

**AN ANALYSIS OF THE USA, EUROPEAN AND NIGERIAN APPROACHES IN
RESOLVING JURISDICTIONAL CHALLENGES IN TRANSNATIONAL
ELECTRONIC CONTRACT**

By

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Abstract

One of the benefits of the internet over other means of communication is that it enables easy access to a wide-reaching audience. Spatial distance and national borders are irrelevant to the formation of electronic contracts. With the internet as a distinctive marketplace in terms of market penetration, any computer, anywhere in the world, connected to the internet can access a website and may conclude, through that site, an electronic contract. It is not in doubt that technology has transformed our states of living, but we cannot wish away the challenges appurtenant to it; the most prominent being the jurisdiction of courts to resolve interparty disputes which may arise in the course of entering or performing an electronic commercial transaction. Oftentimes, electronic contracts are not executed in one particular geographical location. The intricacy of determining the place of business and other connecting factors on the internet, therefore, challenges existing private international law rules on the jurisdiction of national courts to adjudicate on matters relating to transnational transactions.

Utilizing the doctrinal research method, this article addresses the jurisdictional challenges appurtenant to the adjudication of disputes arising from transnational electronic contracts, by examining the EU, USA and Nigeria approaches in this regard. The article argues that since there is currently no worldwide law on internet jurisdiction, the extant rules on jurisdiction should apply to disputes arising from electronic transactions. The article concludes by recommending that for the purpose of uniformity and certainty of the law in this regard, a uniform model law should be enacted.

1.0 Introduction

The continuous growth of information technology has brought about exceptional advancement in commercial transactions.¹ The rate of development of information technology, such as the internet and the usage thereof, has stimulated business entities to use online websites and companies to sell their products and carry out other commercial transactions electronically. In this era of information technology, merchants and consumers, through the use of the boundless internet, can enter into electronic contracts from anywhere in the world. On the Internet, “merchants can order goods from different countries without a physical visit, while consumers can also buy personal products from foreign sellers at home.”²

The benefit, thereto, is that “the process of international trade and business becomes much simpler than before so that the number of cross-border transactions is continually increasing.”³ This ease of communication raises a vital legal question⁴ relating to “where” the contract was actually concluded. This is so because, to decide what State’s or Nation’s laws govern disputes arising from cross-border electronic contracts, a court must first decide “where” the internet contract that led to the disputes took place.⁵

Generally, jurisdiction confers on courts the authority to adjudicate disputes brought before it. It is the blood that runs in the veins of the court.⁶ It should be noted that the jurisdiction of a Court of law cannot be assumed or implied. It is generally denoted by the Constitution of a Country or the enabling statute that established the court. With respect to the internet, no court can easily make claims as to having the jurisdiction to adjudicate disputes arising from transnational e-contracts due to the nature of the internet which has cross-border elements and is not confined to a particular national territory. This has made Cross-border disputes in electronic contracts much more

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¹ Part of this article has earlier been published by the author in E. G. Ekhat, ‘Resolving Jurisdictional Challenges in Transnational Electronic Commercial Transaction’ (2021) 1 (1) International Journal of Law and Politics 1.

² F. F. Wang, *Internet Jurisdiction and Choice of Law: Legal Practices in the EU, US And China* (Cambridge University Press, 2010) 17.

³ Ibid, 17.

⁴ Internet transactions usually generate issues regarding *inter alia*, jurisdiction, choice of law, enforcement of judgments, taxation, online financial transactions, payment mechanisms, security, authentication, content, privacy, intellectual property, and consumer protection.

⁵ Wang (n2).

⁶ *Oloba v Akereja* (1988) 3 NWLR (PART 84) 508.

complicated to deal with than those in the paper-based environment as the location of transactions for determining the jurisdiction of courts or applicable laws is very difficult to predict and ascertain.⁷ The need to address these issues relating to the determination of the court with jurisdiction to adjudicate electronic contract disputes brings to the fore the principles of private international law (conflict of laws).

Currently, there are no specific rules in the model laws and conventions dealing with internet jurisdiction, this lack of a uniform legal framework for jurisdiction regarding internet transactions between different countries creates unpredictability of jurisdiction.⁸ In the absence of specific national, regional and international laws concerning internet jurisdiction, “it will depend on the courts to interpret the existing jurisdictional rules for the determination of the effectiveness of jurisdiction clauses concluded by electronic means and competent courts to resolve internet-related disputes.”⁹ Bodies of law have been developed by Nations to deal with international conflicts of laws, most notably, the EU, USA and Nigerian approaches to the jurisdiction of electronic commerce. Although these three legal systems have different approaches towards consumer contracts, their conflicts of law rules are not isolated as they are somewhat related.

This article, therefore, seeks to address jurisdictional challenges appurtenant to the adjudication of disputes arising from electronic commercial transactions by examining the EU, USA and Nigeria approaches in resolving jurisdictional issues in transnational commercial transactions.

2.0 Principles of Internet Jurisdiction in Electronic Contract.

Currently, there are no specific rules in the model laws and conventions dealing directly with internet jurisdiction.¹⁰ The UNCITRAL Model Law on Electronic Commerce and the UN Convention on the Use of Electronic Communications in International Contracts do not contain any jurisdictional provisions. However, they determine the time and place of dispatch and receipt of data messages or electronic communication and the location of the parties, noting the connecting

⁷ Wang (n2) 17.

⁸ Z. Chen, ‘Jurisdiction and Choice of Law Rules over Electronic Consumer Contracts: The Nexus between the Concluded Contract and the Targeting Activity’ (2022) 29(2) Maastricht Journal of European and Comparative Law 328.

⁹ F. F. Wang, *Law of Electronic Commercial Transactions: Contemporary Issues in the EU, US and China* (Routledge, 2014)225.

¹⁰ Chen (n7).

factors such as “the place of business”, “the closest relationship to the relevant contract, the underlying transaction or the principal place of business”, or “habitual residence”, which may help to analyse parties’ business location to ascertain jurisdiction.¹¹

This section analyses the US and EU approaches for determining jurisdiction in e-contracting cases, this is because U.S. companies are at the forefront of internet technology and litigation regarding e-commerce in the United States is quite more advanced than anywhere else in the world.¹² Similarly, the EU Brussels regime (general and special jurisdiction) will be examined. In addition, it also examines Nigeria’s approach to determining the jurisdiction of courts over transnational contract disputes and how it can be applied to transnational electronic contract disputes.

2.1 The USA Laws on Internet Jurisdiction

At present, there is no specific internet jurisdiction and applicable law rules in the USA. The jurisdiction of courts in electronic contract disputes is determined based on general jurisdiction rules, such as personal jurisdiction rules and specific jurisdiction rules.¹³ In the USA, a court does not have power over every person in the world. Before a court may decide a case, the court must first determine whether it has ‘personal jurisdiction’ over the parties. A plaintiff cannot sue a defendant in a jurisdiction foreign to the defendant unless that defendant has established some relationship with that forum which should lead him to reasonably anticipate being sued there.¹⁴

U.S. Law has two types of jurisdictions: general and specific. General jurisdiction is jurisdiction over the defendant for any cause of action, whether or not related to the defendant’s contact with the forum state; whereas specific jurisdiction exists when the underlying claims arise out of, or are directly related to, a defendant’s contacts with the forum state.¹⁵

¹¹ Wang (n8).

¹² Ibid.

¹³ Ibid.

¹⁴ See *International Shoe Co. v Washington* 326 US 310 (1945).

¹⁵ W.B. Chik, ‘U.S. Jurisdictional Rules of Adjudication Over Business Conducted Via the Internet-Guide-lines and a Checklist for the E-Commerce Merchant’ (2002) 10 TUL. J. INT’L & COMP. L. 243, 248-49.

2.1.1 General Jurisdiction

In the USA, the Due Process clause of the Constitution's Fourteenth Amendment sets the farthest limits of personal jurisdiction. In the USA, the courts need to first examine "whether exercising jurisdiction over a non-resident defendant complies with the due process clause in the US Constitution's 14th Amendment"¹⁶ before the court will proceed to exercise such jurisdiction. If a party has substantial systematic and continuous contacts with the forum, a court may exercise jurisdiction over the party for any dispute, even one arising out of conduct unrelated to the forum. General jurisdiction is therefore premised on 'continuous and systematic' contacts between the defendant and the forum so as to make the defendant amenable to jurisdiction without regard to the character of the dispute between the parties.¹⁷ For example, a corporation or person can always be sued in their state of residence or citizenship or its principal place of business, regardless of whether or not the claim arose there.

The most difficult issue in relation to general jurisdiction is the amount of unrelated contacts needed to subject a defendant to *in personam* jurisdiction.¹⁸ There is the question of whether "mere" residence, as opposed to domicile or nationality, can be a sufficient connection for the exercise of general jurisdiction over an individual defendant.¹⁹

Once it can be established that the unrelated contacts meet the threshold of being 'continuous and systematic', such unrelated contacts are sufficient for the exercise of general jurisdiction "unless the individual's relationship to the state is so attenuated as to make the exercise of such jurisdiction unreasonable."²⁰ So, general personal jurisdiction can be exercised over matters unrelated to the defendant's forum-based activities, "provided that the defendant has 'continuous and systematic' contacts with the forum state which 'render them essentially at home in the forum state'"²¹ unless

¹⁶ Chen (n7) 335.

¹⁷ F. F. Wang, 'Obstacles and Solutions to Internet Jurisdiction a Comparative Analysis of the EU and US laws' (2008) 3 (4) Journal of International Commercial Law and Technology 233.

¹⁸ E. F. Scoles, P. Hay, P. J. Borchers and S. C. Symeonides, *Conflict of Laws* (3rd edn St Paul, MN: West, 2000) 348.

¹⁹ Wang, (n16) 233.

²⁰ The American Law Institute's Restatement (Second) of Conflict of Laws (1971) 37, provides:

A state has power to exercise judicial jurisdiction over an individual who causes effects in the state by an act done elsewhere with respect to any cause of action arising from these effects unless the nature of the effects and of the individual's relationship to the state make the exercise of such jurisdiction unreasonable.

²¹ Chen (n7), 328.

it can be shown that the exercise of such jurisdiction will be unreasonable, then the court will refuse to exercise its jurisdiction. Thus, general jurisdiction results from a party's continuous, systematic and ongoing ties to a certain forum.²² The court in *Burger King Corp v Rudzewicz*²³ opined that a court would exercise general jurisdiction over a person or property of the non-resident if the defendant has systematic and continuous contacts with the Forum State.

In sum, under USA law, if it is reasonable to do so, a court in one state will exercise jurisdiction over a party in another state or country whose conduct has substantial effects in the state and whose conduct constitutes sufficient contacts with the state to satisfy due process. Because this jurisdictional test is ambiguous, courts in every state of the USA may be able to exercise jurisdiction over parties anywhere in the world, based solely on internet contacts with the state.²⁴

2.1.2 Specific Jurisdiction

Specific jurisdiction is the exercise of personal jurisdiction over a non-resident when the case stems directly from the contacts the party has with the forum state.²⁵ Specific jurisdiction is often used when a party's contacts do not fulfil the general jurisdiction criteria and permits the court to assert jurisdiction over parties to a dispute arising from the parties' contacts with the state involved.²⁶ While general jurisdiction results from a party's continuous, systematic and ongoing ties to a certain form, specific jurisdiction turns upon the character of the dispute (related contacts).²⁷ The determination of whether a specific jurisdiction exists in a particular case rests on three separate considerations.²⁸ Firstly, whether the defendant has purposeful contact with the forum or has purposefully availed itself of the privilege of conducting activities within the forum, although physical entry into the forum is not required;²⁹ secondly, assuming that the contacts are so related, whether the contacts are 'constitutionally sufficient'³⁰ to indicate 'a meaningful contact'

²² *Helicopteros Nacionales de Colombia, S.A. v Hall*, 466 U.S.408 (1984).

²³ 471 US 462 (1985)

²⁴ B. Rosenblatt, 'Principles of Jurisdiction on the Internet' <<https://cyber.harvard.edu/property99/domain/Betsy.html>> accessed 27 March 2023.

²⁵ *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 US 408, (1984)

²⁶ *Ashi Metal Ind. Co. v Superior Court*, 480 US 102 (1987).

²⁷ Wang (n8).

²⁸ Chen (n7) 344.

²⁹ *O'Connor v. Sandy Lane Hotel*, 496 F.3d at 318, quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

³⁰ Wang (n8).

between the claim and a legal obligation that arose in the forum³¹ and thirdly, whether the exercise of jurisdiction corresponds to ‘fair play and substantial justice’.³²

For specific jurisdiction to be established, the cause of action should be related to the defendant’s contacts and three prong criteria must be satisfied.³³ In *Publications International Ltd v Burke/Triolo Inc.*,³⁴ it was stated that “the essential inquiry for specific jurisdiction is whether the defendant “purposely availed” itself of the benefits and protections of Illinois law,³⁵ that it could anticipate being hauled into court here. In a breach of contract case, “it is only the dealings between the parties in regard to the disputed contract that are relevant to minimum contacts analysis.”³⁶

While it is a requirement that the litigation must arise out of or relate to at least one of the defendant’s purposeful contacts with the forum state, it is unclear what constitutes a ‘meaningful contact’ between the claim and a legal obligation that arose in the forum state. In the *Zippo Mfg. Co. v Zippo Dot Com, Inc.*³⁷, the Western Pennsylvania District Court expanded on the International Shoe ‘minimum contact test’ by stating that personal jurisdiction for e-commerce companies should be dealt with on a ‘sliding scale’.³⁸ The Court, in this case, applied a ‘passive versus active test’ to the question of jurisdiction which involved a ‘sliding scale analysis’ computing the nature and quality of the commercial activity of the defendant on the internet. The exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the website.³⁹ The court, in accordance with the sliding test, classified websites into three general categories; passive websites, interactive websites and active websites. First, passive websites merely provide information to a person visiting the site. “They may be accessed by internet browsers, but do not allow interaction between the host of the website and a visitor to the site.”⁴⁰ Passive websites do not conduct business, offer goods for sale, or enable a person visiting the website to order merchandise, services, or files. When the

³¹ *O’Connor v. Sandy Lane Hotel*, 496 F.3d at 318, 324, quoting *Helicopteros*, 466 U.S. at 414.

³² *Ibid*, 324, quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985); *International Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945).

³³ K. Seth and J. A. Kabir, *Computers Internet and New Technology Laws* (Lexis Nexis 2013) 33; Wang (n8).

³⁴ *Publications International Ltd v Burke/Triolo* 121 F. Supp. 2d 1178 (N.D. Ill. 2000)

³⁵ Regard is not to be left solely on Illinois laws but should be extended to other jurisdictions and their governing laws.

³⁶ *Publications International Ltd v Burke/Triolo* 121 F. Supp. 2d 1178 (N.D. Ill. 2000)

³⁷ 952 F. Supp. 1119 (W. D. pa 1997).

³⁸ *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W. D. pa 1997), at 1124.

³⁹ *Ibid*.

⁴⁰ Wang (n2) 241.

defendant has simply posted information on a passive internet website which is accessible to users in foreign jurisdictions. This will not be a ground for the exercise of personal jurisdiction. Second, interactive websites “make up the middle of the sliding scale where a user can exchange information with the host computers.”⁴¹ Third, in the case of active websites, the defendant can enter into contracts with residents of a foreign jurisdiction that involve the repeated transmission of computer files over the internet.⁴² These are grounds for determining the exercise of personal jurisdiction.

In this scale, jurisdiction should be determined by the “level of interactivity and commercial nature of the exchange of information that occurs on the website.”⁴³ If the activities occurring on a defendant’s website lean more towards the passive side of the scale, personal jurisdiction will not be applied.⁴⁴ If, however, the activity slides towards the active side of the scale, personal jurisdiction will likely be upheld.⁴⁵ This test has been accepted by the majority of courts and states since its establishment as it tends to establish a coherent path of exercising personal jurisdiction on the internet besides extending the application of the minimum contact rule to the internet. Writers and scholars have also spoken well of the test,⁴⁶ a direction that seems to suggest that its value should not be ignored by courts and judicial officers. Carlos J.R. Salvado describes the sliding scale test as “a thoughtful opinion that remained true to the established principles of personal jurisdiction.”⁴⁷ However, the *Zippo* test with its emphasis on the level of interactivity inherent to a website, has become less relevant given that almost all commercial sites are now “at least highly interactive, if not integral to the marketing of the website owners”⁴⁸ and therefore criticized for discouraging interactivity in a time when websites are becoming more interactive.⁴⁹

⁴¹ Ibid, 241.

⁴² Ibid, see also *CompuServe Inc. v. Patterson*, 89 F. 3d. 1267 (6 thCir. 1996).

⁴³ Ibid.

⁴⁴ In *Cybersell, Inc. v Cybersell, Inc. No. 96-17087 (C.A. 9TH 1997)* the US District Court declined to exercise personal jurisdiction. It took the view that an internet advertisement alone is not sufficient to subject an advertiser to the jurisdiction of a plaintiff’s home state.

⁴⁵ See *Zippo Mfg. Co. v Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W. D. pa 1997), at 1124.

⁴⁶ Wang (n2); Chen (n7) 344; Rosenblatt (n23).

⁴⁷ C. J.R. Salvado, ‘An Effective Personal Jurisdiction Doctrine for the Internet’ (2002) 12 U.Balt.Intell. Prop. L.J. 75, 103.

⁴⁸ D. T. Rice, ‘Problems in Running a Global Internet Business: Complying with the Laws of Other Countries’ (2004) 797 *PLI/PAT* 11, 52.

⁴⁹ M. Geist, ‘Is There a There? Towards Greater Certainty for Internet Jurisdiction’ (2001) 16 *Berkeley Technology Law Journal* 1345; *Digital Control Inc. v Boretronics Inc* 161 F. Supp. 2d 1183 (W.D. Wash 2001).

More recently, courts have looked towards the ‘effects tests’ principle as set out in the pre-internet case of *Colder v Jones*,⁵⁰ the fact that the action had an effect in the other jurisdiction was factored into the equation to determine whether jurisdiction existed in that forum. Under this ‘effects test’, jurisdiction is determined by analyzing the effects intentionally caused within the forum by a party’s online conduct outside the forum.⁵¹ Questioning the utility of the *Zippo* and ‘effects’ tests, USA courts further introduced the ‘targeting test’ approach.⁵² It has been argued that the targeting-based test is a better approach for the courts to employ than the sliding scale test in *Zippo* when determining jurisdiction in cases involving internet-based contracts.⁵³ The targeting test, unlike the other one, places greater emphasis on identifying “the intentions of the parties and the steps taken to either enter or avoid a particular jurisdiction.”⁵⁴ The requirement of the ‘targeting test’ is satisfied “when the defendant is alleged to have engaged in wrongful conduct targeted at a plaintiff whom the defendant knows to be a resident of the forum state”.⁵⁵ The “targeting test” gives more legal certainty over determining jurisdiction in cases involving electronic contracts.⁵⁶ It is suggested that this approach, as well as providing consistency and legal certainty, does not preclude the “American propensity toward individualized justice”.⁵⁷

2.2 The EU Laws on Internet Jurisdiction.

In the EU, the “EC Directive on Electronic Commerce neither establishes additional rules on private international law nor deals with the jurisdiction of courts.”⁵⁸ The question as to which country’s courts have jurisdiction to resolve a dispute is answered in the majority of commercial

⁵⁰ 465 US 783 (1984).

⁵¹ J. A. Gladstone “Determining Jurisdiction in Cyberspace The ‘Zippo’ Test or the ‘Effects’ Test?” Bryant College, Smithfield, Rhode Island, USA. Available at <<http://www.informingscience.org/proceedmgs/IS2003Proceedings/docs/029Glads.pdf>> Accessed 5 May 2023; In *Caiazzo v. American Royal Arts Corp* 26373 So. 3d 245 (Fla. Dist. Ct. App. 2011), the court declined to exercise personal jurisdiction since it did not find that the defendant’s website targeted Florida residents and that the defendant’s sales to Florida residents only represented less than 5% of his total sales.

⁵² *Bancroft & Masters, Inc. v. Augusta Nat’l Inc.*, 223 F. 3d 1082, 1087 (9 thCir. 2000).

⁵³ Chen (n7) 328.

⁵⁴ Michael Geist, *Internet Law in Canada* (2d ed. 2001) 69.

⁵⁵ *Bancroft & Masters, Inc. v. Augusta Nat’l Inc.*, 223 F. 3d 1082, 1087 (9 thCir. 2000).

⁵⁶ Wang (n8) 242.

⁵⁷ B. D. Boone, ‘Why a “Targeting” Approach to Personal Jurisdiction in the Ecommerce Context Makes Sense Internationally’ (2006) 20 Emory Int’l L. Rev. 241, 266.

⁵⁸ Wang (n2) 35.

contracts in Europe by the Brussels I Regulation (EC No. 44/2001),⁵⁹ now Regulation (EU) No 1215/2012 (recast).⁶⁰ Where the Brussels I Regulation do not apply, the English common law governs the issue of jurisdiction. This will be the case where contracts are concluded with persons domiciled outside States not subject to the Brussels I Regulation.⁶¹ The Brussels I Regulation was extended to Denmark by a separate agreement on 1 July 2007.⁶² One of the key objectives of the Brussels Regime is the harmonization of jurisdictional bases in cases involving proceedings brought against defendants domiciled in the States concerned.⁶³

Article 25(2) of Brussels I Regulation 2012, provides that any communication by electronic means which provides a durable record of the agreement shall be equivalent to writing. It means that a piece of contractual information or document stored in a computer as a secured word document (i.e. a read-only document or document with entry password), or concluded by email and click-wrap agreement falls within the scope of Article 25(2) of the Brussels I Regulation 2012 and by that fact the court will apply the Brussels I Regulation to electronic commerce.

The courts in Europe, when confronted with disputes arising from electronic commerce, will determine jurisdiction of the electronic commerce according to three main types of jurisdiction rules in the Brussels I Regulation: general jurisdiction, special jurisdiction and exclusive jurisdiction (Choice of law Clause). The existence of international elements is required for the application of the Brussels I Regulation since the Regulation does not apply to purely internal situations.⁶⁴

⁵⁹ Council Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matter (hereafter the 'Brussels I Regulation'); see Council Regulation (EC) No. 44/2001, 22 December 2000, OJ L 012, 16 January 2001, p. 1.

⁶⁰ Regulation (EU) No 1215/2012 of the European Parliament and of The Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)

⁶¹ Order 6 Rule 20(5) and (6) English Civil Procedure Rule 1998; in Scotland, the rules are provided in Schedule 8 of the Civil Jurisdiction and Judgement Act, 1982.

⁶² S. Singleton, *E-Contract* (Bloomsbury Professional Ltd, 2009)

⁶³ J. Hill, *International Commercial Disputes in English Courts* (Oxford & Portland, Oregon: Hart Publishing, 3rd Ed. 2005) 71.

⁶⁴ A. S. De Sousa Gonçalves, 'Choice-of-Court Agreements in the E-commerce International Contracts' (2017) 11 (1) Masaryk University Journal of Law and Technology 64.

2.2.1 Exclusive Jurisdiction (Choice of Law Clause)

According to Article 25 of the Brussels I Regulation⁶⁵ where the parties to a contract have agreed on the court with jurisdiction to determine any dispute arising from the contract, that court will have exclusive jurisdiction, however, this will not affect the consumer's right to choose to sue in his jurisdiction in a consumer contract. Usually, a well-drafted contract, which has factual links with more than one country, will contain a choice of jurisdiction or court clause providing that all disputes between the parties arising out of the contract must be referred to a named court or the courts of a named country.⁶⁶ Also, Article 25 does not "require any objective connection between the parties or the subject matter of the dispute and the territory of the court chosen."⁶⁷ It must be noted that before the 2012 amendment, by virtue of Article 23(3) of the Brussels I Regulation 2001 parties not domiciled in a Member State were exempted from the application of the Brussel regulation. In this situation, the chosen courts have the discretion to determine the existence and exercise of their jurisdiction in accordance with their law. The courts of the other members shall have no jurisdiction over the disputes unless the chosen court or courts have declined jurisdiction. In contrast, Article 25(1) of the Brussels I Regulation (Recast) replaces Article 23(1)(3) of the Brussels I Regulation and removes the distinction between parties domiciled and non-domiciled in the EU. It states that:

If the parties, regardless of their domicile, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that Member State. Such jurisdiction shall be exclusive unless the parties have agreed otherwise.⁶⁸

⁶⁵ Article 25 of the Brussels I Regulation (Recast) 2012.

⁶⁶ In the case of *Tilly Russ and Ernest Russ v. NV Haven- & Vervoerbedrijf Nova and NV Goeminne Hout* Judgment of the Court of 19 June 1984, Case 71/83 (known as the *Tilly Russ* case), the ECJ held that a jurisdiction clause contained in the printed conditions on a bill of lading satisfies the conditions laid down by Article 17 of the Brussels Convention (now Article 23 of the Brussels I Regulation and Article 25 of the Brussels I Regulation (Recast)).

⁶⁷ Case C-159/97 *Castelletti v Trummpy* [1999] ECR I-1597.

⁶⁸ The Brussels I Regulation (Recast) 2012, Article 25(1).

Thus, the earlier distinction between domiciled and non-domiciled parties has been done away with. Once the parties consensually agreed to a choice of court in their contract, the court is to respect and enforce such agreement “unless the agreement is null and void as to its substantive validity under the law of that Member State.”⁶⁹ It is therefore advisable in the case of e-contracting, to insert a selected jurisdiction clause in the standard terms and conditions on the website as this can avoid ambiguity about which court has jurisdiction when disputes arise. For example, the website owner can incorporate a choice of jurisdiction clause into an interactive click-wrap agreement such that the buyer only needs to click the ‘I agree’ button to assent to.⁷⁰ The clause should be available on a screen and known to the receiver or it is in a condition to be known by him if he chooses to. Therefore, in harmony with the principle of freedom of choice, the selected court should settle the dispute, excluding the jurisdiction of any other court that might have jurisdiction according to the rules of the Regulation.⁷¹

2.2.2 General Jurisdiction

The general jurisdiction rule under the Brussels I Regulation is to the effect that defendants, who are domiciled in one of the Contracting States, shall be sued at the place of their domiciles.⁷² Recital 11 of the Brussels I Regulation states that “the rules of jurisdiction must be highly predictable and founded on the principle that jurisdiction is generally based on the defendant’s domicile”.⁷³ The domicile rules within the Brussels I Regulation govern the domicile of individuals⁷⁴ and domicile of corporations.⁷⁵

On the Internet, since the decision of the e-transaction might be made following discussion via electronic communications between officers who reside in different states, it has become more difficult to ascertain the location of the central administration. According to the UN Convention

⁶⁹ Ibid.

⁷⁰ F. F. Wang, ‘Obstacles and Solutions to Internet Jurisdiction a Comparative Analysis of the EU and US laws’ (2008) 3 (4) Journal of International Commercial Law and Technology 233.

⁷¹ A. S. De Sousa Gonçalves, ‘Choice-of-Court Agreements in the E-commerce International Contracts’ (2017) 11 (1) Masaryk University Journal of Law and Technology 64.

⁷² Article 2 of Brussels I Regulation (now Article 4 of the Brussels I Regulation (Recast) 2012)

⁷³ Recital 15 of Brussels I Regulation.

⁷⁴ The Brussels I Regulation (Recast) 2012, Articles 4 and 62. provides that, as regards natural persons, in order to determine whether a party is domiciled in a particular member state, the court shall apply the law of that state.

⁷⁵ The Brussels I Regulation (Recast) 2012, Article 63. provides that for the purposes of the Brussels I Regulation a company or other legal person or association of natural or legal persons is domiciled at the place where it has (1) its statutory seat or (2) its central administration or (3) its principal place of business.

on the Use of Electronic Communications in International Contracts (the UN Convention), “the location of the parties”⁷⁶ is defined as “a party’s place of business”⁷⁷. If a natural person does not have a place of business, the person’s habitual residence should be deemed as a factor to determine jurisdiction.⁷⁸ If a party does not indicate his place of business and has more than one place of business, then the place of business is that which has the closest relationship to the relevant contract.⁷⁹ The UNCITRAL Model Law on Electronic Commerce is the same as the UN Convention, providing that “if the originator or the addressee does not have a place of business, reference is to be made to its habitual residence.”⁸⁰ The place of domicile therefore, will be the party place of business or its habitual residence.

2.2.3 Specific Jurisdiction

Article 7 of the Brussels I Regulation derogates from the general principle contained in Article 4 of the Brussels I Regulation, which allows the claimant to proceed against the defendant in a Member State in which the defendant is not domiciled.

This goes to show that a claimant in a contractual matter has the choice of suing at the State of domicile of the defendant and where the State of domicile is different from the place of performance of the contract, he/she has the option of suing in the State of performance as the court of that State is conferred with jurisdiction because of the connection between the latter State and the subject matter. Under this provision, it contains seven matters, one of which, Article 7(1) of the Brussels I Regulation, deals with matters relating to a contract. This general rule does not apply to insurance, consumer and employment contracts. In determining jurisdiction, one has to ascertain the place of performance of the obligation in question as this is the focal point of how to determine special jurisdiction.⁸¹

The place of performance, according to Article 7(1)(b) of the Brussels I Regulation, is the place of delivery of goods (or where they should have been delivered), or the place where the services were

⁷⁶ Article 6 of the UN Convention on the Use of Electronic Communications in International Contracts, A/RES/60/21, 9 December 2005.

⁷⁷ Article 6(1) of the UN Convention.

⁷⁸ Article 6(3) of the UN Convention; Article 15(4)(b) of the UNCITRAL model Law on Electronic Commerce.

⁷⁹ Article 6(2) of the UN Convention.

⁸⁰ Article 15(4)(b) of the UNCITRAL Model Law on Electronic Commerce.

⁸¹ Wang (n16).233.

provided or should have been provided. Hence, the place of delivery is a close linking factor to determine special jurisdiction, an electronic contract which involves the physical delivery of goods can be seen as a paper-based contract for the application of this rule. However, the difficulty in applying Article 7(1) of the Brussels I Regulation to electronic contracts lies in the interpretation of whether multiple places of delivery are within the scope of this provision. Problems about multiple places of delivery of goods or provision of services can be divided into two categories: one is where different obligations have different places of delivery, and the other is where the relevant obligation has several places of delivery.⁸²

In the first category, where there are different obligations with different places of delivery, Article 7(1) of the Brussels I Regulation allocates jurisdiction to the courts for each place of performance with regard to the dispute arising out of the obligation, which should have been performed at that place,⁸³ whereas, where it involves two obligations with one principal obligation, the courts for the place of performance of the principal obligation have jurisdiction over the whole claim.⁸⁴

In the second category, there are also two possibilities. If all places of delivery are “without distinction” and “have the same degree of closeness to the facts in the dispute” the plaintiff could sue in the court for the place of delivery of its choice,⁸⁵ where there are several places of delivery within a single Member State, when a dispute arises, the defendant should expect that he may be sued in a court of a Member State other than the one where he is domiciled as this complies with the regulation’s objective of predictability, and proximity underlying the rules of special jurisdiction in matters relating to a contract.⁸⁶

On the other hand, if the places of delivery were in different Member States, would Article 7(1)(b) still apply? Where the relevant obligation has been or is to be, performed in several places in different member states, Article 7(1)(b) should not apply to this situation as the objective of foreseeability of the Brussels I Regulation cannot be achieved,⁸⁷ that is a single place of performance for the obligation in question could not be identified for the purpose of this

⁸² Wang (n16) 233.

⁸³ *Leathertex Divisione Sintetici SpA v Bodetex BVBA* [1999] ECR I-6747.

⁸⁴ *Shenavai v Kreischer* [1987] ECR 239.

⁸⁵ *Color Drack GmbH v Lexx International Vertriebs GmbH* (Case C-386/05), [2007] I. L. Pr. 35.

⁸⁶ *Ibid.*

⁸⁷ Case C-256/00 *Besix SA v Wasserreinigungsbau Alfred Kretzschmar GmbH & Co KG (Wabag)* [2002] ECR I-1699

provision,⁸⁸ then, the claimant should turn to Article 4 of the Brussels I Regulation, according to which the court with jurisdiction is that of the domicile of the defendant.⁸⁹

2.3 The Nigeria Law on Internet Jurisdiction

The jurisdiction of Nigerian courts is prescribed by the Constitution and enabling statutes. The Constitution creates a High Court of Justice for each State of the federation and the Federal Capital Territory⁹⁰ and clearly demarcates their areas of jurisdiction. While the State High Courts have jurisdiction over civil and commercial matters,⁹¹ the Federal High Court has exclusive jurisdiction over certain matters stipulated under section 251 of the Constitution.⁹² The constitution also allows the component States to grant additional jurisdiction to their respective High Courts by law and to establish other inferior courts as they may deem fit.⁹³ Each State High Court in Nigeria has an enabling law that makes provisions for conflict of laws rules which in essence govern among others, choice of jurisdiction rule.⁹⁴ There also exists a nationwide jurisdiction conferred on every State High Court by the Sheriffs and Civil Processes Act 2004 (SCPA). The Act allows every State High Court to exercise jurisdiction over any subject matter once it has a close connection with the forum state. These connections include: if the defendant was resident within the jurisdiction of the court; the contract was performed or breached within the jurisdiction of the court; where it is a tortious claim, that the tort was committed within the jurisdiction of the court.⁹⁵

The Common Law of England received in Nigeria by the Interpretation Act⁹⁶ and all the High Court Laws, also apply limitedly in the determination of the court's jurisdiction in Nigeria. Hence, one can conclude that the traditional common law rules of choice of jurisdiction, particularly the writ rule, are part of Nigerian law.

⁸⁸ J.J. Fawcett, J.M. Harris, and M. Bridge, *International Sale of Goods in the Conflict of Laws* (New York: Oxford University Press, 2005) 514.

⁸⁹ Wang (n16) 233.

⁹⁰ Section 6 (5) of the CFRN 1999 (as amended).

⁹¹ Ibid, Section 272

⁹² These matters range from taxation of companies, custom and excise duties, banking and other financial institutions, the operation of Companies, intellectual property, admiralty matters, bankruptcy and insolvency to mines and mineral resources.

⁹³ Ibid, sections 272, 273, 4(7) and 6(4)(a).

⁹⁴ The Constitution merely provides for the general jurisdiction of the courts especially as it affects subject matters. The details of the jurisdictional rules are contained in the various High Court Laws.

⁹⁵ See Section 101, Sheriffs and Civil Processes Act, CAP S6, Laws of the Federation of Nigeria, 2004.

⁹⁶ Section 23 of the Act, Cap I23, LFN 2004.

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

3.3.1 Presence of the Parties within the Jurisdiction

The primary basis at common law for the exercise of *in personam* jurisdiction by the English courts, therefore the Nigerian courts, is the service upon the concerned party (invariably the defendant) of the writ of summons.⁹⁷ This service can easily be achieved if the parties to a case are present within the area of territorial jurisdiction of the court⁹⁸ and the court can exercise general jurisdiction over them even if they are foreigners or if the cause of action arose in a foreign country.⁹⁹ Even if the presence of a party within the court's territorial jurisdiction is temporary. In the case of e-contract, where the defendant is within the jurisdiction, insofar as the defendant is properly served with the court's writ within the jurisdiction, the court can exercise general jurisdiction over the defendant in accordance with the transient presence rule.¹⁰⁰ Presence as a basis of jurisdiction of the English court is illustrated by the case of *Colt Industries v Sarlie (No.1)*.¹⁰¹ In this case, a company incorporated in New York obtained a judgment in New York against a Frenchman and sought to enforce it in England by serving a writ on him at a London hotel where he was staying for one night. The court did not have any difficulty in concluding that the jurisdiction of the court had been properly invoked. It should be noted that the English court can exercise its discretion to stay an action if it forms the opinion that the action should have been brought elsewhere.¹⁰²

⁹⁷ R.H. Graveson, *Conflict of Laws: Private International Law* (7th ed. 1974) 111.

⁹⁸ See Order 10 Rule 1(c), High Court of Lagos (Civil Procedure) Rules, 2019.

⁹⁹ See *Sirdah Gurdyal Singh v The Rajah of Faridkote* (1894) App. Cas. 670, 683-84; *Carrick v Hancock* (1985) 12 T.L.R. 59.

¹⁰⁰ G. Bamodu, 'Jurisdiction and Applicable Law in Transnational Dispute Resolution before the Nigerian Courts' (1995) 29 (3) *The International Lawyer* 555.

¹⁰¹ (1966) 1 WLR 440 (CA).

¹⁰² This is known as the doctrine of *forum non conveniens*. The principle governing the application of this doctrine in the UK was stated by the English court in *Spiliada Maritime Corporation v Cansulex Limited* (1987) AC 460

3.3.2 Service of the Court's Process Outside the Jurisdiction

This base of exercising jurisdiction is hinged on the long-arm jurisdiction of the Nigerian courts;¹⁰³ in this instance, the courts can exercise jurisdiction in respect of a dispute involving a defendant not present within the jurisdiction. While the court may lack general jurisdiction over the defendant in the case, the exercise of jurisdiction by the court is predicated upon a specific connection between the subject matter of the dispute and the forum.¹⁰⁴ For example, a court may allow its writ to be served on the defendant outside the jurisdiction if, inter alia, the subject matter of the action is land situated within the jurisdiction; or the action is founded on the commission of a tort within the jurisdiction; the action is brought in relation to a contract (a) made within the jurisdiction, or (b) governed by Nigerian law, or (c) the breach of which has occurred in Nigeria irrespective of where it was made.¹⁰⁵

The connections that will be sufficient to enable the court to exercise this long-arm jurisdiction are often stipulated in the rules of the court.¹⁰⁶ The court's jurisdiction is obtained by service upon the defendant of the court's writ or notice thereof in a foreign jurisdiction. The proposed plaintiff must apply for and obtain leave of the court to serve the defendant with the process outside the jurisdiction. The leave is not automatically granted as the court has discretion whether to grant leave for service of its process outside the jurisdiction or not.

In the absence of a choice of court clause in an electronic commercial transaction, the court should first determine where the contract was concluded and breached to know if the contract (a) was made within the jurisdiction, or (b) governed by Nigerian law, or (c) breach has occurred in Nigeria irrespective of where it was made, before the court will proceed to assume jurisdiction.

For e-commercial transactions, transactions are concluded where the last act necessary for its conclusion has occurred.¹⁰⁷ If the receipt rule is applied to e-commerce this would be where the electronic acceptance is received by the offeror or more specifically, where the offeror is capable

¹⁰³ The rules of the different state High Courts in Nigeria, setting out the grounds upon which leave to serve the court's process outside the jurisdiction may be granted, are virtually identical. see Order 10 Rule 1, High Court of Lagos (Civil Procedure) Rules, 2019; Order 9 Rule 13, Federal High Court (Civil Procedure) Rules, 2019.

¹⁰⁴ See Order 10 Rule 1, High Court of Lagos (Civil Procedure) Rules, 2019; Bamodu (n99) 555.

¹⁰⁵ See *ibid*, Order 10 Rule 1; see also *Bank of the North Ltd. v K.G. Polland*, (1969) N.N.L.R. 7.

¹⁰⁶ For instance, see *ibid*, Order 10 Rule 1; see also F. Nwadialo, *Civil Procedure in Nigeria* (1990) 224.

¹⁰⁷ D. Rowland, U. Kohl and A. Charlesworth, *Information Technology Law* (Routledge, 2017) 229.

of accessing it,¹⁰⁸ so if the offeror is located in Nigeria at the time of e-contracting, Nigeria courts will have jurisdiction over the dispute. However, considering the boundless nature of the internet, a person might receive an email in England while there for a visit and his habitual place of residence is in Nigeria. Now where will the forum jurisdiction be? In recognition of the boundless nature of the Internet, both the Model Law and legislation in other jurisdictions favour the offeree's and the offeror's place of business or residence as the place of dispatch and receipt of the electronic acceptance¹⁰⁹ unless otherwise agreed by the parties.¹¹⁰

In the case of a breach, if the breach occurs by express repudiation, for example, an email by one party informing the other of the intention not to perform the contract, the repudiation according to common law occurs where the email was sent and not where it was received,¹¹¹ where, on the other hand, if the breach is a failure not to perform the location will be where the performance ought to have occurred.¹¹² If the performance ought to be in Nigeria, Nigeria courts will have jurisdiction to try the cases, more specifically if the breach occurred in Nigeria irrespective of where it was made, the court will have jurisdiction in accordance with Order 10 Rule 1(f), High Court of Lagos State(Civil Procedure) Rules, 2019.¹¹³

3.3.3 Submission to the Jurisdiction of the Court

Another basis for the exercise of jurisdiction over a foreign defendant is the submission of that defendant to the jurisdiction of the court. One way in which this may occur is if the defendant takes steps to defend, on the merits, an action improperly commenced against him. A person may submit to the jurisdiction of the court by accepting the service of a writ either personally or through his

¹⁰⁸ Article 15 United Nations Convention on International Law (UNCITRAL) Model Law on Electronic Commerce 1996, Article 6 of the UN Convention on the Use of Electronic Communications in International Contracts, A/RES/60/21, 9 December 2005; see also *Chwee Kin Keong and Others v Digilandmall.com Pte Ltd*, [2004] 2 SLR 594; Section 13 (1) Information Technology Act of India 2000; Section 18 Electronic Transaction Act 2008 of Ghana; Article 20(2) ECOWAS Electronic Transaction Act 2010; The receipt rule is more accepted in terms of acceptance communicated via email, phone and other electronic means of communication.

¹⁰⁹ See Article 15 (4) UNCITRAL Model Law on Electronic Commerce 1996; Section 13 (3) Information Technology Act of India 2000; Section 15 Uniform Electronic Transaction Act 2000 of USA; Article 24 of the United Nations Convention on Contracts for the International Sale of Goods 1980; Section 19(2) Electronic Transaction Act 2008 of Ghana.

¹¹⁰ Section 19(2) Electronic Transaction Act 2008 of Ghana.

¹¹¹ Rowland, Kohl and Charlesworth (n106) 229.

¹¹² Ibid, 262.

¹¹³ Other High Court in Nigeria has similar provisions.

solicitor.¹¹⁴ A person who files an unconditional appearance and defence has submitted to the jurisdiction of the court. However, if a defendant merely argues that the court has no jurisdiction over him, this does not constitute submission.¹¹⁵

Likewise, a foreigner who sues in the forum court is deemed to have submitted to the counterclaim of the defendant. A person may also submit to the jurisdiction of the court by contract.¹¹⁶ This may arise where he/she has chosen the court as the choice of court under the agreement forming the basis of the dispute. This seems to be the best way to resolve jurisdictional issues in electronic commerce because the court will usually honour the agreement between parties to a contract.¹¹⁷ If, by a forum selection clause, the parties to a transnational electronic commercial transaction agree to litigate any disputes in the Nigerian courts, then the courts can exercise jurisdiction over the parties by virtue of the submission even if neither of them, especially the defendant, is normally resident or present within the jurisdiction.

3.0 Conclusion.

Technology has brought the world much closer, and transnational transactions can now be initiated and completed between parties seamlessly. The issue of jurisdiction in this context requires deliberate and special consideration. With respect to the cyberspace, the question of jurisdiction is peculiar because activities that occur, cut across various geographic borders and as such could be in different and varying jurisdictions with their peculiar legal systems. At present, there is a dearth of legal frameworks in addressing this issue, the need to bring the law and practice of choice of jurisdiction in line with the global trend is, therefore, imperative. Given the rate of advancement in technology and the increased utilisation in conducting transactions, we do hope that laws regulating jurisdiction in electronic commercial transactions will be enacted soon by countries.

¹¹⁴ A. O. Yekini, 'Comparative Choice of Jurisdiction Rules in Cases having a Foreign Element: Are there any lessons for Nigerian courts?' (2013) 39 (2) Commonwealth Law Bulletin 333.

¹¹⁵ See also M.I. Jegede, Service of Process Outside Jurisdiction, in *Fundamentals of Nigerian Law* (M.A. Ajomo ed., 1989) 107

¹¹⁶ See Order 10 Rule 1(e) (iii), High Court of Lagos (Civil Procedure) Rules, 2019.

¹¹⁷ The presence of a forum selection clause in a contract may have the effect of (a) conferring jurisdiction, by virtue of submission, on a court that otherwise would not have had jurisdiction, or (b) depriving courts that would otherwise have had jurisdiction of the ability to exercise such jurisdiction, especially if the clause expressly confers exclusive jurisdiction on the chosen court.