattni v. Ali & Dinky International SA supra @ [37]
37 Cheshire, North & Fawcett @ p. 533
38 Dolfus Mieg et Compagnie SA v. Bank of England (1949) Ch 369 @ 383
39 Castrique v. Imrie (1870) LR 4 HL 414 @ 427
40 Cheshire, North & Fawcett @ p. 534
41 Re Trepca Mines Ltd (1960) 1 WLR 1273 @ 1277
42 Boyse v. Colclough (1854) 1 K & J 124; Re Hoyles (1911) 1 Ch 179 @ 185 – 186
Judgments relating to movables

In this category, there are at least three classes of judgment in rem namely:

i. Judgments that immediately vest the property in a certain person as against the whole world – this occurs for instance where a foreign court of Admiralty condemns a vessel prize proceedings.

ii. Judgments that decree the sale of a thing in satisfaction of a Claim against the thing itself – a judgment which orders a chattel to be sold is a judgment in rem if the object of the sale is to afford a remedy by appropriating the chattel in satisfaction of the claimant’s claim. In all cases, therefore, the nature of a foreign judgment that has ordered the sale of some chattel must be determined by ascertaining whether, according to the foreign law, the original action was a suit against the chattel. In Minna Craig Steamship Co. v. Chartered Bank of India\(^{43}\), the lien that had been declared by a German Court was one which conflicted with the principle of English Internal Law. In this type of case, the only court competent to give a judgment affecting the status of a res that will command general recognition is the court of the country where the res was situated at the time of the action\(^{44}\).

iii. Judgments that order movables to be sold by way of Administration – if in the course of administering an Estate in Bankruptcy or on death, a foreign court orders the sale of chattels, the sale will be regarded as conferring a title on the purchase valid in England. In the case of succession on death, jurisdiction to make such an Order resides in the court of the country where the deceased died domiciled\(^{45}\). Subject to the European Community Insolvency Regulation\(^{46}\), the English Courts will recognize the Bankruptcy jurisdiction of a foreign Court if the debtor was domiciled in the foreign country or submitted to the jurisdiction of the foreign court\(^{47}\).

ENFORCEMENT OF JUDGMENT IN REM

No foreign judgment relating to immovable abroad can be enforced in England\(^{48}\). This is generally correct because a conflict involving an immovable property should be governed by the lex situs. Whereby we have the lex situs of such immovable property outside England, it only makes sense that England should refuse to enforce that judgment. The same definitely applies to most countries that have the Received English Law as one of their sources of law\(^{49}\). It brings about a sense of justice. If the judgment relates to movables, the real issue is whether it was sufficient to pass title to the property, i.e, a question of recognition rather than enforcement\(^{50}\).

FINALITY OF THE JUDGMENT

A foreign judgment does not create a valid cause of action in England unless it is res judicata by the law of the country where it was given. It must be final and conclusive in the sense that it must have determined all controversies between the parties. If it may be altered in later proceedings between the same parties in the same court, it is not enforceable by action in England\(^{51}\). A provisional judgment is not res judicata if it contemplates that a fuller investigation leading to a final decision may later be held. A judgment in default of appearance, whilst it can be final and conclusive, does not satisfy the condition of finality if it is given in a country where the defendant is allowed to apply within a limited time for its rescission by the adjudicating court\(^{52}\). It is worthy to note that the judgment in personam must be for a fixed sum to be paid by the defendant or such cannot be enforceable in England. But the Supreme Court of Canada in Pro Swing Inc v. Elta Golf Inc\(^{53}\) held in contrast that the traditional common law Rule that limits recognition and enforcement to a fixed sum judgment should be revised so as to open the door to equitable Orders such as Injunctions which are key to an effective modern day remedy.

\(^{43}\)(1897) 1 QB 55
\(^{44}\)Cheshire, North & Fawcett Private International Law (14th Edition) @ p. 535
\(^{45}\)Re Trufort, Trufort v. Blanc (1887) 36 Ch.D 600
\(^{46}\)Council Regulation (EC) 1346/2000 on Insolvency Proceedings
\(^{48}\)Cheshire, North & Fawcett @ p. 536
\(^{49}\)In my own view
\(^{50}\)Castrique v. Imrie supra @ p. 429
\(^{51}\)Novion v. Freeman (1889) 15 App Cases 1; Re Riddell (1888) 20 QBD 512 @ 516; Blohn v. Desser (1962) 2 QB 116. Interim payments are now enforceable under the Foreign Judgments (Reciprocal Enforcement) Act 1933 in England
\(^{52}\)Wolff – Private International Law by M. Wolff (2nd Edition) 1950
\(^{53}\)(2006) SCC 52; (2007) 273 DLR (4th) 663
Conclusiveness of Foreign Judgments

A foreign judgment is not impeachable on its merits. It is well established that in an action on a foreign judgment, the English court is not entitled to investigate the propriety of the proceedings in the foreign court. Erroneous judgments delivered by a foreign court are not void in England. The English Tribunal cannot sit as a court against a judgment pronounced by a court which was competent to exercise jurisdiction over the parties.

Mistakes by the foreign court may be classified as under listed:

i. Mistakes as to Facts or as to Law
ii. Mistakes as to its own jurisdiction or
iii. A Procedural Mistake

Raising Defences Available Abroad

In terms of raising defences available abroad, it is stated that defences that were available before the foreign court cannot be raised in England. In such a case, the defendant should have raised the defence in foreign proceedings. In Ellis v. M’ Henry, judgment had been given in Canada in an action that would have failed had the defendant pleaded a certain composition deed. The plaintiff sued on this judgment in England, and the question was whether the defendant was entitled at that stage to set up the deed as a defence. Bovill CJ dismissed this contention on the basis that this would go to impeach the propriety and correctness of the judgment, and is a matter which cannot be gone into after the judgment has been obtained.

Estoppel by res judicata simply states that where a final decision has been pronounced by a judicial Tribunal of competent jurisdiction over the parties to and the subject matter of the litigation, any Party or Privy to such litigation as against any other Party or Privy is estopped in any subsequent litigation from disputing or questioning such a decision on the merits. Cause of Action Estoppel and Issue Estoppel are the two species of Estoppel per rem judicatam.

Defences Available to the Defendant

1. Where the foreign judgment is obtained by fraud
2. Where the foreign judgment is contrary to public policy of the English Law
3. A breach of Article 6 of the European Court of Human Rights (this is definitely a defence in England)
4. Foreign Revenue, Penal or other Public Laws – English courts will not enforce foreign revenue, penal or other public laws either directly or through the recognition of a foreign judgment. Thus, in USA v. Inkley, the Court of Appeal refused to enforce a judgment granted in Florida relating to a bail appearance bond, where the purpose of the enforcement action was the execution of a foreign public/penal process. However, the foreign judgment will be denied recognition only if it falls directly within the area of revenue, penal or other public laws, strictly construed.
5. The protection of Trading Interest Act 1980 – under this Act, the Secretary of State is given wide powers to counter foreign measures for regulating International Trade which affect the Trading Interests of persons in the United Kingdom.
6. Foreign judgment contrary to natural justice
7. A foreign judgment on a matter previously determined by an English Court – a foreign judgment will not be recognized if there has been a prior English judgment in respect of the same Matter. This was the decision of the House of Lords in Vervaekte v. Smith.
8. A foreign judgment on a matter previously determined by a court in another foreign State – this refers to a situation where there are two irreconcilable foreign judgments, each pronounced by a Court of

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54 Henderson v. Henderson (1844) 6 QB 288; Vadala v. Lawes (1890) 25 QB 310 @ 316; Pemberton v. Hughes (1899) 1 Ch 781 @ 780
55 Imrie v. Castrique (1860) 8 CBNS 405 @ 428
56 Dent v. Smith (1869) LR 4 QB 414 @ 446; Imrie v. Castrique supra; Ferdinand Wagner v. Laubscher Bros & Co (1970) 2 QB 313 @ 318
57 Cheshire, North & Fawcett @ p. 542
58 (1871) LR 6 CP 228; Dallal v. Bank Mellat (1986) QB 441
59 Ellis v. M’ Henry supra @ 238-239
60 Carl Zeiss Stiftung v. Rayner & Keeler Ltd (No. 2) (1967) 1 AC 853 @ 933
61 (1989) QB 255
63 (1983) 1 AC 145, HL
9. An Overseas judgment given in proceedings brought in breach of agreement for settlement of disputes. In England, Section 32 of the Civil Jurisdiction & Judgments Act 1982 provides an important defence which is that a judgment given by a Court of an Overseas country in any proceedings shall not be recognized or enforced in the United Kingdom if – (a) the bringing of those proceedings in that court was contrary to an Agreement under which the dispute in question was to be settled otherwise than by proceedings in the courts of that country; (b) those proceedings were not brought in that court by, or with the agreement of the person against whom the judgment was given; and (c) that person did not counterclaim in the proceedings or otherwise submit to the jurisdiction of that court.

THE HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS
According to Cheshire, North & Fawcett, work carried out at the Hague Conference on Private International Law on a Multilateral Convention on Jurisdiction, Recognition and Enforcement of Foreign judgments in Civil and Commercial Matters failed. In 2005, a Convention on Choice of Court Agreements was adopted to ensure the effectiveness of exclusive choice of Court Agreements. A judgment given by a Court of a Contracting State designated in the Agreement will be recognized in other contracting States subject to a number of grounds of refusal. Where one of these grounds is established, recognition or enforcement may be refused. The grounds include:
1. Where the agreement was null and void under the Law of the State of the chosen Court (including its choice of Law rules), unless the chosen court has determined that the agreement is valid.
2. A party lacked the capacity to conclude the agreement under the law of the Requested country/State.
3. Where the document which instituted the proceedings was not notified to the defendant in sufficient time, and in such a way as to enable him to arrange for his defence, unless the defendant entered an appearance and presented his case without contesting notification in the court of origin.
4. Where the judgment was obtained by fraud in connection with a matter of procedure. Here, recognition or enforcement would be manifestly incompatible with the public policy of the requested Country/State.
5. Where the judgment is inconsistent with a judgment given in the requested Country/State in a dispute between the same parties.
6. Where the judgment is inconsistent with an earlier judgment given in another country/State between the same parties on the same Cause of Action, provided that the earlier judgment fulfils the conditions necessary for its recognition in the requested Country/State.
7. Where the judgment awards damages, including exemplary or punitive damages that do not compensate a party for actual loss or harm suffered.

The effect on this on the UK and USA is that if they applied this Hague Convention, recognition and enforcement of judgments granted in the USA consequent on a jurisdiction agreement would be dealt with, not under the Common Law Rules, but under the very different Rules under the Convention.

CONCLUSION
Recognition and Enforcement of foreign judgments in my view only arises because parties to a dispute or at least, one of such parties deliberately wants to complicate an issue. The fact remains that there is no reason why judgment should be given in a country, and enforced in another country. The truth is that it is better for such parties to decide and agree before any contractual agreement or business transaction gets controversial that the same place or Forum where the judgment will be enforced shall certainly be the same Forum where the court to try the case shall be sitting. Therefore, where an immovable property and rights over it is the

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65 Cheshire, North & Fawcett Private International Law @ p. 570
66 Private International Law @ p. 593
68 Article 9 (a)
69 Article 9 (b)
70 Article 9 (c)
71 Article 9 (d)
subject in dispute, the parties involved must decide that the lex situs (the law of the place where the property is situate) shall govern the transaction, and therefore the case involving this immovable property shall be tried by a Law Court of competent jurisdiction sitting in the Forum of the lex situs. In that case, there will be no problem as to jurisdiction, recognition and enforcement of the judgment. It will have nothing to do with a court sitting in a different country from the lex situs, even if one or none of the parties to the suit is a citizen of the country of the lex situs. It simply makes transactions much easier with less friction, disputes and controversies. It also saves the time of the court that is being requested to assume jurisdiction, as many of such cases lack merit when brought before a foreign court for recognition and Enforcement. This is definitely the most important way forward to reduce conflicts of this nature in International Transactions/Agreements.

The doctrine of territoriality is also emphasized to a large extent as a solution to this problem of recognition and enforcement of foreign judgments, because it is not going to be possible in most cases for a court in a foreign country to recognize and enforce judgments of another country if it is going to do injustice to the citizens of the forum or abuse the Independent status of its country by making the country look like one that is still being led by Colonial Masters. Any country being requested to assume jurisdiction, in my opinion, should only do so if it finds it convenient to sit and adjudicate over the Matter, especially where the Cause of Action did not arise within its territorial boundaries.

The International Court at the Hague should pass a law insisting that the place where a dispute is brought before the Court shall be the place where the judgment shall be given, recognized and enforced. This will reduce the incidence of people going into International commercial transactions and agreements with any fraudulent motive. The incidence of res judicata having to be pleaded on this issue of recognition and enforcement of foreign judgments will also be reduced if parties to any international transaction are educated on the fact that they cannot challenge any suit arises in any other jurisdiction that has got no significant connection with the subject of dispute.

**The Author, Barrister (Miss) Chigozie Ifeoma Nwagbara, LL.M** is also a Solicitor & Advocate of the Supreme Court of Nigeria.

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72 *Ph.D Law (In View) @ Bayero University, Kano.*