DETERMINING THE PROPER LAW OF CONTRACT UNDER PRIVATE INTERNATIONAL LAW

BY

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DECLARATION

I hereby declare that this research is original. It has not been presented or published any where at any time by any body, institution or organization. All published and unpublished works cited have been acknowledged.

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MAY, 2008.

CERTIFICATION

The Thesis entitled "DETERMINING THE PROPER LAW OF CONTRACT UNDER PRIVATE INTERNATIONAL LAW" by Ashigwuike Emmanuel Anyanwu meets regulations governing the award of the Degree of Master of Laws (LL.M.) of Ahmadu Bello University, Zaria and is approved for its contribution to knowledge and literary presentation.

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DEDICATION

This Thesis is dedicated to my lovely wife and children, Annastecia Nkeiruka, Michael, Gabriel, Uriel, Raphael, Sarah and David.

To my caring mother, Agnes Ahunna, late father, Johnson Ajagbaonwu, my junior brother Raphael Anayo & family and my sisters Mrs. Bessy Umunagbu, Mrs. Gold Nweke, Mrs Oluchi Josiah and their families and Anthonia, for their faith in God, patience, endurance and support throughout the period of my studies.

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ABSTRACT

Where a dispute arises from the breach of a term or terms of a contract between 'A' a Nigerian and 'B' an Italian, the court which entertains the action will employ an objective test in order to determine the law to govern the resolution of this dispute. Before arriving at this law, the court considers the intention of the parties regarding their choice of law.

The parties' intention could be expressed where they provide that "Nigerian law shall govern the construction of this contract", or their intention could be implied where, from the terms of the contract, the court could hold that the parties' intention is that Italian law should govern the contract. Where their intention is neither expressed nor to be inferred from the terms of the contract, the court could hold that the system of law with which the transaction has its closest and most real connection shall be the proper law of the contract and this is arrived at by looking at the surrounding circumstances of the case.

The above explanation is what "Determining the Proper Law of Contract under Private International Law" is all about and it is that proper law so determined that

is applied in all issues or matters arising from international contract disputes brought before the court for resolution.

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CHAPTER ONE

1.0 GENERAL INTRODUCTION

1.1 INTRODUCTION

Business men and women, the world over, are continually entering into agreements. It is therefore necessary to know which law should be applied to govern these agreements, because every international contract must be governed by a particular law, if not it is no longer a contract which the court must enforce. Generally, the law of contract has uniqueness of its own, in that it is the only branch of the law in which broadly speaking parties are free to make their own choice of law. The court will apply this law if it passes the objective test. The courts follow a procedure in conducting this test; it is the result that constitutes determining the proper law of contract. At first the choice of law was fixed, rigid and arbitrary but as times went on, the law became flexible, more reasonable and universally acceptable.

The Proper Law of Contract was defined in *Coast Lines Ltd. v. Hudig and Veder Chartering N.V.*[1] "as the system of law (e.g. Nigerian Law, English Law, German Law or Italian Law) by which the parties intended

the contract to be governed, or, where their intention is neither expressed nor to be inferred from the circumstances, the system of law with which the transaction has its closest and most real connection."

The proper law of contract was also defined by Lord Wright in *Mount Albert Borough Council V. Australasian Temperance & General Mutual Life Assurance Society*[2] as "that law which the English court is to apply in determining the obligations under the contract. English law in deciding these matters has refused to treat as conclusive, rigid or arbitrary criteria such as lex loci contractus or lex loci solutionis, and has treated the matter as depending on the intentions of the parties to be ascertained in each case on a consideration of the terms of the contract, the situation of the parties, and generally on all surrounding facts. It may be that the parties have, in their agreement expressed what law they intend to govern, and in that case prima facie their intention will be effectuated by the court. But in most cases they do not do so. The parties may not have thought of the matter at all.

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1. (1972) 2 Q.B. 34 (C.A.)
2. (1938) A.C. 224, 240

Then the court has to impute an intention or to determine for the parties what is the proper law which as just and reasonable persons they ought to or would have intended if they had thought about the question when they made the contract."

It can be deduced from the above definitions that what constitutes the proper law of contract is not very easy to determine, because of its complex nature. One cannot at a glance pick a particular law as the proper law of contract.

The difficulty arises from the fact that businessmen and women representing their companies from different parts of the world, enter into various kinds of contracts; such as contracts of sale of goods, hire purchase contracts, contracts of employment, equipment leasing agreements, consolidation contracts, etc. In Nigeria, commercial banks for example, are required to raise their minimum share capital from N2 billion to N25 billion. To meet this target, banks enter into merger agreements with other banks both local and international. Therefore the proper law to govern contract of sale of goods is not the same as contract of hire purchase or contract of employment or equipment leasing contract or a share acquisition contract.

These contracts contain terms, conditions and multiplicity of connecting factors. These terms and conditions form the constitution of the contract of which the breach of any clause will lead to action for claims.

At first and in relation to the determining of the proper law of contract, there may be no problem among the parties to the contract, where each respects or carries out his obligation under the contract. But problem arises where one party to the contract breaches or fails to perform his own obligation under the contract.

Where the contract is a domestic one, the issue in dispute before the court may not pose much problem, because the domestic law i.e. Nigerian Law of Contract, which is based on common law principles as well as on legislation, shall apply. However, where a Nigerian company enters into a contract with an Italian company and the issue before the court involves a foreign element, problem arises as to which country's proper law, Nigerian Law or Italian Law is the applicable law in resolving the matter.

Where the matter is brought before a Nigerian Court and the parties file their pleadings and tender various documents including a copy of the contract which binds them, the court will of course study the parties' pleadings including the agreement. In the course of the study, the court may discover that the Agreement provides that foreign law governs the contract.

The court can determine the applicable law by looking at the place where the contract was made. It can also look at the place where the contract is to be performed, from the intention of the parties, the domicil, nationality or business centre of the parties; the situation of the subject matter, the nationality of the ship in the case of a charter party etc. The place of contracting, place of performance and intention of parties represent the old and classical theories, which were relevant for some time before they were discarded and replaced by more flexible rules.[3]

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3 The examples of the recent principles are:
(a) where there is an express choice of the proper law
(b) where there is an implied choice of the proper law
(c) where there is no choice of the proper law express or implied

The proper law applies either because the parties have chosen it and the choice has been objectively tested by the court, or because it is the law most closely connected with the contract. In the absence of strong evidence to the contrary, the parties must be deemed to have intended to refer to the domestic rules and not to the conflict rules of their chosen law, and the connection with a given legal system is a connection with substantive legal principles and not with conflict of laws rules.[4]

The development of this area of private international law is still at its infancy in Nigeria. This is because industrial growth in the country has been at its lowest ebb, with few local companies having international connections and associates. Therefore foreign elements in contracts between Nigerian companies and their foreign counterparts are not so rampant and hence, our courts are not so burdened with such cases for determination.

There are also very limited local legal materials on the subject matter. For instance there are few Nigerian text books on the subject with heavy reliance on foreign cases and legislation. Also there is yet

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4. Dicey and Morris, *Conflict of Laws* (Stevens & Sons Ltd., London 1973), p. 724.

no local legislation on proper law of contract as we have in Europe. These problems have made reliance on opinions of foreign writers and decided cases inevitable in this research.

1.2 AIMS AND OBJECTIVES OF THE RESEARCH

This work aims at highlighting the various rules which courts follow in determining the proper law to apply in resolving disputes arising from international contracts. It is also the aim of the work to examine and determine the various problems encountered by the courts in choosing the proper law. In trying to do this, the researcher will look into the various theories and solutions postulated in resolving the problems.

1.3 SCOPE OF THE RESEARCH

This research work focuses attention on various rules for determining the proper law of contract entered into between parties from different countries, such as between a corporate organization in Nigeria and another corporate organization doing business in Germany. Also attention shall be focused on some essential requirements such

as offer and acceptance, consideration, capacity, performance of the contract, illegality and interpretation of the contract.

1.4 STATEMENT OF THE PROBLEM

International contracts entered into between parties from different countries for the execution of their various obligations is a document of extreme importance. Once parties endorse the agreement, they are bound by its terms and conditions.

The area that is very crucial in realizing their dreams is that which deals with determining the proper law that governs their rights and obligations in the contract should any dispute arise.

In the event of such dispute, the court is normally saddled with the onerous task of determining the proper law to apply in order to resolve the dispute. If the parties have expressly chosen a law of a particular country, say English law as the law to govern the contract, the problem is not over till the parties can prove that their choice is bona fide and legal.[5]

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5 See Lord Wright's definition of the proper law of contract in the case of *Vita Foods Products Inc. V. Unus Shipping Co. Ltd* (1939) A.C. 277.

Where the parties have expressly chosen the governing law can the courts go ahead to apply the law chosen? This is a problem because the law expressly chosen by the parties can only become the proper law to be applied by the court if it passes the objective test. However where the parties cannot expressly choose the law, problem arises as to which law of a particular country can be implied to govern the contract. To solve this problem the court has to look at the terms of the contract to be able to know which elements of the contract constitute the natural seat and thereby determine the proper law. The court can also look at the system of law with which the contract had its closest and most real connection.

This search is cumbersome because it does not entail looking at the facts of the case from one aspect. It entails looking at all the relevant facts and all the surrounding circumstances of the transaction in order to choose the proper law of the contract. Again, does the alleged contract fulfill all the essential requirements of a valid contract notwithstanding the fact that the parties have chosen the governing law? All these and more, form the statement of the problem.

1.5 **JUSTIFICATION OF THE RESEARCH**

The subject matter of this research - determining the proper law of contract under Private International Law is a subject of monumental importance. As a result of the emergence of technological advancement in virtually all spheres of human endeavour, the effect of globalization, the need for stronger and well managed organizations, companies all over the world embrace mergers, acquisitions, restructuring, consolidations etc in order to form a stronger group and dominate the world market.

To achieve above objectives there is the need to make contacts and search for investors. This search always results, in the final analysis, into signing of contract documents which bind parties to it. One of the important terms of this contract is the law that will govern the contract in the event of dispute. Therefore certain clause(s) stipulating the governing law and place of arbitration are commonly provided in these contracts.

These provisions will enable the parties to resolve disputes that may arise as the courts will rely on them when such problems arise. Therefore the proper understanding of the subject matter and

resolution of business disputes based on them will go a long way in enhancing business harmony, co-operation and growth among different corporate organizations around the world. It must be emphasized that it is not only in the formation of companies that the proper law is relevant, the proper law is also relevant in resolving contractual disputes between companies and individuals as well as companies and companies. Therefore once a dispute resulting from an international contract is resolved through the application of the proper law of contract, it enables the parties and their various organizations to move forward and forget about the past, learn from the consequences of their actions, principles and rules of law are made by the decisions of the court which create precedents for the courts below. All these combined results in the development of private international law as it relates to contracts.

1.6 **SIGNIFICANCE OF THE RESEARCH**

This research work is of importance to legal practitioners on international business law, legal advisers to multinational companies. It is also of importance and beneficial interest to private international law students. The Judges of our various courts of record who are saddled with adjudicating on issues brought before

them - deciding on proper law governing international contracts, will immensely benefit from this research. Businessmen and women, who have interest in legal literature, will find the research work equally beneficial.

1.7 **LITERATURE REVIEW**

The subject matter - determining the proper law of contract under private international law has generated heated comments and contributions by eminent legal scholars who propounded various theories which have assisted the courts of both Anglo-American and Continental countries in resolving issues emanating from international contracts. Despite their contributions, confusion and lack of proper understanding of the subject matter have made further inquiries inevitable.

Also many of these legal writers who have contributed much on this topic, have not fully discussed thoroughly the technicalities involved in determining the proper law of contract in a simplified and lucid manner for proper understanding by legal practitioners and non-legal practitioners alike. Consequently we had a situation where courts of different countries apply rules quite different from the others. For

example, American courts apply the lex loci contractus, following the English courts. Later Lex loci solutionis was applied only as an exception. American courts refused to apply the intention rule. Some Continental countries apply intention theory while some apply lex loci contractus and lex loci solutionis.

At a point, the doctrine of the proper law of contract in Europe became a legislative matter, making the decisions of courts tied to the provisions of the law. In this way, legal provisions became superior to judicial decisions thereby making it difficult to follow precedents. For example, Articles 3(1) and 4(1) of the Contracts (Applicable Law) Act 1990 of the Contractual Obligations Convention 1980 (usually referred to as the Rome Convention), provide that a contract 'shall be governed by the law chosen by the parties. Their choice must be express or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case' failing which, 'the contract shall be governed by the law of the country with which it is most closely connected'.

In as much as this Law tries to solve the problem of determining the proper law of contract, it gives room for forum shopping and does not

affect a party from a non-European country. The law only binds parties from different countries within Europe. It has therefore compounded the problem of determining the proper law because a party from non-European country may opt out of the provisions of this law and lean on the theory or principle applied by the courts of his own country.

It is therefore the responsibility of this research to as much as possible simplify these complications and technicalities arising from the writing of such authors and the certain comments by some Judges. This will go a long way in the proper understanding of what is determining the proper law of contract.

The need for the proper understanding of the subject matter is very crucial in that international contract as it stands today is the bedrock of industrial growth and development. No country is an island; therefore there is the need for business co-operation and understanding between parties from different countries. The interdependence nature of world commerce has made this co-operation unavoidable. For example the recent world economic summit which was held in Switzerland brought together various countries of

the world for discussions which bothered on cross fertilization of ideas on economic cooperation and integration. In this type of forum, various contracts are entered into and concluded by businessmen and women who participated from various countries of the world. In these agreements, legal practitioners who are versed in private international law, particularly those knowledgeable in issues of proper law of contract shall be consulted before the final signing ceremonies.

The Scholars who made significant contributions in this area of the law can be categorized into ancient and modern writers. The early writers have propounded theories which enabled the courts then to resolve conflict matters in contracts entered between parties from different countries. Huber[6] for example, propounded the lex loci contractus theory. This theory states that the law of the place where a contract is entered constitutes the governing law. However, where parties have another place in mind, then the law of the place of contracting will give way. The lex loci solutionis which means the law of the place where the contract is to be performed became an exception to the theory of place of contracting.

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6. Ademola Yakubu, *International Contracts* (Malthouse Press Ltd., Lagos 1999), p. 13.

Dumoulin[7] propounded the theory of party autonomy. It states that parties have unrestricted freedom to enter into contract. He stated with respect to contracts the principle that the will of the parties is sovereign, and that, if the will is not expressed, it must be sought in the surrounding circumstances, the place of contract being one, but only one of these circumstances. The question to ask is whether this autonomy is unlimited. As we shall see later, the autonomy of parties is not unrestricted.

The First American Restatement had made matters worse when it stated that the courts are considered powerless to depart from the firm grip of lex loci contractus rule.[8] And because of the influence of Professor Beale, party autonomy or intention of parties was also not followed. According to him the rule that the governing law for a contract is the law that the parties intend did not find any viable repose in the early American law. The intent of the parties to contract was far from the mind of the court. It was felt that the law must intend the place to govern the contract. He stated that allowing

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7. Ibid at p. 35.

8. Aurthur Nussbaum, "Conflict Theories of Contracts: Cases versus Restatement," (1942)*The Yale Law Journal*, Vol. 51, No. 6, p. 894.

the intention of the parties would not only be objectionable, it would be wholly unreasonable.[9]

It is difficult to agree with the provisions of the First Restatement and the writings of Beale, when one considers that at a point when the strict adherence of the lex loci contractus and lex loci solutionis rules could not produce the desired results in the resolution of contract disputes brought before the courts, they were abandoned and replaced with the principles of intention or party autonomy, a sort of the stone which the builders refused is become the head stone of the corner.[10]

As Rabel[11] rightly pointed out, the doubts whether parties may determine their law at all, may have been augmented by Beale's influence. Also, the unreasonable belief that parties can choose only between the law of the place of contracting and that of the place of performance seems to have increased as an effect of Beale's teaching.

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9. Ademola Yakubu, *op cit*, at p. 27.
10. Psalm 118 verse 22 *King James Version of the Holy Bible* p. 511.
11. Rabel, *The Conflict of Laws*: A Comparative Study, 2nd Edn., (University of Michigan Law School 1960), p. 377.

The confusion of the cases, so often deplored, would have been relieved in part, if the courts had always been told in no uncertain words that it is not at all in their discretion and free decision to refuse to apply a law which the parties agreed to apply.

The intention theory as we shall see later became the forerunner and guiding light to the modern view of the proper law. In fact the proper law in the modern view is the modification of the intention theory. Intention therefore became the foundation on which the proper law was built. It cannot be said to have been abandoned completely and or replaced with a different theory and therefore no longer relevant.

Ademola Yakubu branded this theory as obsolete and imaginary when he said "the modern approach has not done away with the idea that the parties are free to choose the law to govern their contract, but what is considered now is not the obsolete or imaginary choice of law but whether the parties have chosen the proper law or not."[12] This expression could lead a reader to believe that the intention theory is

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12 Ademola Yakubu, *op cit* at p. 50.

no longer applicable or it has been done away with and replaced with an entirely new theory.

This writer disagrees with the notion that intention theory is obsolete. The word obsolete means "no longer used because something new has been invented"[13] Parties to a contract till date have the freedom to enter into a contract, negotiate on their terms and conditions which bind them, sign the agreement and exchange same, as evidence of the contract.

Parties also have the freedom to choose their governing law, which will be applicable in settling any dispute that may arise out of that contract. Are all these not evidence of intention? What Ademola regards as obsolete is the selection of the law by the parties, which is subjected to further inquiry by the courts, as parties are no longer required to choose the governing law at will. This law is subjected to further test, to see whether it was chosen in good faith without any hidden agenda or capriciously made for the parties advantage. If this limitation on the parties is what constitutes 'obsolete' in the thinking of Ademola, I disagree with him, with all due respect. Rather what

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13. A.S. Hornby, *Oxford Advanced Learners Dictionary of Current English*, 6th Edn., (Oxford University Press, 2000), 805.

has happened is that, parties can choose their law but they must make sure that that law was chosen in good faith i.e. there was no attempt on their part to choose a law in order to make valid a contract which is already invalid.

Therefore, parties are still at liberty to choose their law or where they could not choose one, the court will imply or infer one for them or still where the terms and conditions could not enable the court to imply the proper law, the court could import the most closely connected rule to determine the proper law for them. It could be seen from the above that the intention theory is still very much valid and at the end of the parties' negotiation, their intention metamorphoses into what is called Memorandum Of Understanding (MOU) which leads to the final conclusion and signing of the contract proper.

Furthermore, the courts have not helped matters in the proper explanation of the proper law of contract. Their decisions brought confusion and complications.

For example, in the case of *Lloyd V. Guibert*[14] Willes, J. said "in such cases, it is necessary to consider by what general law the parties intended that the transaction should be governed, or rather to what general law it is just to presume that they have submitted themselves in the matter". In a similar decision, Lord Wright in *Vita Food Products Inc. V. Unus Shipping Co.*[15] said "it is now well settled that by English law the proper law of the contract is the law which the parties intended to apply."

The problem with above decisions is the use of the word intention without further explanation of what it meant. Intention is a problematic word which requires precise explanation so that we can know where we are going. Therefore there is apparent ambiguity in the use of the word intention by the two Law Lords. The complication and complexity involved raises some important questions. One, is intention used here subjectively - based on one's own ideas or opinion rather than facts, as to what constitutes the test to ascertain the

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14 (1865), L.R. 1 Q.B. 115 at pp. 120 - 121.

15 *Supra*, at pp. 289 - 290.

proper law of contract or objectively - not influenced by personal feelings or opinions but on clear facts i.e. the use of connecting factors as a test to ascertain the proper law of contract.

Secondly, does it mean that the parties directed their minds to the matter and in fact reached an agreed conclusion? In other words, should the test of reasonable man (i.e. looking at the objective angle as suggested by Willes, J.) be relied on as the true test or should the subjective test be applied? The two Law Lords did not proffer solutions.

From whatever angle the issue of intention is looked at, and the suggestions as to how to discover the intention of parties, no headway can be reached unless formidable and acceptable rules or tests are propounded to unravel the all time deadlock of discovering the intention of the parties. These theories shall form part of discussion in chapter three.

1.8 RESEARCH METHODOLOGY

The methodology adopted is the doctrinal research method - that is library oriented research and divided into two: (a) Primary Authorities which are Acts of the National Assembly and of the States and case laws. (b) Secondary Authorities consisting of relevant information from leading authoritative text books on the subject matter, international journals, opinions of specialists and practitioners on private international law. Adequate references have been made to all the materials consulted.

1.9 ORGANIZATIONAL LAYOUT

Chapter one of this research work introduces the subject matter by defining what is the proper law of contract and stating the aims and objectives of the research, scope of the research, statement of the problem, justification of the research, significance of the research, literature review, research methodology and organizational layout.

Chapter two starts with introduction of the old and classical theories. It discussed the lex loci contractus, lex loci solutionis and the theory of intention. The merits and demerits of these theories were also discussed.

Chapter three introduces determining the proper law of contract - the modern position and goes further to discuss its meaning, the express selection, limitation on the parties to choose the proper law, implied selection and the closest and most real connection.

Chapter four introduces the essential requirements and the proper law of contract and goes further to discuss offer and acceptance, consideration, capacity, performance of the contract, illegality and interpretation of the contract.

Chapter five which forms the concluding part of this research work consists of a summary of the entire work; as well as the writer's recommendations.

CHAPTER TWO

2.0 DETERMINING THE PROPER LAW OF CONTRACT - OLD AND CLASSICAL THEORIES

2.1 INTRODUCTION

In order to resolve questions arising from disputes from international contracts, various theories have been propounded by eminent jurists and writers. These thories, unlike those formulated under the common law, such as consideration, offer and acceptance, capacity, intention to create legal relations, misrepresentation etc, are more perplexing, complex and confusing. This is because we are dealing with situations where parties from different countries are contracting. And again there is no one type of contract, as there are variety of contracts.

It is therefore a problem to make a definite choice of law to govern a transaction, for example, between a Nigerian businessman and a French company, who have entered into a contract for the supply of petroleum products from Nigeria to France using an Italian ship and payment to be made in American Dollars into the bank account of the Nigerian businessman in London. This is the more reason why there is

no topic in the conflict of laws in regard to which there is greater uncertainty than that of contract.[1] This uncertainty comes into play in a situation as above, where a contract which contains one or more foreign elements, is brought before the court to determine which law governs it, the difficult and complicated question of determining the applicable law arises.[2]

The difficulty is as a result of multiplicity and diversity of connecting factors which are raised as issues from the case. For example, the following issues may have arisen in a different jurisdiction - the place of contracting, the place of performance, the residence of the parties and the business, place of payment which could be New York, the currency of payment which could be Dollars, Pounds Sterling or Naira, the domicile or nationality of the parties and so on. Which of these connecting factors will be considered as the decisive one? Our selection of the proper connecting factor will depend on the type of contract in question. The type of contract could be contract of sale, carriage of goods by sea or insurance, contract of employment etc.,

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1. Ernest G. Lorenzen, "Validity and Effects of Contracts," (1942)*The Yale Law Journal,* Vol. 51, No. 6, 565.
2. Abla J. Mayss, *Conflict of Laws*, (Cavendish Publishing Ltd., the Glass House, Wharton Street, London, 1994), p. 89.

and also the nature of the dispute - validity, illegality, non-performance, capacity, etc.

In an attempt to resolve the above multiplicity of issues or connecting factors, various theories have been propounded. The earliest theories which form part of this chapter are the Lex loci contractus or the law of the place where the contract is made, this theory gave birth to lex loci solutionis or the law of the place of performance of the contract. Where the two theories produced a road block to finding a solution, intention of the parties was applicable.

2.2 THE LAW OF THE PLACE WHERE THE CONSTRACT IS MADE - LEX LOCI CONTRACTUS

The latin maxim *lex loci contractus* means the law of the place where the contract is made. The early proponent of this theory was Bartolus.[3] He made a distinction between the natural consequences of a contract,[4] i.e. those inherent, intrinsic, internal or pertaining to the essential nature of the contract or what can be referred to as the essential requirements.

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3. Ademola Yakubu, *op cit.,* at p. 19.
4. Ibid.

According to him, these intrinsic matters are governed by the law of the place where the contract was made and the extrinsic matters or issues that comes after the contract is formed, i.e. the consequences arising subsequent to its formation, which he determined according to the law of the place which had been agreed upon for performance[5] (such as delay to deliver the goods within the stipulated period or negligence of the master, which results to damages to the cargo) are issues to be determined according to the law of the place where the contract is to be performed.

Another early proponent of this theory was Huber[6] who propounded that contracts are entirely governed as regards form and substance by the lex loci contractus and that if the parties in contracting have another place in mind, the lex loci contractus should not prevail. Huber's theory can be said to be the beginning of the search for the proper law of contract or rather it opened the door for this search.

The first English case to apply Huber's theory was *Robinson v. Bland*[7] where an action was brought to recover money won on a wager (gaming

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5. *Ibid.*
6. *Ibid* ., at p. 20.
7. (1760) 1 W.B. 1, 257, 258 - 259.

contract) made in France. The case for the defendant was argued by Blackstone (one of English renowned lawyers) who admitted that regard had often been paid to foreign laws in the case of contracts made abroad, as the parties might be supposed to refer to that law, but he argued that the courts would not enforce a contract which was prohibited by an English statute or the enforcement of which was contrary to public policy. Lord Mansfield adopting the lex loci contractus theory held that the general rule established where the contract is made, and not where the action is brought, is to be considered in expounding and enforcing the contract. But this rule admits of an exception where the parties at the time of making the contract had a view to a different Kingdom.

It is pertinent at this stage to ascertain what is "the place" for the purpose of attributing its law as the governing law of the contract. The literal meaning of "place" is a particular area or position or a city, town or village or a building or area of land used for a particular purpose.[8] The word is also applied to mean any locality, limited by boundaries, however large or however small. It may be used to

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8. A.S. Hornby, *op. cit*., at p. 884.

designate a country, state, county, town or a very small portion of a town.[9]

Going by the above definition of "place", it appears that contracts that can match the lex loci contractus theory are those concluded between parties in one locality, particular area or town or a designated territory. For example, a contract concluded between a Nigerian and an American in Nigeria will be governed by the Nigerian law, going by the lex loci contractus rule.

However, where parties are contracting from different countries, it will become difficult to determine the place where the contract is made, until the contract is concluded. For example, A, a businessman from Nigeria, has entered into a contract with B, a businessman from New York. B using the internet, signs the contract in New York. A, on his part, signs the contract documents in Nigeria through the internet same day. Which law of the place, New York or Nigeria, is the applicable law to govern this transaction? It becomes very difficult to say that the law of the place is Nigeria or New York.

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9. Henry Campbell Black, *Black's Law Dictionary* (St. Paul Minn. West Publishing Co. 1990), p. 1428.

By the application of this rule, courts, particularly American courts were considered powerless to depart from their countries conflict rules from the grip of the lex loci contractus; and in no case may the contrary intent of the parties be taken into account (the inflexible character of the doctrine).[10] The lex loci contractus became a rigid, inflexible and mechanical approach which was relied upon by Anglo-American courts as well as by Continental courts for several years.

At that time, the courts had already regarded it as a fixed rule to be applied, whenever a matter in relation to contract came before them. For example, the first American Restatement on Conflict of Laws provided its own version of the theory with extra features to the effect that this solution (lex loci contractus) is made even more rigid by the postulate that the place of contracting be determined by the internal rules on offer and acceptance, with no regard to the essential materiality of the contracts contemplated. The inflexible rule is extended to the effects of the contract, intrinsic and extrinsic validity which are to be treated in the same way.[11]

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13 Arthur Nussbaum, *op. cit*., at p. 895.

14 *Ibid.*

2.2.1. **MERITS AND DEMERITS OF LEX LOCI CONTRACTUS**

There are certain merits of the theory, even though it has its problems, arising principally from its rigidity. The lex loci contractus theory results to certainty and accurate forecast of the law to govern the transaction. If a contract is concluded in Nigeria between 'A' from Ghana and 'B' from Togo, no doubt Nigerian law of contract is applicable to resolve any dispute arising from this contract. The place of contracting therefore is always vivid and devoid of speculation. The application of any other law, say Gabon law, will be fortuitous and any decision by the court based on the application of Gabon law, will amount to injustice.

Its problem has to do with where parties are contracting from two different countries. For instance, A from Nigeria and B from France have concluded a contract in England. Following the lex loci contractus, English law is applicable. However, where the ship is a French ship with the master and the crew French citizens, payment to be made in French Francs and to the bank in France, the application of English law without taking into account the above connecting factors in favour of France will result to injustice or miscarriage of justice. Injustice in this example arise from the fact that England has nothing

to do with this contract, only that the contract documents were signed and exchanged in England. But notwithstanding that the trial court is obliged to apply English law simply because that is where the contract was effectively concluded.

Further, the place of contracting may be fraudulently inserted in the contract to give validity to an otherwise invalid contract. For example, a Nigerian businessman entered into a contract for the supply of foreign fabrics, which has been prohibited in Nigeria with an Italian businessman. The goods are to be sold to secret agents in Nigeria for sale to the public through the black market. The contract was concluded in Nigeria but the parties decide to choose Italian law because the selection of Nigerian law will definitely render the contract invalid and subject the parties to prosecution according to Nigerian law.

Again the place of contracting may be accidental or has nothing to do with the contract, as where a contract is entered in Germany between two Germans and French law is chosen as the governing law because the acceptance letter was posted in France. The reason why German law should be the governing law in this transaction is that the contract

has no foreign element in view. The parties are German citizens and are subject to German law of contract.

The contract elements may have factual links with several countries, each of which has some claim to be considered. Injustice will result if the law of the place where the contract is made is the applicable law and has no factual link with the contract.

2.3 **THE LAW OF THE PLACE WHERE THE CONTRACT IS TO BE PERFORMED - *LEX LOCI SOLUTIONIS***

The word performance means the fulfillment of the terms of the contract in every respect i.e. carrying it out or discharging it. If a time is fixed for the performance, it must be observed; if not, a reasonable time is to be followed. The same is true as to the mode of performance. The thing to be accomplished must be done in the manner prescribed, otherwise there is no performance. But where there are several ways in which a contract can be performed, and if there is no stipulation to the contrary, that method may be adopted which is the least burdensome to the defendant[12].

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12. Lord Chorley & O.C. Giles, *Slaters Merchantile Law* (Pitman Publishing Ltd., London, 1977), p. 102.

The primary place of contracting was supplemented by a secondary and again inflexible place of performance theory. Here where the law of the place cannot be determined the only alternative is to regard the place of performance as the proper law of the contract. Where all the parties have to perform their contractual obligations in the same country, it is very likely that the court will consider the legal system of that country as the proper law of the contract.

The lex loci solutionis rule was followed in the well-known judgment of Lord Esher in *Chatenay v. Brazilian Submarin Telegraph Co.*,[13] which has always been considered as the principal authority for the doctrine. In this case, X a Brazilian citizen resident in Brazil, executes in Brazil in the Portuguese language and in the form required by the Brazilian law in favour of A, a stock broker carrying on business in London, a power of attorney to purchase and sell securities. In so far as the power of attorney is intended to be acted upon in England its extent (at any rate, in so far as third parties are concerned), is governed by English law as the *lex loci solutionis*. Where all the parties have to perform their contractual obligations in the same country, it is very likely that the court will consider the legal

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13. (1891) 1 Q.B. p. 82 - 83

system of that country as the one with which the contract is most closely connected. Seen in terms of the modern development of the law, this it is submitted, is the practical meaning to be attached, since there is serious conflict as to the proper law to govern. In the above case, great weight will thus be given to the law of the place of performance as being the proper law of the contract, especially where the contract is made in one country but to be wholly performed in another.[14] The important decision of the Court of Appeal in the *Assuzione*[15] shows that, where both parties have to perform in a country other than that in which the contract was made, the argument in favour of the lex loci solutionis is very strong because the contract is almost certain to be more closely connected with the law of the place of performance than with any other law.

The lex loci solutionis only provides an exception to the theory of the place of contracting. The courts adopted the proper law in determining that place of performance.

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14. Dicey and Morris, *op. cit.,* at p. 745.
15. (1954) P. 150 (C.A.).

2.3.1. **MERITS AND DEMERITS OF LEX LOCI SOLUTIONIS**

This theory has some merits and demerits, which we shall now discuss. The lex loci solutionis does away with the inherent problems associated with the law of the place of contracting. For example where an Italian enters into a contract with a Nigerian for the shipment of crude oil from Nigeria to Italy, using Italian ship and payment in Italian currency, no doubt the place of performance is Italy and its law governs this transaction. But, if the contract was concluded in Nigeria, definitely the governing law will be Nigerian law applying the *lex loci contractus* rule. So, where the parties choose Italy as the place of performance the lex loci solutionis rule applies and Italian law shall be the governing law of the contract thereby doing away with the law of Nigeria as the lex loci contractus.

Another merit of the theory is that it is based on substantial connection between the contract and its governing law.[16] These factors such as the currency of payment, the time within which the

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16. J.H.C. Morris, *The Conflict of Laws* (Stevens & Sons Ltd., London 1984), p. 266.

contract must be completed, the place where the cargo is to be shipped, third parties obligation under the contract etc are connected with the law of the place of performance and the contract itself. Justice of the case therefore demands that the law of the place where those elements are connected to shall be the governing law.

The problem it poses is that where the contract is bilateral and each party is to perform from his own country, then there will be difficulty of deciding as to which country's law represents the law of the place of performance? In our above example, where the Nigerian and Italian have entered into a contract and each of them is to perform from his country, which law, Nigerian or Italian law should be the proper law? As where the Italian ship is to carry crude oil from Nigeria to Italy and the same ship is to carry Italian fabrics and shoes into Nigeria, which country is the place of performance, Nigeria or Italy?

Again, in a loan agreement, the lender may prefer repayment of the loan to be made in a place other than the place where the contract is concluded. The lender therefore may select another country other

than his own to be the place of repayment. For example, 'A' signs a loan of N500m with 'B' a French businessman. Ordinarily repayment should be in French Francs, but 'B' may prefer repayment of the loan by 'A' to be made in Dollars and payable into his bank account in London. As we shall see later, this mechanical approach does not produce the desired result in resolving international contract disputes.

2.4 **INTENTION OF THE PARTIES - THE CLASSICAL APPROACH**

Intention is a state of the mind and therefore an ambiguous and subjective term. How then does the court go about discovering the meaning of a term? It is commonly said that the court seeks to discover the intention of the parties; but this does not mean that the court will probe into the minds of the parties at the time when they conclude their bargain. A judge is not a psychologist, and the need for certainty demands a limitation of the evidence of intention[17].

Because of the difficulties associated with the lex loci contractus and lex loci solutionis, the classical approach, based on the intention of parties was innovated.

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17. Lord Chorley & O.C. Giles, *op. cit*., at p. 89.

The doctrine was formulated by Willes, J. in the case of Lloyd v. Guibert[18] when he said:

> *It is necessary to consider by what general law the parties intended that the transaction should be governed, or rather to what general law it is just to presume that they have submitted themselves.*[19]

However, there is a fatal ambiguity lurking in the formulation of his Lordship. The question is, did he mean that the proper law is the law intended by the parties, or the law which reasonable men in the position of the parties would presumably have intended? Again, should the doctrine be formulated subjectively or objectively? This is a question which has long been controversial among legal writers and judges.

Some support the subjective view since the parties have freedom to contract and choose their law, while others support the objective view i.e. looking at the matter from outside the terms and conditions of the contract and applying the test of the reasonable man.

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18. *Supra*, at p. 120
19. *Ibid* ., at p. 121

Westlake and Cheshire[20] preferred an objective formulation. According to them, the proper law is the law with which the contract has the closest and most real connection.

In the case of *Bonython v. Commonwealth of Australia*[21] the court looked at the intention of the parties and held Queensland law to be the governing law of the contract and not English law. From this decision, it can be inferred that what is intention of the parties is looked at objectively and not subjectively. Therefore, the court could perform this task by looking at the terms and conditions of the contract and the surrounding circumstances of the case and select the proper law for the parties as if that was their original intention.

In *Mount Albert Borough Council's* case[22] the court held that "the proper law of the contract is that law which the English court is to apply in determining the obligations under the contract. English law in deciding these matters has refused to treat as conclusive, rigid or arbitrary criteria such as *lex loci contractus* or *lex loci solutionis,*

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20. Cheshire & North, *Private International Law*, 9th Edn., (Butterworth, London 1974), p. 214.
21. (1951) A.C. 201
22. *Supra*, at p. 224.

and has treated the matter as depending on the intention of the parties to be ascertained in each case on a consideration of the terms of the contract, and the situation of the facts." Lord Atkin in the above case was of the opinion that

> *the legal principles which are to guide an English court on the question of the proper law are now well settled. It is the law which the parties intended to apply. The intention will be ascertained by the intention expressed in the contract if any, which will be conclusive. If no intention is expressed, the intention will be presumed by the court from the terms of the contract and the relevant surrounding circumstances.*[23]

Lord Wright in *Vita Food's* case[24] stated that "*it is now well settled that by English law the proper law of the contract is the law which the parties intended to apply*."[25]

The intention of the parties here is looked at subjectively i.e. the court determines the governing law from the four corners of the contract or from the terms and conditions as contained in their contracts. Where the parties expressly select the governing law, as it was done in *Vita Food's* case (supra) the court has no option but to apply the law chosen subject to certain objective tests. However,

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23. *Ibid.,* at p. 240.
24. *Supra*, at p. 289.
25. *Ibid* ., at p. 290.

where the parties have not expressly selected the governing law, the court will search for the governing law through the terms and conditions of the contract, as well as from the surrounding circumstances of the case. This was the situation in the *Assuzione*.[26]

The court was confronted with the problem of determining the intention of the parties. Here in pursuance of a charter party agreement signed in Paris after negotiation between brokers resident in France on behalf of French shippers, and brokers resident in Italy on behalf of Italian ship owners, the Italian steam ship *Assuzione* commanded by an Italian master, loaded a cargo of wheat at Dunkirk for delivery at Venice. During the voyage, the cargo was damaged and the charterers sued the ship owners for short delivery and damage to the cargo. The charter party was in the English language and used the printed form of Uniform General Charter of the Documentary Council of the Baltic. It contained additional clauses in the French language. It provided that freight and demurrage should be paid in Italian Lire in Naples. Bills of lading in the French language were signed by the master at Dunkirk and endorsed by the Italian consignees. The wheat was shipped under an exchange

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26. *Supra*

agreement made between the French and Italian governments but the ship owners did not know this. The Court held Italian law as the applicable law. The law was ascertained from the intention of the parties and surrounding circumstances of the contract.

The truth of the matter is that the intention of the parties as to the law by which the contract is governed is not generally expressed in the contract itself nor do the terms of the contract and the surrounding circumstances always point to an implied intention. In fact very often intention has no real existence.[27] The court in this situation therefore look at the connecting factors to the contract in order to ascertain the proper law. Dicey[28] stated under Rule 148

> *The term proper law of a contract means the law or laws by which the parties intended or may fairly be presumed to have intended the contract to be governed or (in other words) the law or laws to which the parties intended or may fairly be presumed to have intended to submit themselves*.

It could be seen that the parties are presumed to have the power to stipulate any law and that law alone shall determine all issues referable to the contract. They thus have the autonomy to choose the law to govern their contract. It is possible for the parties to

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27. Ademola Yakubu, *op. cit*., at p.40
28. *Ibid.,* at p. 38

express their intention in respect of the proper law to govern their transaction in case of any problem arising from the contract. Thus provisions may be made with respect to the law that would govern resolution of differences, outright breach or damages resulting from the contract. It has been stated that the express choice of law by the parties must not be disregarded even if it has no visible or real connection with the contract.[29]

This view is consistent with the decision of the Judicial Committee of the Privy Council in *Vita Food's* case[30] where it was stated that connection of the transaction with the English law which was chosen as the proper law of the contract was immaterial. By this, it is possible for the parties to "legislate" on the law to govern their transaction. Contrary to some views, this should not be objectionable after all, if the agreement of the parties could be called legislation, they do so only for themselves.

They are merely seeking to determine primarily what rights each shall have as against the other. They could not be said to be seeking to

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29. *Ibid.,* at p. 38
30. *Supra*, at p. 521

make law for other persons. It could be said that what they are trying to do is to alter by their agreement what would or might otherwise be the legal consequences of the transaction into which they are entering. The only caveat entered against this rule is that such agreement must not be contrary to public policy.[31]

2.4.1 **MERITS AND DEMERITS OF INTENTION THEORY**

The intention theory has some merits and demerits and they are as follows:

The parties to the contract are free to provide the terms and conditions which will bind them without external influence. Intention of the parties creates binding and enforceable contract between the parties. Where a contract is made and there are no rights and corresponding obligations or duty imposed, the question of law to govern it does not arise. For parties to have unrestricted freedom to make their contract produces convenience and certainty. In vivid terms parties know their rights and obligations. The proper law of the contract chosen by the parties enables the court to resolve any dispute arising from the contract amicably without further inquiry and

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31. Ademola Yakubu, *op. cit.,* at p. 39.

this at the same time saves the cost of litigation and delay of trial.

The demerits are that where parties do not choose the governing law, it becomes difficult to select the governing law by the court. The court may be tempted to adopt a subjective view in choosing the governing law. Again the result of such test may not produce good result.

The intention theory does not give room for external consideration or circumstances except from the terms and conditions of the contract. The result is the selection of a law which does not have any connection with the contract, unless that law is objectively ascertained. Parties can capriciously exercise their freedom by choosing a law for mere purpose of validating an illegal contract.

CHAPTER THREE

3.00 DETERMINING THE PROPER LAW OF CONTRACT - MODERN APPROACH

3.1 INTRODUCTION

In the preceding chapter emphasis was placed on old theories, where discussions were centred on Lex loci contractus, lex loci solutionis and the intention theories. In this chapter attention will be focused on a more satisfactory modern approach of selecting the proper law. This modern approach was evolved by the courts and it simply means that where parties expressly choose their governing law; such a choice, provided it is chosen in good faith and did not infringe on any subject matter prohibited by the law of the country chosen, shall be allowed by the court.

It also means that where the parties fail to choose the governing law expressly, their intention is to be inferred from the terms and nature of the contract; and where there is no choice express or implied of the proper law, the intention of the parties will be found from the surrounding circumstances of the contract. This approach has been tested, acknowledged and accepted as the only way to deal with disputes arising from the modern complexities of international

contract than the rigid and mechanical approach of the lex loci contractus, lex loci solutionis and the intention theories earlier on discussed in chapter two.

The first case to open the door of the modern approach to the proper law theory is *P. & O. Steam Navigation Co. v. Shand*[1] the plaintiff, who had been appointed Chief Justice of Mauritius, took a ticket in England for his passage from Southampton to Alexandria and from Suez to Mauritius on Board the defendant's steamships. An exemption clause excluded the defendant's liability for loss of or damage to passengers' luggage. The plaintiff's luggage was lost in Egypt.

The Supreme Court of Mauritius held that the contract was governed by French law (which prevailed at Mauritius) and that by that law the defendants were liable in spite of the exemption clause.

The Privy Council reversed this decision by laying down the general rule that English law is the proper law of the contract.

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1. (1865) Moo. P.C.N.S. 272

The holding of their Lordships opened the door for further inquiries into the proper law of contract and its further principles. They arrived at this decision based on the following objective test:

- the parties did not disclose the governing law of the contract
- the steamships were British ships
- the ticket was bought in England
- the payment was in pounds sterling
- the place of contracting was England
- the contract was not entered in Mauritius

From the above external factors, it could be deduced that the greater part of the performance was to be on board two English ships which for this purpose carry their country with them (flag of the ship) and that the application of English law must have been intended by both parties as the law of the place where the contract was concluded. English law therefore is the proper law of this contract and in choosing it, the court did not follow the old and rigid theory of the law of the place of contracting, but looked at the surrounding circumstances.

This decision pulled down the application of the lex loci contractus for a more flexible principle - the proper law of contract. From the issues that led to this decision, there is clear evidence that the decision of the Supreme Court of Mauritius was anchored on the lex loci solutionis - the law of the place of performance rather than that of the place where the contract was made; therefore the decision was reasonably based on the rigid approach of the lex loci solutionis principle which the House of Lords did not agree with but based their decision on the proper law by looking at the surrounding circumstances of the contract.

Having given the full meaning of what the modern approach is all about we shall now go ahead to see how the courts over the years have applied this approach in disputes involving international contracts. In resolving these issues, the courts look at the contract of the parties from three perspectives namely:

3.2.1 EXPRESS SELECTION OF THE PROPER LAW

It is now an acceptable and recognized principle that parties are free to express or select the law to govern their contract. When the

intention of the parties to the contract, regarding the law that governs their contract, is expressed in words, this expressed intention in general determines the proper law of the contract.[2] Parties have the right to agree on what is the governing law of their contract. Where they choose that law, they relieve the courts of the difficult task of determining it when the facts are well balanced. To allow them to do so thus injects some certainty into the proper law doctrine.

The intention of the parties is most of the time expressed in a simple statement that the contract shall be governed by the law of a particular country. For example, under clause 21 of the General Conditions of a Charter Party Agreement[3], it is expressly provided that:

"Applicable Law: This Agreement will be construed according to the laws of the United Kindgom".

The above express provision is to the effect that in time of dispute in

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2. Dicey and Morris, *op cit*, Rule 145, Sub-rule 1, at p. 753.
3. Agreement between *Ujus UK and StoneBoat Nig. Ltd*.

respect of this Charter Party Agreement, English law shall govern. Where there is a dispute, the court shall find no difficulty in applying

English law in resolving the dispute. In applying English law, the court will make further inquiry whether the parties chose English law in good faith or not and whether the law was chosen capriciously or not. This approach by the courts was adopted in England in the case of *Vita Foods Products Inc. v. Unus Shipping*.[4] A Newfoundland Statute provided that the Hague Rules should govern any contract of carriage from that country and that every bill of lading in respect of such carriage should contain an express clause making the rules applicable. A Nova Scotian Shipping Company, having agreed to carry goods from Newfoundland to New York, signed bills that omitted the express clause.

The bills expressly provided that the contract should be governed by English law. Both the rules and the bills themselves exempted the company from liability for the negligence of the master. Newfoundland was admitted as the country with which the contract

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4. *Supra*, at p. 277.

had the most substantial connection. There was no factual connection with England whatsoever. The cargo was damaged owing to the negligent navigation of the master, and the question was whether the company was liable.

The court held that the company is not liable, the reason being that the Newfoundland Statute by a provision that clearly affected the creation of the contract, compulsorily imposed the Hague Rules upon the parties and it was therefore by reason of these rules that the company justified their claim to exemption from liability.

The Privy Council however held that it could be rested upon the rules as the selection of English law to govern the contract was effective in spite of the fact that English law has no connection with the contract and by English law, the rules applied to an outward shipment from England, not to a shipment from any other country.

Lord Wright who delivered the lead judgment on behalf of other three Law Lords said:

> *Where there is an express statement by the parties of their intention to select the law of the contract, it is difficult to see what qualifications are possible, provided the intention expressed is bonafide and legal and provided there is no reason for avoiding the choice, on the ground of public policy*.[5]

The above case provides a solution to handle situations where parties' intention is expressly provided and the reaction of the court. Where a common intention of the parties can expressly be determined, it normally fixes the proper law of the contract. Parties are entitled to agree on what is to be the proper law of their contract. This is based on the doctrine of freedom of contract and provided such choice of law is done in good faith.

In the case of *Suisse Atlantique Societe d'Armement Maritime S.A. v. N.V. Rotterdamsche Kolen Centralen*[6] a contract made between Swiss Shipowners and Dutch Charterers for the carriage of coal from the United States to ports in Belgium, Holland and Germany was treated as governed by English law, although it had no connection of any kind with English law except that it contained a clause providing for arbitration in London.

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5. *Ibid.,* at p. 290.
6. (1969) 1 A.C. 361.

Presumably neither party pleaded that any other law than English law was applicable. The court held English law as the proper law. English law was allowed to apply by the court because this choice was chosen without capricious intentions.

The decisions in the Vita Food's and *Suisse Atlantique's* cases are very narrow in the sense that the parties choice of the governing law unconnected with the contract shall produce injustice from such decisions; particularly where that choice was made in order to circumvent the proper law which is more connected to the contract. With due respect to their Lordships, I am not comfortable with the decisions.

Again, can this freedom of the parties be exercised without some checks or whether parties may stipulate the law to govern their contract without restrictions? In many continental systems, such as France, Germany etc., it is required that the contract should have some connection as noted above, with the chosen law, which may

take the form of the place of making or of performance, or the domicile or nationality of the parties.[7] Lord Wright sensing the inadequacies of his decision, provided a restriction in the use of the words 'bona fide and legal'[8] which are to be present in the intention of the parties making a choice of the governing law. These words have curtailed the absolute powers of the parties in choosing the governing law or what can be regarded as a limitation to the selection of the proper law.

3.2.2 LIMITATION TO THE SELECTION OF THE PROPER LAW

The decision of Lord Wright in Vita Food's case places limitation on the intention of parties to choose the proper law to govern their contract. According to his Lordship once the parties have expressly chosen the law of a country to govern their transaction, whether this law has substantial connection with the contract or not is not very vital, provided the law chosen is bonafide and legal i.e. was not chosen for the benefit of one party at the expense of the other. Or the

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7. Wolf, *Private International Law*, "Autonomy in choice of laws," (1952) *American Journal of Comparative Law*, No. 134, p. 417.
8. *Supra,* at p. 290.

parties did not choose it in order to evade a law prohibiting the subject matter of the contract.

The test whether parties express selection of the proper law is bonafide and legal was in *Golden Acres Ltd. v. Queensland Estates Property Ltd*.[9] This is an action for specific performance of a contract for sale of land on Queensland, called Gold Coast. Under the settlement, the defendant consented to the making of the decree sought to the payment out of court, of the sum of $10,800.00 which sum represented the purchase price for the land.

Complications arose when a claim was made by a third party, Freehold Land Investments Ltd, to a portion of the money paid into court. The claim was made upon the basis of a deed executed by the defendant in favour of the claimant company and was in respect of commission alleged to be due to the claimant company which had acted on behalf of the defendant in the sale of the land to the plaintiff. One issue that arose with respect to the claim was whether the deed relied upon

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9. (1969) Qd. R. 378.

by Freehold Land Investments Ltd was not invalidated by the Auctioneers, Real Estate Agents, Debt Collectors and Motor Dealers Act 1922 - 1961, section 23 of which provides that a Real Estate Agent shall not be entitled to claim commission or other remuneration unless he is the holder of the requisite license and unless the commission does not exceed that prescribed by regulations made after the Act. If Queenland law applied, the deed was ineffective since Freehold Land Investments Ltd did not possess the requisite licence and the remuneration exceeded that permitted under the Act. However, the parties had inserted in the deed the provision that "for all purposes arising under this agreement, the same shall be deemed to be entered into the colony of Hong Kong". As the deed had in fact been executed in Queensland.

Hoare J. treated the clause as one involving a choice of Hong Kong Law as the law to govern the contract. The Judge was consequently faced with the question whether the choice was effective to avoid the operation of the Queensland Statute.

Freehold Land Investments Ltd claimed that the choice was a bonafide one since, although the land itself was situated in

Queensland, the company was seeking, on behalf of the defendants to find purchasers of Gold Coast land who were themselves resident in the Far East and in particular in Hong Kong. The Judge was satisfied however that the selection of a law other than that of Queensland was made for the specific purpose of avoiding the consequences of the illegality which would follow if Queensland law applied. The Judge concluded that the choice of Hong Kong law was not bonafide and proceeded to determine the case on the basis that the law of Queensland was applicable to the claim.

Therefore, no court, will give effect to a choice of law if the parties intended to apply it in order to evade the mandatory provisions of that legal system with which the contract has its most substantial connection and which for this reason, the court would, in the absence of an express or implied choice of law, have applied. This could be the reason why the court in Golden Acres Ltd's case refused to apply the law of Hong Kong to the contract of the parties, that is the contract between the claimants Freehold Land Investments Ltd and the defendants Queensland Estates Property Ltd.

The principle laid down in Vita Food's case which limits the intention of the parties is very much in operation. The old and subjective rule that the law to govern contract of the parties must be derived from the intention of the parties, and no more, has given way to the objective one - that intention of the parties is only one factor to be taken into consideration; also the express choice of law as being the governing consideration where a system of law is chosen which has no real or substantial connection with the contract looked upon as a whole.[10] In Boissevain v. Well[11] Lord Denning held that:

> *I do not believe that parties are free to stipulate by what law the validity of their contract is to be determined. There intention is only one of the factors to be taken into account.*

For purposes of arbitration the court will not apply any law as the proper law which is unconnected with the contract. In *Compagnie d'Armament Maritime S.A. v. Compagnie Tunisiene de Navigation S.A.*[12] This is a contract for the carriage of 300,000/350,000 tons of oil was printed on a form appropriate to a charter party. Clause 13 of the form stated that "This contract shall be governed by the laws of

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10. *Re Herbert Wagg & Co.* (1956) Ch. 323, at 341 (per Up John J.)
11. (1949) 1 K.B. 482
12. (1971) A.C. 572.

the flag of the vessel carrying the goods". Clause 18 stated "all disputes to be settled in London."

Clause 13 was held by the court of Appeal to be meaningless in the case of a contract which, as here, contemplated that it would be performed in a number of different vessels flying different flags. Once this clause was ignored, the proper law was held to be that of the chosen country of aribitration, England. However, the House of Lords decided that the arbitration clause was not, in fact, to be conclusive as to the proper law and a bare majority felt able to interpret clause 13 as referring to the law of the flag of the ship primarily used to carry the cargo. This was held to be French law.

An arbitration clause is generally intended by the parties to operate as a choice of the proper law of the contract and should be so construed by the court. Where this intention is not clear from the clause, the court will abandon, it and look for alternative clause or term to ascertain the proper law of the contract.

Where parties have chosen the proper law which the court find difficulty in determining, the choice cannot be rendered ineffective.

In the case of *The Blue Wave*[13] The court held that a clause providing for the application of the law of the country where the carrier has his principal place of business should be given effect to despite the fact that ascertainment of the proper law was not easy. This decision softens the strong position of the objective theory.

3.3 IMPLIED SELECTION OF THE PROPER LAW

It is not in all cases that parties to a contract expressly choose or select the law that governs their contract. Where express selection is visible by a statement that the governing law of this contract is English law, the courts have no difficulty in determining the proper law of the contract. However, problem arises where the parties' intention is not expressly shown in the contract. When the intention of the parties to a contract with regard to the law governing the contract is not expressed in words, their intention is to be inferred from the terms and nature of the contract, and from the general circumstances of the case, and such inferred intention determines the proper law of the contract.[14]

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13. (1982) 1 LL.L.R. 151
14. Dicey and Morris, *op. cit*., Rule 145, Sub-rule 2, p. 761.

In the case of *Jacobs Markus v. Credit Lyonnais*[15] the plaintiffs were esparto merchants and the defendants a banking company respectively, both carrying on business in London. By a contract made in London, the defendants agreed to sell to the plaintiffs 20,000 tons of Algerian esparto. By the terms of the contract, the esparto was to be shipped by a French company at an Algerian port over a period of twelve months, in equal proportions per month as far as possible. Provision was made by the contract for the determination of the quantity for each month; plaintiffs were under obligation to provide ships or steamers to take delivery at a certain specified daily tonnage. The esparto was to be paid for by the plaintiffs in cash in London on or before arrival of the ship or ships at port of destination less interest at 5% for the unexpired portion of three months from date of bill of lading, for the full amount of the invoice based on shipping weight. The defendants made one monthly delivery in accord with the contract but failed thereafter either wholly or in part to give notice of subsequent monthly deliveries or to make delivery of the quantities

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15. (1884) 12 Q.B.D. 589

specified. An action being taken for damages for breach of contract, the defendants pleaded that at the projected time of performance of the contract there was an insurrection in Algeria. This caused their non performance of this contract. The plaintiffs claimed that the contract was governed by English law and rejected the defendant's claim.

The crucial focus of this case is that the parties did not expressly provide the governing law of their contract. Therefore to determine this law, the court looked into the four corners of the contract to make this determination. Bowen L.J. said:

> *The first matter we have to determine is, whether this contract is to be construed according to English law or according to French law. To decide this point, we must turn to the contract itself, for it is open in all cases for parties to make such agreement as they please as to incorporating the provisions of any foreign law with their contracts. …. In such a case the only certain guide is to be found in applying sound ideas of business, convenience and sense of the language of the contract itself with a view to discovering from it the true intention of the parties. In the present case the contract was made in London between merchants carrying on their business in the city of London and payment*

> *was to be made in London, presumably therefore, we should infer that this was an English contract and intended to be governed by the English law.*[16]

It can be inferred from the above decision that where parties expressly select the proper law of their contract, there is no presumptions of their intention, the highest the court can go is to test the conscience of the parties towards such selection to see whether the choice was done in good faith and there is no infringement of public policy.

It is clear that the parties did not select the law to govern their contract as can be seen from the facts of this case. Determining the governing law under the circumstances is by looking at the implied intention of the parties from the terms and nature of the contract and other surrounding circumstances. Where the intention of the parties point to a particular country, it will give a strong implication that the law of that country or place should be applied. We can see vividly from the above case that since the contract was entered and concluded in London between English resident houses, and under which payment is to be made in England upon delivery of goods from up

16. *Ibid.,* at p. 601

country in an Algerian port, does not put an end to the inference that the contract remains an English contract between English merchants to be construed according to English law and with all the incidents which English law attaches to the non-performance of such contracts.[17]

Another way of determining the proper law from the implied intention of the parties, is the provision of arbitration clauses in the contract. In *Hamyn & Co. v. Talisker Distillery & Ors*[18] In 1892 X and A entered in London into a contract which was to be performed in Scotland, except as to the arbitration clause. By this way any dispute arising out of the contract was to be settled by arbitration by two members of the London Corn Exchange or their Umpire in the usual way.

In an action brought by the firm in Scotland for implementation of the contract and for damages, the English firm pleaded that the action was excluded by the arbitration clause. The Scotish courts held that the clause was governed by the law of Scotland, in as much as the country was the locus solutionis and that the reference, being

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17. *Supra,* at p. 642.
18. (1894) A.C. 202

to arbitrators unnamed, was therefore invalid. It was held by the House of Lords that the contract was governed by English law according to which the arbitration clause was valid, and deprived the Scotish courts of jurisdiction to decide upon the merits of the case, unless the arbitration proved abortive. Lord Watson held that:

> *In my opinion, the clause of reference is expressed in terms which clearly indicate that the parties had in contemplation and agreed that it should be interpreted according to the rules of English law. If they had stipulated that all disputes arising out of the contract were to be decided in the Court of Session, should have been of opinion that they had in view the principles of Scotch law, and meant that their mutual stipulations should be construed according to these principles. And to my mind their selection from the membership of a commercial body in London of a conventional tribunal which is to act in the usual way or in other words, in the manner which is customary in London, indicates no less conclusively that in agreeing to such an arbitration they were contracting with reference to the law of England.*[19]

It can be implied from the above decision that if the parties agree that arbitration shall take place in a given country; this usually permits the inference that the law of that country was intended to be the proper law of the contract. The provision in a contract of sale for

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19. *Ibid.*, at pp. 212 - 213.

English arbitration imports English law as the law governing the transaction, and those familiar with international business are aware how frequent such a provision is, even when the parties are not English and the transactions are carried on completely outside England.[20]

In the case of *Tzortzis v. Monark*[21] a contract made and to be performed in Sweden for the sale of a ship by Swedish sellers to Greek buyers had no connection whatsoever with English law except that it contained a clause providing for arbitration in London.

The court of Appeal held that English law was the proper law of the contract. Salmon L.J. said: "the arbitration clause raises an irresistible inference which overrides all other factors."[22]

However, where the place of arbitration chosen by the parties has no connection with the contract, the court will disregard such choice and determine the proper law from the terms and nature of the contract. The limits of the choice of arbitration was reached in the case of

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20. *Ibid* ., at pp. 277 - 290.
21. (1968) 1 W.L.R. 406 (C.A.).
22. *Ibid* ., at p. 414.

Compagnie d'Armament Maritime S.A. v. Compagnie Tunisienne de Navigation[23] French ship owners contracted with a Tunisian Company for the shipment of oil from one Tunisian port to another. The contract was in English form and language and provided in clause 13 that the contract was to be governed by the laws of the flag of the vessel carrying the goods. Clause 18 stated that disputes were to be settled in London.

Although the House of Lords by a bare majority, concluded that clause 13 was not meaningless, and could be construed as a reference to French law, it was unanimously agreed that, if clause 13 was inapplicable, the arbitration clause was not decisive. Such a clause is an important factor, and may often be a decisive one, but it is not a conclusive factor pointing to a choice by the parties of the country of the arbitration. Lord Diplock said:

> *The fact that they have expressly chosen to submit their disputes under the contract to a particular arbitral forum that of itself gives rise to a strong inference that they intended that their mutual rights and obligations under the contract should be determined by reference to the domestic law of the country in which the arbitration takes place, since*

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23. *Supra*, at p. 584E

> *this is the law with which arbitration sitting here may be supposed to be most familiar. But this is an inference only. It may be destroyed by inferences to the contrary, to be drawn from other express provisions of the contract or relevant surrounding circumstances, and those inferences may be so compelling as to lead to the identification of another system of law which the parties must have intended to be the proper law of the contract.*[24]

The arbitration clause could be ascertained as the proper law of the contract only if it is decisive and could be determined along with other surrounding circumstances considered in totality and or as a whole in this regard. Lord Wilberforce stated it more vividly thus:

> *An arbitration clause must be treated as an indication to be considered together with the rest of the contract and relevant surrounding facts. Always it will be a strong indication. But in some cases it must give way where other indications are clear.*[25]

In spite of this decision, it could be said that the place of arbitration is usually given a prominent position in the determination of disputes between parties. In difficult cases, especially where two or more countries are connected with the contract and there are substantial connections pointing towards all of these other countries, for example

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24. *Ibid.,* at pp. 604 - 605.
25. *Ibid.,* at p. 600.

where one is searching for a single proper law among the many systems concerned with the supply, delivery, transport, shipment, discharge, the residence or nationality of the parties or the place of making the contract, resort to the single place of arbitration might well claim the commercial advantages of simplicity and certainty but injustice is the resultant consequence if above presumption is applied.

Intention of the parties as to the proper law of contract can also be inferred by such factors as form of the document involved in the contract. In the case of *The Adriactic*,[26] the plaintiffs were a firm carrying on business in England with a branch office at Alexandria. By a freight engagement note the plaintiffs agreed to reserve room for certain cotton-seed to be shipped to England by a steamship to be specified. Later, the plaintiffs as charterers, chartered the Swedish steamship Adriatic and the cargo of the defendants was loaded on board.

The plaintiffs, purporting to act as agents only, issued bills of lading whereby the cargo was to be delivered in London to the order of the

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26. (1931) at pp. 241 - 254

defendants on payment of freight. In the course of the voyage the vessel came into collision with another vessel and was badly injured, the cargo was discharged at Cadiz and delivery was taken there by the defendants. The plaintiffs, suing on behalf of the ship owners, claimed pro rata freight which they claimed was payable either by the law of the flag (Sweden) or the lex loci contractus (Egypt). Pro rata freight is not payable under the law of England.

It was held that the presumption of the law of the flag or of the lex loci contractus were displaced by the existent circumstances inter alia, the use of a common English printed form for both charter party and bill of lading, the use of documents in the English language and containing phrases peculiar to English mercantile documents, the fact that delivery and payment were to be made in London, that the defendants were a British firm and that the British position in Egypt had been dominant for many years and that the freight engagement notes did not specify a ship of any particular nationality. Hence it was held that the parties must be taken to have intended English law to have prevailed and the claim failed.

Another method of looking at the intention of the parties in order to ascertain the proper law of the contract is to look at the style the contract documents are drafted and the language in which the contract is couched. In the case of *Chatenay v. Brazilian Submarine Telegraph Co.*[27] The plaintiff who was a Brazilian subject and resident in Brazil, executed in favour of one Broe, a stock broker carrying on business in the city of London, a power of attorney to purchase and sell shares in public companies and public funds. The power of attorney was in the Portuguese language and was executed by the plaintiff in Brazil with the formalities required by the Brazilian law.

Broe, purporting to act under the power of attorney, disposed of certain shares in the defendant company which were the property of the plaintiff and registered in his name. Broe did not account to the plaintiff for the proceeds of the sale of these shares, the purchasers of which were registered as owners in the books of the company. The plaintiff issued an originating summons asking for the rectification of

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27. *Supra,* at p. 79.

the register by inserting therein his name as holder of the shares, and an issue was directed to be tried by a jury in London to determine whether the plaintiff was entitled to have the register so rectified. Before this issue came on for trial an order was made that the question whether Brazilian or English law was to govern the construction of the power of attorney, should be tried by a judge without a jury. The matter came on before Day J. who decided that English law was to govern the construction of the power of attorney, and a certificate to that effect was accordingly made out. Lord Esher M.R. held:

> *The question raised is, what is the meaning of that document? Now I agree that it has one meaning and no more; and the question is, what was the meaning of the plaintiff when he wrote that document? The court has to ascertain that meaning from a consideration of what it is that was written under the circumstances in which it was written; that is, in other words, having regard to the words used, and to the surrounding circumstances at the time they were used. Now, this writing was a business document, written in Brazil, in the Brazilian language and with the formalities necessary according to the Brazilian law and custom, by a man of business carrying on business in Brazil…. a true translation is the putting into English that which is the exact effect of the language used under the circumstances.*[28]

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28. *Ibid.*, at p. 82.

The judgment of the lower court was affirmed because from the language and style of the document it was clear that parties intended that English law shall govern their contract.

Bowen L.J. in *Jacobs v. Credit Lyonnais*[29] summarized in his ruling that the residence of the contracting parties, the character of the contract and the nature of the transaction are determinant factors which enable the court to inquire into the intention of the parties as to ascertain the proper law to govern their contract.

The currency of the country in which payment is to be made could also be a determinant factor. Thus in the case of *R. v. International Trustee for the Protection of Bondholders*[30] The British Government under the powers of the War Loan Act 1916 arranged to borrow a sum of $250 million in the United States and in pursuance of the scheme, the British Government offered in New York $5^{1/2}$ loan convertible gold notes the principal and interest where under were to be payable in

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29. *Supra,* at p. 589.
30. (1937) A.C. 500.

NewYork in United States gold coin or at the option of the holder, in London in Sterling at a fixed rate of $4.86^{1/2}$ Dollars to the Pound.

The gold notes were to be secured by pledge of certain securities with a New York banking company. The notes were to be convertible into bonds of a certain specified type. The notes were accordingly issued and the written instrument of pledge was executed and the securities deposited there under accordingly. In determining the law proper of the contract between the parties, Lord Atkin held:

> *various questions have been raised in this case; but that which comes first under consideration is what is the proper law of the contract. The legal principles which are to guide an English court on the question of the proper law of a contract are now well settled. It is the law which the parties intended to apply. Their intention will be ascertained by the intention expressed if any, which will be conclusive. If no intention be expressed, the intention will be presumed by the court from the terms of the contract and the relevant surrounding circumstances. Now beginning with the Notes, what is the true inference as to the intention of the parties as to the proper law of the contract contained in them? They (the Notes or Currency) were issued in America, they were expressed in terms of American currency, they were to be paid on one option in America on a value estimated by reference to American coins.*

He therefore concluded that American law was the proper law of the whole transaction.[31]

Other surrounding circumstances such as the flag of the ship, ownership, the destination, the master of the ship, the currency of payment, endorses of the bill of lading etc enable the court to ascertain the proper law of the contract. In the case of *The Assuzione*[32] in pursuance of a charter party signed in Paris after negotiations between brokers resident in France on behalf of French shippers and brokers resident in Italy on behalf of Italian ship owners, the Italian steamship *Assuzione*, commanded by an Italian master, loaded a cargo of wheat at Dunkirk for delivery at Venice. During the voyage, the cargo was damaged and the charterers sued the ship owners for short delivery and damage to the cargo.

The charter party was in the English language and used the printed form of Uniform General Charter of the Documentary Council of the Baltic and Whitesea Conference ('GENCON'). It contained additional clauses in the French language and provided that freight and

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31. Edward I. Sykes, *Cases and Materials on Private International Law,* 2nd Edn., (Sweet & Maxwell Ltd., London 1969), p. 653.
32. *Supra*, at p. 150.

demurrage should be paid in Italian Lire in Naples. Bills of lading in the French language were signed by the master at Dunkirk and indorsed by the Italian consignees. The wheat was shipped under an exchange agreement made between the French and Italian government, but the ship owners did not know this.

The court held Italian law as the proper law. The decision was based on the fact that, though the parties' intention was not stated upon the subject, the court has to look at their intention from the surrounding circumstances as follows: the ship was an Italian ship, which was owned by two Italians in partnership, a ship wearing the Italian flag, the master was an Italian, the contract was for carriage from a French port to an Italian port, the cargo was to be delivered at an Italian port, it is right to say that loading was at a French port and discharging at an Italian port, the charter party provided that freight and demurrage should be paid in Italian currency. All these linkages point to Italy as the place where the contract is to be performed, hence its law shall govern the contract. The place of performance is only one factor the court took into consideration; other surrounding circumstances also played important part.

In the case of *Re Missouri Steamship Co.*[33] one Munro, an American citizen residing in Boston, shipped cattle at Boston for England in a ship owned by an English company. The contracts of shipment (which were signed in Boston) were in the English form and contained a clause purporting to exclude the liability of the company for, inter alia the negligence of the master or crew and there was a similar stipulation in the bills of lading.

By the law of Massachusetts such a stipulation in the case of a common carrier was void. The vessel was wrecked and the cattle were drowned. Munro lodged a claim in respect of the loss in the liquidation of the company which was rejected. For the purposes of the claim, it was admitted that the cargo was lost through the negligence of the master, and crew. The Court of Appeal held that the parties contemplated being governed by English law in their contracting relations so that the question of liability was determinable by English law.

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33. (1889) 42 Ch.D. p.321.

Fry L.J. was of the opinion that:

> *According to the law of England, the contract would be good in the terms in which it stood. Whereas according to the law of the United States important terms of the contract would be excluded from it. This is to my mind, a very cogent consi-sideration to show that what must be presumed to have been the intent of the parties was this - that the law which would have the contract valid in all particulars was the law to regulate the conduct of the parties.*[34]

In the above case, the court found it difficult to ascertain the intention of the parties from the terms of the contract. The application of presumption to ascertain this

Still on implied selection of the proper law, in the case of *Adel Kamel Barsoum v. Clemessy International*[35] the appellant sued the respondents, French companies, for breach of contract which was to the effect that the appellant would be entitled to a 5% commission from the payment arising from all the jobs executed in Nigeria by the respondents. It seem that the respondents did not live up to their obligations as per the said contract, hence the appellant sued them claiming a number of reliefs including a declaration that he was entitled to a commission of 5% as referred above.

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34. *Ibid*., at p. 341.

35. (1999) 12 NWLR (Part 632), p. 516.

An injunction restraining the respondents from claiming more than 95% of the contract value and an order directing that the 5% commission be paid into an escrow account, in the name of the appellant.

The statement of claim of the appellant did not disclose where the contract was entered into and where it would be performed. However, the contractual sum was to be collected in Switzerland. The appellant was later granted leave to issue and serve the writ of summons and statement of claim out of jurisdiction (in France). He was also granted an interim order of injunction restraining the respondents and their agents from withdrawing any money from the Central Bank of Nigeria, Federal Ministry of Mines, Power and Steel and other associated bodies.

Thereafter, the respondents applied for the discharge of all the orders made by the court. The respondents also applied that the appellant's motion on notice be stayed pending the application for discharge. The main contention of the respondents was that the court lacked jurisdiction in that the contract was neither entered into, nor to be performed, within the jurisdiction of the court. The

appellant's counter affidavit was to the effect that the contract was negotiated in Nigeria. According to him, the terms already agreed were communicated to him in his address in London.

The trial court in its ruling declined jurisdiction to handle the matter holding that the interest of justice would be better served if the proceedings were done abroad since the respondents were in France and all the contract documents were in French. Furthermore, the payment claimed by the appellant was to be made in Switzerland.

On appeal by the appellants, the Court of Appeal sitting in Lagos unanimously dismissed the appeal. The court held:

> *On duty on court to give weight to intention of parties in deciding forum convenience, the court shall in considering a matter as in the instant case between parties who appear to be resident abroad, though one partly is half resident within jurisdiction (Nigeria), give weight to the intention of the parties by which they will be held to be bound by their agreement.*[36]

In order to choose the proper law based on implied intention of the parties from their contract the court went further to hold:

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36. *Ibid*., at p. 526 paras. A - B

> *In general, the court has jurisdiction in an action in personam against any person who is present in the territorial jurisdiction of the court when the writ of summons or other originating process is served upon him. As a general rule, the domicile, resident and nationality of the parties are immaterial. In the instant case, the statement of claim did not disclose where the contract was entered. The contract document was written in French and was only translated to English by an academic don brought to the trial court. Even the agreed fee was collectable in Switzerland and not Nigeria. Therefore, this is not a case where the local court will have jurisdiction.*[37]

In the above case, because the parties did not choose or disclose the governing law of their contract from the translated copy of the contract, the court has to discover the implied intention of the parties from the four corners of the contract document and conclude that Switzerland and not Nigeria is to assume jurisdiction in this case; therefore its law shall apply in resolving the case.

In *Sonar (Nig.) Ltd., & Anor. v. Partenreedri, M.S. Norwind & Anor.*[38] the Supreme Court of Nigeria was to resolve (among other issues) the contention whether upon an express stipulation of a foreign jurisdiction in a contract a court which is not mentioned in the

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37. *Ibid*., at p. 527 paras. F - G & G - H
38. (1988) N.S.C.C. (Part 11), p. 28

contract cannot entertain the action.

Eso J.S.C. held that "it is trite law right from the decision in the nineteenth century in the case of Carlill V. Carbolic Smoke Ball Co.[39] that the tests by the courts in order to determine the intention of the parties to a contract have been objective rather than subjective. The proceedings brought by the plaintiffs against the defendants in this case shall proceed to be heard by the Federal High Court up to determination of the action."[40]

The court based the decision on the fact that since the parties were silent on the court that should entertain the matter despite the express stipulation of a foreign jurisdiction clause in the contract and also the fact that the foreign law agreed by the parties was time barred, it became imperative that the intention of the parties from the terms of the contract is to resort to Federal High Court therefore the proper law to govern this contract by implication is Nigerian law.

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39. (1893) 1 Q.B. 256.

40. *Supra*, at p. 520.

3.4. THE CLOSEST AND MOST REAL CONNECTION

When the intention of the parties to a contract with regard to the law governing it is not expressed and cannot be inferred from the circumstances, the contract is governed by the system of law with which the transaction has its closest and most real connection.[41] This is an objective test of the reasonable man, where the Judge, putting himself in this position determines the proper law for the parties. He attempts to ascertain not the non-existent intention of the parties themselves but how a just and reasonable person would have treated the problem.

In *Mount Albert Borough Council v. Australasian etc Life Insurance Society Ltd*[42] The appellants, a New Zealand borough council and a local body within the New Zealand Local Bodies Loans Act, borrowed money for public works from the respondents, a company incorporated in Victoria, Australia, and carrying on business in Australia and New Zealand. As security for the loan the appellants issued a New Zealand debentures totaling one hundred and thirty thousand

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41. *Supra*, at p. 201.
42. (1938) A.C. 224.

Pounds Sterling repayable in Melbourne Victoria, and bearing interest payable in Melbourne half-yearly. The debentures were issued under the Local Bodies Loans Act of New Zealand, and the loan and interest were secured on a special rate.

The respondents claimed certain interest due on the principal amount. The appellants, however paid three thousand, two hundred and fifty pounds sterling, alleging that as the interest was payable at Melbourne, the payment was governed by Financial Emergency Act of Victoria, which provided for a reduction in the rate of interest on mortgages and other securities. Lord Wright said:

> *The parties may not have thought of the matter at all. Then the court has to impute an intention or to determine for the parties what is the proper law which, as just and reasonable persons, they ought or would have intended if they had thought about the question when they made the contract.*[43]

This is an objective test which imposes the proper law on the parties where they could not provide the law expressly or where the law cannot be implied or inferred and cannot be ascertained from the

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43. J.H.C. Morris, *Cases on Private International Law*, 4th Edn., (At the Clarendon Press Oxford 1980), p. 267.

surrounding circumstances imbedded in the terms and conditions as well as the nature of the contract. The principle is therefore to look at what constitutes the proper law from the outside or what can be regarded as third parties i.e. what reasonable men in the standing of the parties, would regard as the proper law of the contract, after examining the surrounding circumstances of the case as reasonable businessmen who are in the same footing and standing as the contracting parties would have examined same. These are sensible persons in the position of the contracting parties, if their attention had been directed to the contingencies which escaped their notice but within the Judge's knowledge.

In the case of *Re-united Railways of Havana and Regla Warehouses Ltd*[44] Lord Denning held that "*the test is simply with what country has the transaction the closest and most real connection.*"[45]

The criteria formulated to assist the court in determining the proper

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44. (1961) A.C. 1007.
45. *Ibid.,* at p. 1068.

law through the test of a reasonable man includes the place of contracting, the place of performance, the places of residence or business of the parties, and the nature and subject matter of the contract.

In the case of *Bonython v. The Commonwealth of Australia*[46] the Queensland Government raised money by the issue of debentures of denominations of 1,000 and 500 pounds secured upon the consolidated revenue of the state of Queensland. The moneys there under were by the terms of the debentures made payable on the 1st January, 1945 either in Brisbane, Sydney, Melbourne or London at the option of the holder, but notice had to be given to the treasurer of the colony on or before 1st July, 1944, of the place chosen for presentation of the debenture.

The holders were expressed to be entitled to the amount payable there under in pounds sterling. The plaintiffs, who were holders of some of the inscribed stock, exercise their option for repayment in

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46. *Supra*, at p. 201.

London and claimed to be entitled to be paid in London the face value of their stock in English currency or alternatively, to be paid in Australia the equivalent in Australian currency of such value in English currency. The High Court of Australia by a majority decision rejected the plaintiffs claim. They appealed. Lord Simonds held that:

> *The mode of performance of the obligation may, and probably will be determined by English law; the substance of the obligation must be determined by the proper law of the contract, i.e. the system of law by reference to which the contract was made or that with which the transaction has its closest and most real connection.*[47]

Applying this test to the present case, his Lordship found in the circumstances overwhelming evidence that it was to the law of Queensland that the parties looked for the determination of their rights. The debentures were issued on the authority of a Queensland Act which empowered the Governor-In-Council to raise by way of loan not more than two million pounds for the public service of the Colony. By the same Act the loan was secured on the public revenues of the Colony. These circumstances must be of great, if not decisive weight in determining what is the proper law of the contract.

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47. J.H.C. Morris, *op. cit.,* at p. 290.

In trying to explain further the criteria which are followed in determining the proper law where parties have not expressly provided one, and the law cannot be implied or inferred, the case of THE *Assunzione*[48] provides assistance. The parties in this case failed to select the governing law either expressly or by implication. In order to ascertain the applicable law the court looked at the surrounding circumstances of this case, weighing the facts from the point of view of the reasonable man in the same footing and business standing as the parties to the contract.

The objective factors and or facts emanating from this case are as follows: the ship was an Italian ship, the ship was owned by two Italian brothers in partnership, the ship was wearing an Italian flag, the master was an Italian, the contract was for carriage from a French port to an Italian port, the cargo was to be delivered at an Italian port, the port of discharge, the freight and demurrage should be paid in Italian currency, the place of performance is Italy.

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48. *Supra*, at p. 150.

Lord Singleton said:

> *One must look at all the circumstances and seek to find what just and reasonable persons ought to have intended if they had thought about the matter at the time when they made the contract. If they had thought that they were likely to have a dispute, I hope it may be said that just and reasonable persons would like the dispute determined in the most convenience way and in accordance with business efficacy. Applying the rule which I have stated and weighing all the facts to which attention was directed, I am satisfied that the scale comes down in favour of the application of Italian law.*[49]

A reasonable business man in the standing of the parties, after examining the above factors and other contingencies which escaped their attention, would hold that these linkages are most closely connected to Italy and not France, hence Italian law was chosen as the proper law to govern this transaction. The court therefore arrived at the decision that Italian law governs the contract. I quite agree with the decision of the court because, the facts of the case are more connected to Italy than France; and if these facts were to be weighed in a scale, the scale will come down heavily in favour of Italian law.

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49. J.H.C. Morris, *op. cit*., at p. 279.

In *R.T.C. V. F.O.B. Investment & Property Ltd*[50] the Court of Appeal, sitting in Lagos Nigeria applied the objective test in resolving a preliminary question before the court which was, which country as between Nigeria and United States of America had jurisdiction in a breach of contract case. In this case the 2nd respondent was a Director in an American Financial Institution called the Central Savings Bank. The said bank was a federally chartered savings and loans association. The 2nd respondent visited Nigeria sometime in 1989 and on behalf of the said Bank convinced the 1st respondent to invest in the bank by acquiring shares. On December 7, 1990 the bank became distressed and was declared a failed bank by US regulatory financial authorities.

The office of Thrift Supervision, a branch of the US Federal Government which consequently chartered a new Central Federal Savings Bank and appointed the appellant as its Conservator. As such the appellant entered into an arrangement with the new central federal savings bank, whereby the latter bank agreed to assume the deposit liabilities of the failed central savings bank. According to the

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50. (2001) 6 NWLR (part 708) at p. 246.

1st respondent, the appellant was the receiver of the failed bank and as such transferred all the assets and claims against the said bank to itself. In that capacity, it ought therefore to ensure that the 1st respondent's contract and investments with the failed bank were enforced and protected. However the appellant breached its duty to the 1st respondent and prohibited the 1st respondent from enforcing its entitlement to a right of ownership in the new bank. Based on this claim, the 1st respondent sued the 2nd respondent as 1st defendant and the appellant as 2nd defendant at the High Court of Lagos State.

The court below held that it has jurisdiction to hear the matter. Dissatisfied with the ruling the appellant appealed to the Court of Appeal. In resolving the appeal the Court of Appeal considered the provisions of s10 Hight Court Law Cap. 60 Laws of Lagos State and Or 2 R 3 High Court of Lagos (Civil Procedure) Rules. Chukwuma - Eneh JCA delivery the leading Judgment said:

All the defendants are domiciled in the USA. The business of the 2nd defendant/appellant is carried on in the US and has no connection to Nigeria or presence in Nigeria. The Central Savings Bank was located in the state of New York. It had no branches, operations or contacts with Nigeria. The investment which the plaintiff alleged it would make was in the USA. The alleged breach for which the plaintiff is suing occurred in the USA. The law governing the affairs of the parties is the Financial Institutions Reform Recovery and Enforcement Act 1989 (FIRREA), a Statute of the United States

Congress. The documents necessary to resolve the dispute are located in the USA. Given all the foregoing factors set side by side the comprehensive averments contained in the amended statement of claim and the aforesaid affidavits, there can be no difficulty whatsoever in acknowledging and indeed concluding that the proper forum for trial of the instant matter is in the United States where the contract ought to be performed and is the residence of all the defendants.[51]

The above statement of his Lordship points to the fact that the objective test was applied i.e. looking at all the surrounding circumstances of this case before arriving at the decision that forum convenience of this case is the United States of America and not Nigeria. Where therefore the substantial issues are brought before the court for resolution, the United States is the closest and has the most real connection with the contract and its law is the proper law of this contract

The closest and the most real connection theory of determining the proper law by the court was re-echoed in the case of *Rossano v. Manufacturers' Life Insurance CO.*[52] The plaintiff was an Egyptian national residing in Egypt and carrying on business there as a cotton merchant. He applied for three endowment policies for three

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51. *Ibid.,* at pp. 248 - 265.
52. (1963) Q.B. p. 352.

thousand and four pounds and ten thousand US dollars respectively with the defendant insurance company which had its head office in Ontario and had branches in many parts of the world. The policies were negotiated through the defendant's branch office in Egypt. An interim policy was first issued in Egypt and the final policies were executed at Toronto in the plaintiff's favour. Under the first two policies, the amounts thereof were expressly made payable in bankers' demand drafts in London for pounds sterling and the amount under the third policy was expressly made payable in bankers' demand draft on New York for United States dollars.

On the policies maturing the defendant company refused payment on two grounds, viz (a) that payment of the moneys would be illegal under the Egyptian exchange control laws if effected without the permission of the Egyptian control authorities and such Egyptian laws were applicable on the grounds that Egyptian law was the proper law of the contract of insurance or the lex situs of the debt or the law of the place of contractual performance; (b) that by virtue of two garnishee orders served by the Egyptian revenue authorities in respect of tax alleged to be due by the plaintiff, payment to the plaintiff would

expose the defendant to penalties under the law of Egypt. The Court Australia, where the test was laid down to the effect that the proper law of contract following the closest and most real connection rule is the system of law by reference to which the contract was made or that with which the transaction has its closest and most real connection, held that Ontario law was the proper law of the three insurance policies. They based their decision by following the decision in Re-United Railways of Havana and Regla Warehouses Ltd[53] and Bonython V. Commonwealth of Australia[54] where the court laid down the objective test in ascertaining the proper law as the system of law by reference to which the contract was made or that with which the transaction has its closest and most real connection.

In *Aluminium Industries A.G. v. F.B.I.R.*[55] the appellant company was registered and resident in a foreign country. It was not resident in Nigeria and had no place of business in Nigeria. It owed all the shares in a Nigerian manufacturing company and incurred expenditure outside Nigeria for the Nigeria company on Current account. By an agreement

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53. (1963) 1 WLR 377, 380
54. *Supra.,* (1951) at p. 201
55. (1971) 2 Com.L.R. p. 212

in the appellant's country, the company agreed that part of the Nigerian company's indebtedness on the current account should be transferred to an interest bearing loan account in the appellant's country, and that the loan was in the currency of that country and was to be repaid in that currency. The respondent assessed the appellant for tax on interest debited to the Nigerian company on the loan account. The appellant appealed to the Appeal Commissioners against the assessments, on the ground that the interest was not derived and could not be deemed to be derived from Nigeria because the appellant carried on no trade or business in Nigeria. The Commissioners allowed the appeal, and the respondent appealed to the High Court of Lagos State which reversed the decision of the Commissioners.

On appeal by the appellant to the Supreme Court, the respondent contended that the interest was taxable as profits derived from Nigeria by the effect of the first deeming provision of s17 of the Companies Income Tax Act 1961 (as amended) whereby interest is deemed derived from Nigeria if there is a right to the payment of the interest in Nigeria.

The Supreme Court of Nigeria held that where interest on a loan contracted outside Nigeria is payable only outside Nigeria and in a foreign currency, under the terms of the contract between the parties as in this case, there is no right to payment of interest in Nigeria which would make the interest derived from Nigeria under s17(1) of the companies Income Tax Act 1961 (as amended) and taxable under paragraph (c) of the same.

The Supreme Court took this decision based on the objective test. They considered the terms of the contract between the parties and other surrounding circumstances some of which are:

- The loan agreement was concluded in Switzerland
- Repayment of the loan was to be made in Switzerland
- The currency of repayment is Swiss Francs
- A term of the contract states that Alumaco is to repay the principal and interest on the loan to the appellant company in Zurich in Swiss currency.

From the above facts it is evident therefore that the law which is closest and has the most real connection in this contract is Swiss law

and not Nigerian law and the fact that the foreign company did not carry on any business in Nigeria as to be bound by Nigerian law to pay tax, Swiss law is the proper law of this contract.

The cases discussed above, the decisions of the courts and the reasoning there from show that any reference to the parties' intention is little more than a legal fiction. In *Coast Lines Ltd v. Hudig and Veder Chartering N.V.*[56] Lord Denning said that:

> *The determination of such a system of law is not dependent on the intention of the parties. They never thought about it. They had no intention upon it. We have to study every circumstance connected with the contract and come to a conclusion.*[57]

3.5 **MERITS AND DEMERITS OF THE PROPER LAW**

The doctrine of the proper law of the contract as propounded by text writers and judges is one of the most outstanding contributions in resolving amicably international contract disputes between parties from different countries.

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56. *Supra*., at p. 34.
57. *Ibid*., at pp. 46 - 50

The rule of ascertaining the proper law provides an all-embracing formulae into which all types of contracts can be fitted. In this way harmony is brought to bear in the rules adopted by the courts in resolving contract disputes brought before it. Had the doctrine not been invented, it is quite likely that the courts would have had to develop different conflict rules for the resolution of contract dispute.

The proper law doctrine provides all-embracing or general formulae which governs all types of questions that can arise in connection with a contract; subject to a number of exceptions, the formation, validity of the contract, its interpretation and discharge are all governed by the same law. It is open to the parties to agree that one aspect of the contract shall be governed by the law of one country e.g. the law of the place of contracting and another aspect by the law of another country e.g. the law of the place of performance.[58]

The rights and liabilities of both parties to the contract are governed by the same law thereby doing away with the rigid and mechanical

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58. J.H.C. Morris, *op. cit*., at p. 281.

theories of the lex loci contractus and lex loci solutionis. Their application results to injustice which has been taken care of by the proper law of contract.

The doctrine has opened the door for further inquiry in future in case the present rules fall short of expectation due to more advanced complexities in commercial transactions.

On demerits side, where the parties have not chosen the proper law, the courts will impose one on them by applying the objective rule of balancing the contract factual situations between one system of law and another. This is stripping the parties of their right to freedom of contract, since the parties have no option but to accept what ever law the court has chosen at the end.

Where parties have chosen the law to govern their contract and that law passes the objective test but is a law which invalidates the parties contract, the court will go ahead to apply that law irrespective of its invalidating effect. English courts and also courts in other countries[59]

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59. See *International Encyclopaedia of Comparative Law*, Vol.111 Chap. 24 para. 80.

do in fact apply invalidating rules if they were intended to apply to the contract in question, however irrational this may seem. According to J.H.C. Morris[60] the irrationality if any is part of the price we have to pay for allowing the parties such a wide freedom to choose the governing law.

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60. J.H.C. Morris, *op. cit*., at p. 289.

CHAPTER FOUR

4.0 ESSENTIAL REQUIREMENTS AND THE PROPER LAW OF CONTRACT

4.1 INTRODUCTION

It has now been established that parties are no longer the final determinants of the governing law of their contract. Similarly it has been established that the traditional rules for determining the applicable or governing law, that is, the lex loci contractus and the lex loci solutionis are no longer to be strictly adhered to. In this chapter, our concern is with some of the essential requirements of valid contracts. These are offer and acceptance, consideration, capacity, performance, illegality and interpretation of contracts.

The question in this regard is, what is the proper law for determining the absence or presence of these essentials. This question is important because what may for instance constitute offer or acceptance within a particular legal system may not in another. However answering this question requires some basic analysis of the issues raised above. The analysis and other related issues are for discussion in this chapter.

4.2 OFFER AND ACCEPTANCE

An offer is a promise to do or refrain from doing some specified thing in the future, conditioned on an act, forbearance, or return promise being given in exchange for the promise or its performance; a display of willingness to enter into a contract on specified terms, made in a way that would lead a reasonable person to understand that an acceptance having been sought will result in a binding contract.[1] An offer can also mean a definite undertaking or promise that it shall become binding on the party making it as soon as it is accepted by the party to whom it is addressed. The person making the offer is the offeror while the person to whom the offer is addressed is the offeree.

On the other hand, an acceptance can be defined as the offeree's assent either by express act or by implication from conduct, to the terms of an offer in a manner authorised or requested by the offeror, so that a binding contract is formed.[2]

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1 Bryan A. Garner, *Black's Law Dictionary*, 8th Edn., (St. Paul Minn. West Publishing Co, USA., 2000) p. 113.

2. *Ibid* ., at p.12.

Acceptance occurs when the offeree finally expresses his assent to the terms of the offer. The person accepting the offer must indicate it either by words, in writing or by conduct. A mere intention to accept or silence[3] or modifying the terms of the contract, does not constitute an acceptance.

The case of *Major Oni. V. Communications Associates*[4] illustrates offer and acceptance by conduct under Nigerian law. In this case, the plaintiff made an offer to let his flats to the defendants. The latter modified the terms of the offer by including the installation of air conditioners. It was held that this brought a contract into existence between the two parties. The plaintiff had accepted the defendant's counter offer, by conduct.

The court took this decision because if the plaintiff had failed to install the air-conditioners as demanded by the defendant, there could have been no acceptance and of course no valid contract.

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3. I.E. Sagay, *Nigerian Law of Contract*, (Sweet and Maxwell, London 1985), at p. 6.
4. (Unreported) High Court of Lagos, Lambo J. Suit No. LD/625/71 delivered on January 8, 1973.

By installing the air-conditioners, the plaintiff has accepted the modified terms of the contract by conduct hence the decision of the court that there was a valid contract.

However, offer and acceptance as discussed above and as locally applicable here may not be exactly the same with other jurisdictions. Consequently, where there is a dispute between a Nigerian and a person subject to a legal system whose requirements for offer and acceptance are different from that as under our legal system, then the rule for determining the proper law of the contract has to be employed to solve the problem. For example, under Nigerian law, the mere posting of a letter of acceptance constitutes a valid offer and acceptance, even though the offeror has not received the letter of acceptance. Thus in the case of *Entores Ltd v. Miles Far East Corporation*[5] Lord Denning said:

> *When a contract is made by post it is clear law that acceptance is complete as soon as the letter is put into the post box and this is the place where the contract is made.*[6]

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5. (1955) 2 Q.B. p. 327.
6. *Ibid* at p. 332.

Under Swiss law, the mere posting of the letter of acceptance, does not constitute a valid acceptance. It is only when the offeror receives the letter of acceptance that a valid contract can be said to have been concluded. Therefore under Nigerian law the place of concluding the contract is at the place of posting the letter, while under Swiss law, it is at the place where the letter of acceptance is received, i.e. it could be at the registered place of business or any other place.

The rule for determining the proper law, shall be applied by the court to resolve the dispute where the Swiss offeree sues the Nigerian offeror in respect of the contract entered between them and where the question in issue is, which law governs the contract, is it Nigerian law or Swiss law? If the result of the test is that from all the facts of the case and other surrounding circumstances, Swiss law is the proper law, the contract shall be invalid since the offeror is yet to receive the letter of acceptance. However, if the test proves that Nigerian law is the proper law, then the contract is valid, since mere posting of the letter of acceptance makes the contract valid.

An illustrative case is *Albeko Schuhmaschinen v. Kamborian Shoe Machine Co. Ltd*.[7] In this case an offer was posted to Switzerland from England. An acceptance was alleged to have been posted in Switzerland, but was never received by the offeror. The question arose as to whether a contract came into existence. By English law as well as Nigerian law, there would have been a valid contract immediately the acceptance letter was posted. By Swiss law however, a contract could not come into existence unless the acceptance was posted and received. Salmon J. found that:

> *the letter of acceptance had not been posted and that even had his finding been different, the fact of agreement would have been determinable by the test of reception since Swiss law would have been the proper law of the contract had one been concluded.*[8]

Under German law, the letter of acceptance must be received by the offeror before the acceptance can be valid. This is not the rule in English law and other common law jurisdictions. If Nigerian offeree posted the acceptance immediately after receiving the offer, the contract is validly completed but the contract is void if the German

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7. (1961) 111 L.J. 519.
8. *Ibid.*, at p. 221

offeror is yet to receive the letter of acceptance. The proper law of the contract shall be applied in resolving the dispute before the court.

Where a Nigerian offeree receives an offer from a German offeror for instance, and decides to keep silent over the offer, this does not amount to a valid acceptance under Nigerian law, but under German law, such silence on the part of the offeree amounts to a valid acceptance. For example, a German businessman offered in a quotation to supply electrical parts to a Nigerian, who receives the quotation and failed to reply it. German law recognizes this contract as valid because silence signifies acceptance under German law while under Nigerian law, the contract is invalid.

4.3 CONSIDERATION

Consideration can be defined as something such as an act, a forbearance or a return promise bargained for and received by a promisor from a promise, that which motivates a person to do something, especially to engage in a legal act.[9] In the eye of the domestic law, something of value must be given for a promise in order

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9. Bryan A. Garner, op. cit., at p. 324.

to make it enforceable as a contract.

Thus for a party to be entitled to bring an action on an agreement, he must demonstrate that he contributed to the agreement.[10] Lush J. in CURRIE V. MISA[11] defined consideration as:

> *A valuable consideration in the eye of the law may consist either in some right, interest, profit or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility, given, suffered or undertaken by the other. Thus consideration does not only consist of profit by one party but also exists where the other party abandons some legal right in the present, or limits his legal freedom of action in the future as an inducement for the promise of the first. So it is irrelevant whether one party benefits but enough that he accepts the some burden or lose something which in contemplation of law may be of value.*[12]

In the case of *Miles v. New Zealand Alford Estate Co*,[13] a company had bought land and was dissatisfied with the purchase. The vendor later promised to make certain payments to the Co., and it was alleged that the consideration for this promise was the company's forbearance to take proceedings to rescind the contract.

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10. I.E. Sagay, *op. cit.*, at p. 42.
11. (1875) L.R. 10 Exch. 153.
12. *Ibid* at p.162.
13. (1886) 32 Ch.D. p. 267.

A majority of the Court of Appeal held that there was no consideration for the vendor's promise as no proceedings to rescind where ever intended. According to Cotton L.J.:

> *In my opinion a simple expectation even though realized would not be a good consideration for the promise which he gave. In order to make a good consideration for the promise, there must be something binding done at the time by the other party there must be something moving from the other party towards the person given the promise. In my opinion, to make a good consideration for this contract, it must be shown that there was something which would bind the company not to institute proceedings, and shown also that in fact proceedings were intended on behalf of the company.*[14]

Consideration as has been so far discussed and as it is locally applicable, in fact is not exactly the same with other countries laws. As a result, where there is a dispute between a Nigerian and an Italian or a person subject to a legal system which requirements of consideration are different from that as under our law, then the rule for determining the proper law of the contract has to be employed to solve the problem. For example in the case of *Re Bonacina*[15]

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14. *Ibid* at p. 285.
15. (1912) 2 Ch. 394 (C.A.).

X who carries on business in England, is made bankrupt and obtains his discharge. At the time of the discharge, he owes a sum of money to 'A'. Both X and A are Italian citizens. After the discharge X signs in Italy a document not under seal by which he undertakes to pay the debt to 'A'. This is by Italian law, a valid promise to pay, whilst according to Nigerian or English domestic law; it is void for want of consideration.

After X's death, A is entitled to prove for the debt against X's estate. Italian law being the proper law of the contract. The Court of Appeal held that a promise to pay made in Italy by one Italian to another but unsupported by consideration, constituted a debt provable in English bankruptcy proceedings. Hence an agreement can be a contract if it lacks one of the elements necessary for a valid contract by English or Nigerian domestic law, but not by its proper law.

Why did the court took this decision in the way it did? Is it because of the choice of law by the parties or because the court adopted the objective test in ascertaining the proper law? The court took into

consideration the terms and conditions of the contract and the surrounding circumstances of this case in order to determine the proper law of the contract which is Italian law. In order to entertain this case, the English court has to relax the requirement of consideration under the English domestic law in relation to contract; hence under the proper law i.e. Italian law, the contract is valid notwithstanding absence of consideration. If the requirement of consideration under English domestic law was not relaxed, the English court could have dismissed the action for lack of consideration, since the court could not have applied the principle of renvoi for its non applicability under law of contract.

The decision of the English court could have been the same if the matter was brought before a Nigerian court. This is because Nigerian laws were tied to those of Britain when it was the colonial overlord and the English common law continued to be applied in our legal principles even after independence.

In PRITCHARD V. NORTON[16] Pritchard had become surety on an appeal bond in Louisiana on behalf of a defendant railroad company

16. (106) U.S. 124 (1882).

against which a judgment had been rendered in Louisiana. McComb and Norton executed and delivered to Pritchard in New York an indemnity bond in which they promised to indemnify him against all losses arising from his liability on the appeal bond. McComb and Norton had not requested Pritchard to become a surety. The judgment against the railroad company was affirmed and Pritchard was compelled to satisfy the bond. Pritchard's executrix sued McComb and Norton in Louisiana on the indemnity bond.

Under Louisiana law the preexisting liability of Pritchard as surety was sufficient consideration to support the promise of indemnity, although Pritchard's obligation was not incurred at the defendant's request. The law of New York was other wise that Pritchard's pre-existing liability was not sufficient consideration to support the promise of indemnity. The lower court at Louisiana held that New York law as the law of the place where the contract was made governed the transaction.

On appeal by the plaintiff, the Supreme Court of U.S. reversed the decision of the lower court and held that Louisiana law governs and as such the contract is valid.

Had the decision of the lower court been upheld, the contract could have been invalid under New York law for want of consideration. The court applied the lex loci solutionis according to the presumed intention of the parties, thus preventing the contract from being held invalid for want of consideration. The court wanted to preserve the contract by allowing the proper law dictate the law to govern the transaction, hence it applied the law of the place of performance which allowed a contract without consideration to be a valid contract. The court therefore looked at the intention of the parties, the place of performance and the place where the contract was concluded and other surrounding circumstances before arriving at the decision that Louisiana law is the proper law of this contract.

The decision of the court would have been different if Nigerian law was chosen as the governing law and not the law of Louisiana, this is

because under Nigerian law, a promise not supported by consideration is void.

In Scotland, apart from certain classes of contracts required to be in writing, it is sufficient, that the promisor should intend to bind himself and should express that intention in clear words. For example if A a Scottish businessman entered into contract with B a Nigerian businessman and A promises to supply C goods worth $10,000.00, under Scot's law this promise to C is enforceable even though it is unsupported by consideration under Nigerian law, provided that C can proof a clear intention by A to supply the goods to him. The contract cannot be enforced under Nigerian Law but enforceable under Scots law. The rule governing the ascertainment of the proper law will be applied in resolving any dispute arising from this contract.

4.4 **CAPACITY**

Capacity can be defined as legal qualification, competency, power or fitness. Mental ability to understand the nature and effects of one's acts.[17]

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17 Henry Campbell Black, *op. cit.,* at p. 207.

The term is also used to denote the ability to incur legal liability or to acquire legal rights.[18]

Under Nigerian law, the age of twenty one years has been fixed at common law as the legal age at which a person shall enter into a contract. Persons below this age are therefore infants for the purpose of entering into a contract. This is the position of the law in both Nigeria and England. However in the United Kingdom, by the Family Law Reform Act 1969, the age of majority has been reduced to 18 and the Act provides that persons over 18 but under twenty one years of age on January 1, 1970 shall be regarded as having attained full age on that day. And in Nigeria, s29(3)(a) of the 1999 Constitution provides that "full age" means the age of eighteen years and above, this is a reform to the common law prescription of 21 years. This provision, by extension gives every citizen of age eighteen the right to enter into a contract.

Capacity to contract as discussed above and as locally applicable may

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18 M.O. Adesanya & E.O. Oloyede, *Business Law in Nigeria*, (University of Lagos & Evans Brothers Nigeria Publishers Ltd., Ibadan 1972), p. 33.

not be exactly the same with other jurisdictions. Consequently, where there is a dispute between parties from different countries with different laws governing capacity to contract, then the rule for determining the proper law of the contract has to be applied to solve the dispute arising from the contract. For example, what happens where a Japanese, aged seventeen and domiciled in Japan, enters into a contract for the supply of Electronics to a Nigerian businessman? Under Nigerian law, the contract is void as a result of his incapacity.

Also if for instance a person domiciled and resident in Nigeria and aged eighteen makes a contract in Dublin during a temporary visit to the Republic of Ireland and by Irish law he has no capacity to enter into such a contract because by that law minority ends at twenty-one. Under Irish law the contract is invalid but under Nigerian law the contract is valid. Which law shall govern the contract, Nigerian law or Irish law? The court shall solve this problem by the application of the proper law of the contract.

On issues relating to contracts entered by married women, under Nigerian law a married woman can enter into a contract for her

benefit and that of her husband and children.[19] This law provides that *a husband and wife, for all purposes of acquisition of any interest in property under a disposition made or coming into operation after the commencement of this Law be treated as separate persons*. By this provision, the law empowers a married woman to have separate rights over property belonging to her and her husband; and as such she can sue and be sued over the said property. Her contractual rights over such property and others are hereby guaranteed. She can also be capable of rendering herself and being rendered liable in respect of any contract, debt or obligation and of suing and being sued in contract. Nigerian law therefore recognizes the capacity of a married woman to enter into a contract; in fact she is as free to contract as a man. In some legal systems, this position is the opposite.

In the case of *University of Chicago v. Dater*[20] negotiations were commenced to secure a loan in the sum of $75,000 on a piece of property in Chicago. The property was owned by George R. Dater and John R. Price. The plaintiff agreed to make the loan if it could be assured that the title was good.

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19. *Kaduna State Law of Property Edict (Now Law)* No. 20 of 2004. on Rights of Husband and Wife.
20. SC (1936) 277 Mich. 658, 270 N.W. 175.

A Trust Deed and certain promissory notes were drawn up with George R. Dater and Nellie E. Dater, his wife and John R. Price and Clara A Price, his wife, as parties of the first part, and the Chicago Title & Trust Co as Trustees and, as party of the second part. The notes were payable in the city of Chicago and at such place as the legal holder might appoint. The trust mortgage and notes were sent by mail to the Benton Harbour State Bank for the signature of the parties involved.

The papers were signed in Benton Harbour Mich, and mailed to the plaintiff's agent in the city of Chicago where the trust deed was placed on record, then it was found that there were some objections to certain delinquent taxes of 1927. Further negotiations followed and finally on Jan 3, 1929 and after the tax objections were cleared in the title, the loan was actually made and the money paid over by cheques and made payable to Mr. and Mrs. Dater and Mr. & Mrs. Price and cashed in Chicago. January 29, 1929, John R. Price died and it is conceded that Mrs. Price became the actual and record owner of at least one-half of the property after the death of her husband. Subsequent to December 1, 1933 disclosure proceedings were

commenced on the property and the property purchased at the Chancery sale. Suit was filed in Michigan and on June 18, 1935, judgment was rendered in favour of plaintiff against George R. Dater and on same date judgment was entered in favour of Clara Price. The lower court held that:

> *The capacity of defendant Clara A. Price is governed by the law of Michigan. Under the law of Michigan, a married woman cannot bind her separate estate through personal engagement for the benefit of others. Defendant Price is not liable.*

The judgment of the lower court was reversed and the court held:

> *under the law of Illinois, a married woman is as free to contract as a man, while in Michigan, she has no capacity to bind herself. Since Illinois was the place where the contract was concluded, its law governs the contract because Chicago is the lex situs of the property* [21].

Where therefore a married woman from Nigeria enters into a contract in Michigan, the contract is void under Michigan law but valid under the law of Kaduna State of Nigeria. In the circumstances, the proper law shall apply to resolve the problem before the court.

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21. Elliott E. Cheatham, *Cases and Materials on Conflict of Laws*, 5th Edn., (The Foundation Press Inc. Brooklyn 1964), pp. 530 - 531.

The court considered the place where the contract was concluded, the place where the contract is to be performed, the intention of the parties, the terms and conditions of the Deed of Mortgage and other surrounding circumstances to determine which law is the proper law and that proper law is the law of the place where the contract was concluded which is the law of Chicago.

In a similar case *Charron v. Montreal Trust Co.*[22] Peter Charron was domiciled in Quebec. In 1906 he came to Ontario and joined the Royal Canadian Mounted Police. In 1908 he married the plaintiff in Ontario and lived with her there until they separated in 1920. They entered into a separation agreement in Ontario form in 1920. He died in 1953 and appointed the defendant his executor. The plaintiff sued to recover arrears of payments due under the separation agreement. One of the defenses was that by Quebec law spouses have no capacity to enter into a separation agreement.

The court gave judgment for the plaintiff. The court applied Ontario law as the proper law of this contract and therefore the spouses have

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22. (1958) 15 D.L.R. (2d) 240, 244 - 245.

capacity to enter into the contract. If Quebec law was applied, the spouses have no capacity to enter into such agreement. Ontario law is the proper law because it is the system of law with which the contract had its closest and most real connection with the contract than Quebec, hence its law was chosen as the proper law of the contract. The decision of the court could have been the same if Nigerian law is chosen as the proper law because under Nigerian law spouses can enter into separation agreement and be bound by it.[23]

4.5 PERFORMANCE OF THE CONTRACT

Performance of a contract can be defined as the fulfillment or accomplishment of a promise, contract, or other obligation according to its terms, relieving such person of all further obligation or liability there under.[24] A party who carries out all his obligations under a contract is discharged or is free from any liability under that contract. Where both parties fully perform their obligations under the contract, then they are both discharged from the obligations of the contract, which therefore comes to an end. Where one party is to

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23. *Kaduna State Law of Property Edict (now Law)* , op. cit.
24 Henry Campbell Black*, op. cit.,* at p. 137.

perform a given duty by the terms of the contract, he is still liable under the contract until the given duty is wholly performed.

In the case of *Cutter v. Powell*[25] the defendant agreed to pay Cutter 30 Guineas provided he proceeds, continues and does his duty as second mate in sailing the ship Governor-Parry from Jamaica until it arrived at Liverpool. The ship sailed from Kingston, Jamaica on August 2, 1793 and arrived Liverpool October 9. But Cutter died enroute on September 20. He had performed his duties as second matter right until the day he died. His wife, the plaintiff, claimed payment for Cutter's services in quantum meruit.

The action failed because according to the court, Cutter was by the terms of the contract to perform a given duty before he could call on the defendant to pay him anything. It was a condition precedent in the absence of which the defendant could not be liable.

However, performance of the contract as discussed above and as

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25. (1795) 6 T.R. 320.

locally applicable here may not be exactly the same with other jurisdictions. Consequently, where there is a dispute between a Nigerian and an Italian whose requirements for performance are different from that under our Nigerian law, then the rule for determining the proper law of the contract has to be employed in resolving the dispute.

The differences in the law between two different countries can be noticed in the case of *Royal Exchange Assurance Corporation v. Vega*[26] where an English and a Swedish Insurance Company concluded a re-insurance contract in respect of a ship. Under English law, it was invalid in so far as it exceeded a time limit of twelve months. Under Swedish law it was valid. The court held English law as the proper law of the contract and declared the contract invalid beyond the time limit. In resolving the issues before it, the court followed the rule for determining the proper law i.e. by considering the terms and conditions of the contract and the surrounding circumstances. The decision of the court could have been the same if Nigerian law is

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26. (1901) 2 K.B. at p. 567.

chosen as the proper law of this contract because Nigeria being a former British colony adopted English legal system and its common law rules.

Another example of differences in the law between two different countries is the case of *Adel Kamel Barsoum v. Clemessy International*[27] the Court of Appeal sitting in Lagos held that by virtue of Order 2 Rule 3 of the Lagos State High Court (Civil Procedure) Rules 1994, all suits for the specific performance, or upon the breach of any contract, may be commenced and determined in the judicial division in which such contract ought to have been performed or in which the defendant resides. Since this contract is to be performed in Switzerland, Swiss law governs the contract and therefore Lagos High Court has no jurisdiction. The court has to follow the rules for determining the proper law to arrive at its decision.

In *South African Breweries v. King*[28] a service contract concluded between English parties living and working in South Africa contained a clause by which the employee agreed not to engage in any brewery

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27. *Supra*, at pp. 520 - 527.

28. (1899) 2 Ch. 173; (1900) 1 Ch. 373.

business in South Africa within ten years after the termination of his engagement, the clause was held valid under English law, though void under the South African law. Since South African law was the proper law of this contract, the English court declared the clause to be void. Nigerian law has similar provision on restraint of trade as English law; therefore under Nigerian law, the contract could have been valid had the court declared that Nigerian law is the proper law of the contract. But since the proper law of the contract is South African law, the contract could still remain void if the contract is between a Nigerian and a South African.

In *P. & O. Steam Navigation Co. v. Shand*[29] this was a contract which performance started from the English port and was to terminate at Mauritius. The court below held that Mauritius law was the governing law. The House of Lords held that English law is the proper law and shall govern the contract and therefore the defendants are not liable. The court took into consideration all the facts and surrounding circumstances including the terms of the contract before arriving at this decision.

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29. Supra, at p. 272.

In *Adelaide Electric Supply Co. Ltd. v. Prudential Assurance Co. Ltd.*,[30] the company carried on business of supplying electric light, later by special resolutions duly passed and confirmed, the whole conduct and control of the company business, except such formalities as were required by Statute to be observed in England, was transferred to Australia and it was provided that all dividends should be declared at general meetings to be held in Australasia and should be paid in and from Adelaide. A second company held stock registered in the Register of the Adelaide Electric Co., and claimed a declaration that they and all other holders of A & C stock registered on the English register were entitled to be paid their dividends in English legal tender to the full nominal amount thereof.

It was held by the House of Lords that the Adelaide Electric Co. discharged its obligation by paying in Australian currency that which was in Australian legal tender for the nominal amount of the dividend warrant. The court held Australian law as the governing law of this contract. The court in arising at this decision, considered all the

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30. (1934) A.C. 122.

surrounding circumstances such as the currency and the place of performance, all pointed to Australia.

In *Bonython's* case[31] the Privy Council rejected the claim of the plaintiff that he is entitled to be paid the face value of his stock in English currency. Lord Simmonds held that:

> *It has been argued that if London is chosen as the place place of payment, then English law as the lex loci solutionis governs the contract and determines the measure of the obligation. But this contention cannot be accepted. The mode of performance of the obligation may, and probably will be determined by English law, the substance substance of the obligation must be determined by the proper law of the contract, i.e. the law of Queensland.*[32]

In a loan agreement it is the requirement of French law to transfer the money to be borrowed to the Borrower as an essential prerequisite. Under Swiss law, the mutual consent of the parties is enough to create contractual rights of the borrower to receive and of the lender to recover the money. It is the proper law of the contract

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31. *Supra*, at p. 201.
32. *Ibid,* at p. 219.

that determines the contract in time of dispute. If the lex loci solutionis is the proper law French law governs while if it is the lex loci contractus, Swiss law governs. For example, if X and A enter into a contract which is subject to French law and X alleges that by an act which amounts to payment, he has discharged his obligation, the courts will in general decide the issue in accordance with French law.[33] If X who resides in Nigeria promises to make payments to A in New York, X may not deduct Nigerian income tax if the law of New York is the proper law of the contract and does not permit X to do so i.e. the proper law of the contract and only that law determines whether by paying part of the debt to the Nigerian revenue authorities, X pro tanto (in part) discharges his liability to A.

The proper law also applies where a contract has been discharged by an event other than performance, for example force majeure,[34] supervening illegality of performance,[35] change in the law,[36] accord

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33. Ellis V. M'Henry (1971) L.R. 6 CP. 228 - 234.
34. *Supra*, at p. 589.
35. Kleinworth Sons & Co. V. Unga Rische Banwolle Industrie A.G. (1935) K.B. 678.
36. National Bank of Greece & Athens V. Meliss (1958) A.C. 509.

and satisfaction,[37] frustration,[38] out break of war,[39] and such other issues.

4.6 ILLEGALITY

Illegality can be defined as that which is contrary to the principles of law, as contradistinguished from mere rules of procedure.[40] Under Nigerian law, certain contracts are prohibited by Statute and where parties enter into such contracts in contravention of the Statute, such contracts shall be pronounced as illegal by the court. For example, a contract to import foreign currency without clearance from appropriate government authority. The local law providing express prohibition of this contract is the Exchange Control (Anti-Sabotage) Act[41] s1(1)(b) provides that any person who without the permission of the appropriate authority and being a person resident in Nigeria, makes any payment outside Nigeria to or for the credit of a person resident outside Nigeria or takes or accepts any loan, bank overdraft or other credit facilities shall be liable to imprisonment for

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37. Ralli V. Dennistoum (1851) 6 Exch. at p. 483.
38. *Supra*.
39. Re Anglo Australian Bank (1920) 1 Ch. 69.
40. Henry Campbell Black, *op. cit.,* at p. 747.
41. Cap. 114 Laws of the Federation (LFN) 2004.

not less than five years and a fine of an amount not less than the amount and the value of the currency, security, payment, property or transaction in respect of which the offence was committed.

The following cases will reveal the attitude of the court in such illegal contracts. In *Chief A.N. Onyuike III v. G.F. Okeke*[42] the Plaintiff brought a claim for one thousand, six hundred and fifty pounds sterling being the value of 110 tons of palm oil sold and delivered to the defendant in Biafra some time in 1969. It was admitted by both parties that the transaction was in Biafran currency.

The defendant argued that the contract was illegal because of the currency in which it was expressed. The Supreme Court held that the contract was illegal. It had contravened the provisions of the Decree No. 48 of 1968 (as amended), making it an offence to possess or deal in Biafran Currency.

In *Madam Anna Chukwudifu v. Oguta Shawe*[43] the Plaintiffs handed over a sum of five hundred and fifteen pounds, five shillings to the defendant, a Sailor in Ivory Coast, with the instruction to bring it

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42. (Unreported) SCN Suit No. SC 430/74 on May 5, 1976.
43. (Unreported) High Court of Lagos Suit No. LD/834/70 October 4, 1971.

into Nigeria and hand it over to their nominee in Lagos. It appeared that the Plaintiffs were attempting to beat the deadline for the Exchange of old currencies for new ones, expressly introduced to render useless the stock of Nigerian currency notes in Biafra. The defendant claimed that he was arrested by Soldiers in Lagos Port and the money seized from him. The Plaintiffs had good reason to suspect that he had converted the money to his own use, and so brought this action. The suit was dismissed on the ground that the contract was an illegal one since the parties intended to contravene the provisions of the Exchange Control Act.

Also under Nigerian law, it is illegal to import foreign fabrics or textiles into Nigeria, the courts in Nigeria will declare such contracts illegal. Nigerian law equally regulates by Statutes the practice of professions like law, medicine, pharmacy, auctioneers etc. So that a person who is not qualified and who has no license to practice any of the above professions cannot venture to set up practice, as attempt to do so will lead to prosecution.

In international contracts the question of illegality as discussed above and as locally applicable may not be exactly the same with the law of other countries. Therefore where there is dispute between a

Nigerian businessman and a South African subject to a South African law, which requirements for illegality of a contract are not the same with our legal system, then the rule for determining the proper law of the contract has to be employed to resolve the dispute. The following cases will help to buttress above reasoning. In *South African Breweries* case[44] X entered into a contract of employment with A & Co. The law of the Transvaal Province is the proper law of the contract. The contract contains a provision which though valid according to English law is illegal according to the law of the Transvaal. Since South African law is the proper law of the contract, the English court declared the contract void.

The decision of the court in this case will be the same if the proceedings were before a Nigerian court. This is because restraint of trade between an employer and employee is recognized under Nigerian law, subject to the following conditions:

(a) they are reasonable in the interest of both contracting parties, and this is to be proved by the party seeking to enforce the protection.

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44. *Supra*., at p. 173.

(b) they are not injurious to the public in determining the question of reasonableness regard must be given to:

(i) the nature of the business, trade or occupation

(ii) the area of the business over which the restraint is imposed, and

(iii) the length of time in which the restraint is to continue.[45]

Therefore since South African law is the proper law of this contract, which regards such contract as illegal, the Nigerian court could have declared the contract void. The second reason is that Nigerian law adopts English common law as a result of Nigeria's colonial ties with Britain.

In the case of *Prodexport State Company for Foreign Trade v. E.D. & F. Man, Ltd.,*[46] the Plaintiffs Rumanian State trading corporation, agreed to sell Rumanian sugar to the defendants an English Company; delivery to be made in Rumania. Disputes were to be submitted to arbitration by the Council of the Sugar Association in London.

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45. Yagba, *et al*, *Elements of Commercial Law*, (Tamanza Publishing Co. Ltd., Zaria Nigeria 1994), at p. 3.
46. (1973) Q.B. 389.

The proper law of the contract was English. After half of the sugar had been delivered, the Rumanian Government declared illegal all further exports of sugar.

The defendants were awarded damages by the Arbitrators for non-delivery and the Plaintiffs sought to have the award set aside. The Court held that the Arbitrators lacked jurisdiction because of the illegality of the contract according to English law.

If the plaintiffs had dealt with a Nigerian company, the decision of the court would be the same because Nigeria and Britain operate almost similar legal system by virtue of Nigeria's colonial link with Britain.

4.7 INTERPRETATION OF THE CONTRACT

The word interpretation means the art or process of discovering and ascertaining the meaning of a Statute, will, contract, or other written documents.[47] While construction means the process or the art of determining the sense, real meaning, or proper explanation of obscure,

47. Henry Campbell Black, *op. cit*., at p. 817.

complex or ambiguous terms or provisions in a Statute, written instrument, or oral agreement.

The Interpretation Act[48] is applied by the Nigerian courts in the interpretation of actual meaning of Nigerian laws. The long title of Interpretation Act is "An Act to provide for the construction and interpretation of the Acts of the National Assembly and certain other instruments; and for purposes connected therewith." The phrase other instruments" include among others contracts. Where the words or phrases used in the Statute is ambiguous or complex the court will construe such words or phrases, that is give the actual intention of the legislature. Where the terms and conditions of a contract is simple to understand the court will apply them according to the intention of the parties. But where they are complex and ambiguous and the intention of the parties is not clear, the court will interpret and construe such terms in order to ascertain their true meaning in resolving the dispute under the contract.

In doing this the court applies the general principles of interpretation

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48. Cap. 192, Laws of the Federation of Nigeria (LFN) 2004.

thus: the literal construction, the mischief rule, the golden rule. The court in *R. V. Commissioners of Income Tax*[49] held "the first and most elementary rule of construction is that it is to be assumed that the words and phrases of technical legislation are used in their technical meaning if they have acquired one; and otherwise in their ordinary meaning".

In the case of *Quinn v. Burch Brothers (Builders) Ltd.,*[50] Paul J. in interpreting s1(1) of the Law Reform (Contributory Negligence) Act 1945 which provides that the Act "shall not operate to defeat any defense arising under a contract. The words can only relate to some express clause in a particular contract which governs the liability of the parties in the event of one of the parties being at fault."

However, interpretation of the contract as discussed above and as locally applicable may not be exactly the same with other legal systems. Consequently, where there is a dispute between a Nigerian and a person subject to a legal system whose requirements for interpretation of the contract are not the same from that under our

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49. (1888) 22 Q.B.D. at p. 296.
50. (1966) 2 Q.B. 370 at p. 377.

legal system, the rule for determining the proper law of contract has to be applied to resolve the matter. For example, if Nigerian law is the proper law of the contract the court, will apply Nigerian law in resolving any ambiguity in the Contract. Parties to the contract have the right to select the law which should govern the construction of their contract. This is a question of facts as when they provide that "English law shall govern the construction of this contract."

It is therefore the duty of the court to apply the rule for determining the proper law of the contract in selecting the said law for the parties. The court will then invoke the chosen proper law in the construction of the contract. It must be emphasized that the whole object of interpretation is to determine the intent of the parties as expressed in the terms and conditions of the contract, this is a question of fact. Where ambiguities, complex and technical terms are used, which bear different meanings to different legal systems, the court will apply the proper law in resolving the question raised in the terms.

In a contract where the country's currency other than that of the proper law is used in a contract, the meaning to be attached to the

units of that currency is the law of that country which uses the currency and not the proper law. For example, if Nigerian currency, the Naira is used in a contract between a Nigerian and a French, where the proper law is French law, Nigerian law shall be applied in interpreting any question in connection with the units of the Nigerian currency. The lex monetae, that is the law of the country in the currency of which a debt or other legal obligation is expressed applies. This is an exception to the principle that the proper law governs construction of parties' contract.[51]

4.8 **INTENTION TO CREATE LEGAL RELATIONS**

A contract between A, a Nigerian businessman and B, a French businessman, will not constitute a binding contract unless it is intended by them that it should give rise to legal relations. Courts in Nigeria, Italy, France and other jurisdictions, recognize that an intention to create legal relations is a necessary element of a valid contract though the intentions need not be expressly stated.[52] How does the court determine this intention and which law is applicable in this exercise.

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51. Ademola Yakubu, *op. cit*., at p. 97.
52. M.O. Adesanya & E.O. Oloyede, o*p. cit*., p. 31.

Intention is a problematic word, hence the court has devised the objective test through the application of the proper law to ascertain the intention of the parties to create legal relations. This is determined objectively by looking at the subject matter of the contract, the form of the contract and the terms stipulated. In the case of *Carlill v. Carbolic Smoke Ball Co*.[53] the defendants were held liable, despite their contention that they did not intend to create legal relations by their advertised promise to pay one hundred pounds to anyone who caught influenza after using their product in a prescribed way. The court using the objective test felt that a reasonable third person, looking at the advertisement, particularly the part stating that one thousand Pounds had been deposited at a bank as a guarantee of their good faith, would conclude that an intention to create legal relations had been anticipated.[54]

The presumption of law on the intention to create legal relations is that if the negotiation or transaction between the parties had some business or commercial aim, there is an intention to create legal

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53 *Supra*, p. 259.

54. *Ibid*., at p. 270

relations.[55] This, however, although the transaction is commercial in nature, yet it is deliberately stated that they do not intend to enter into any legally enforceable relationship. Thus in the case of *Rose and Frank v. Crompton Bro.*[56] an agreement between an English and an American Company was held to be legally unenforceable. The clause reads as follows:

> *This arrangement is not entered into, nor is This Memorandum written, as a formal or legal agreement and shall not be subject to legal jurisdiction in the law courts either of the US or England.*[57]

Where the subject matter of a contract between the Nigerian businessman and a French businessman is football pool, and Nigerian law is declared as the proper law, the court will declare that there is no intention to create legal relations between the parties, as those contracts are entered in honour only and not binding on the parties. However where French law is declared as the proper law, the French court will declare such contracts (including gaming contracts, see Robinson v. Bland[58]) as binding on the parties.

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55. *Edwards v. Skyways Ltd* (1964) 1 WLR 349
56. (1925) A.C. 445.
57. *Ibid*., at p. 446.
58. *Supra*, p. 1077

Another method of looking at the intention of the parties to create legal relations is the form in which their contract takes. The proper law is considered as governing this in the first instance; but if its formal requirements are not fulfilled, formal requirement is saved by compliance with the local law, i.e. the law of the place where the contract was concluded.[59] In support of this, German Introductory Law provides:

> *The form of a transaction is determined by the laws governing the legal relation that constitutes the subject of the transaction. It is sufficient however, to observe the laws of the place where the transaction is made.*[60]

4.9 **INTERNAL CONFLICT IN CONTRACTS**

From what has been said so far, the proper law of contract dominates the governing law to settle international contract disputes. Can such law be applicable in resolving internal contract disputes relating to contract in Nigeria? In giving answer to this question, one has to look at the Federal system we operate and the reception of the Common

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59. Ademola, Yakubu, o*p. cit*., p. 101.
60. Art. 11(1).

Law of England into our legal system. It will be difficult to apply the proper law in resolving internal contract dispute between A, a businessman from Imo State and B, a businessman from Kaduna State, on the validity of the contract.

Where the question is whether there is a valid offer and acceptance, the court will neither apply Imo State nor Kaduna State contract law but will apply the general law based on the common law principle of offer and acceptance. However, where the parties are from different countries, as where A is from Nigeria and B from France; and Nigerian law is the proper law, under the circumstance, which law will be applicable, the general law or customary law.

If customary law is applicable, which customary law; Ibo, Yoruba, Efik, Ijaw or Islamic customary laws? It should not be assumed that parties cannot agree that customary law should govern a contract of international dimension. To argue otherwise would be too general a statement. After all, what is the benefit of the proper law approach if it is not a consideration of the intention of the parties ascertained objectively from surrounding circumstances.[61]

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61. Ademola, Yakubu, o*p. cit*., p. 103.

Apart from above situation, there may be also conflict between the general law and customary law. For example in *Labinjoh v. Abake*[62] a girl of seventeen years of age was sued for certain trade debts. Her defence was based on the Infant Relief Act 1874, an English Statute of general application, the effect of which was to make such debts unenforceable against an infant. The court held that the general rule is that if there is a native law and custom applicable to the matter in controversy and if such native law and custom is not repugnant to natural justice, equity and good conscience or incompatible with any local law, and if it shall not appear that it was intended by the parties that the obligations should be regulated by English law, the matter in controversy shall be determined in accordance with native law and custom.[63] In the case of Alake v. Awawu[64] the court held:

> *This court is asked to lay down as a strict rule of law that land, the property of an illiterate native cannot be disposed of by him or her without complying with the Statute of Frauds. I am not prepared to* do this.[65]

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62. (1924) 5 N.L.R. 33.
63. *Ibid*., at p. 34.
64. (1932) 5 N.L.R. 39.
65. *Ibid*., at p. 40.

Therefore, the proper law of contract in a particular case should be that agreed upon by the parties and it could be customary law or the general law. However, where the proper law is customary law problem arises as to which customary law is applicable. Nigeria as a multi ethnic nation (with more than 250 ethnic groups) and each ethnic group has its own customary laws; it becomes very difficult to apply say Ibo customary law, as the proper law because within the Ibo nation, there are multiplicity of customary laws. This problem may warrant the application of the general law as the proper law in resolving above dispute between the parties.

CHAPTER FIVE

5.0 SUMMARY AND RECOMMENDATIONS

5.1 SUMMARY

Proper law of contract has been defined in Chapter one of this work as that law which the English court (as well as Nigerian court) is to apply in determining the obligations under the contract. English law in deciding these matters has refused to treat as conclusive, rigid or arbitrary criteria such as lex loci contractus or lex loci solutionis, and has treated the matter as depending on the intention of the parties to be ascertained in each case on a consideration of the terms of the contract, the situation of the parties, and generally on all the surrounding facts (or circumstances)……[1]

Determining the proper law of contract has not been so easy. The difficulty bothers on the fact that we are not dealing with one type of contract; as contracts are of various types - contract of sale of goods, marine contract, contract of employment, marriage contract,

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1 Lord Wright's definition of the Proper Law of Contract in *Mount Albert Borough Council's* case, supra., at pp 224-240.

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contract of mortgage, contract of sale of land etc. A choice of law rule which is appropriate for a sale of goods contract, will not be appropriate for a marine contract. Again problems that arise in one single contract are numerous that determining the proper law by looking at one or two issues may not produce the desired results. To solve the above problems, the courts look at issues emanating from the contract according to the rules laid down for determining the proper law. Such rules have been discovered in the preceding chapters of this work.

It was highlighted in this Chapter that there is a dearth of local materials and cases. This is due to lack of enough text books and other literature on the subject and the apathy of our people in pursuing their rights when breached in the court of justice.

In Chapter two, the old and classical theories as determinants of the proper law were discussed. In the old theories, the lex loci contractus which means the law of the place where a contract is concluded and the lex loci solutionis meaning the law of the place where a contract is to be performed, were identified as applicable rules by the courts to resolve disputes arising from contracts

between parties from different countries. The lex loci contractus became a universal rule and once it is established that a contract is concluded in Nigeria for example, Nigerian law automatically becomes the proper law of the contract to be applied by the court in resolving the dispute. The courts therefore treat as conclusive the lex loci contractus rule to settle any contract dispute brought before it. The first English case to apply this rule was ROBINSON V. BLAND[2] where Lord Mansfield held:

> The general rule established ex comitate et jure gentium[3] is that the place where the contract is made, and not where the action is brought, is to be considered in expounding and enforcing the contract.[4]

The Judge based his judgment mainly on the passage which he quoted from Huber's De Conflictu Legum.[5] This decision marked an important stage in the development of English private international law.[6] The lex loci contractus rule was abandoned and the lex loci solutionis became

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2. *Supra* ., at p. 1077.
3. Out of comity or courtesy and by the law of nations.
4. *Supra.,* at p. 1078.
5. For reprints with translations, see Lorenzen Chapter 6 and Llewelyn Davies, "The influence of Huber's De Conflictu Legum on English Private International Law" (1937), 18 *B.Y.B.I.L.* 49 in Ademola Yakubu. *op. cit.,* at p. 20.
6 Ademola Yakubu, *op. cit.,* at p. 21.

the rule for determining the proper law of the contract.

This rule was traced to the famous judgment of Lord Esher M.R. in CHATENAY V. BRAZILIAN SUBMARINE TELEGRAPH CO.[7] which has always been considered as the principal authority for the lex loci solutionis. His lordship's decision is to the effect that if a contract is made in one country to be carried out in another country, the intention of the parties is that the law of that other country shall govern the performance of this contract.

These theories were abandoned when their rigid and inflexible approach could no longer meet the complexities of modern commerce and could not do justice to the cases brought before the courts. Attention was therefore focused on the intention of the parties based on the theory of autonomy or freedom of contract. This is the classical approach. Willes J. held in LLOYD V. GUILBERT[8]

> The rights of the parties to a contract are to be judged by that law by which the parties intended,....

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7. *Supra*., at pp. 82 - 83.
8. *Supra.*, at p. 115.

In VITA FOOD PRODUCTS case[9] Lord Wright held "it is now well settled that by English law the proper law of the contract is the law which the parties intended to apply." The parties under this rule have the autonomy or freedom to choose the law that governs their contract. The intention of the parties in the selection of the law cannot be a subject of debate by the courts. The choice of law has to be applied by the court in resolving the dispute arising from the contract; the connection of the contract to the law is immaterial once the parties have expressly chosen the law.

As the intention of the parties alone could no longer do justice in resolving contract cases because of its inflexibility and complexities of present day commercial activities, a more formidable and flexible rule was evolved by the courts. The intention of the parties under this approach is final.

The modern approach for determining the proper law was the point of discussion in Chapter three. This approach reveals that the intention

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9. *Supra*., at p. 277.

of the parties in choosing the proper law is not final. Where the law is expressly chosen, the court will test this choice whether it is done in good faith or whether the choice is bonafide and legal.[10] Where the choice of the parties is done in good faith, that choice of law should be regarded as the proper law of the contract and applied by the court. Where there is no express selection of the proper law by the parties, their intention as to what is the proper law has to be inferred or implied from the four corners of the contract. Where there is no choice express or implied of the proper law, the intention of the parties will be found from the surrounding circumstances; that is the contract is to be governed by the system of law with which the transaction has its closest and most real connection.

The modern approach of determining the proper law of the contract therefore places a limitation on the autonomy or freedom of the parties in choosing the proper law. Before this law can be accepted and applied by the court, it must under go the test of express selection, implied selection and the closest and most real connection.

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10. Lord Wright's decision on the express choice of law by the parties and its limiting effect in the case of *Vita Food Products, supra*., at p. 277.

In Chapter four discussions were centred on the essential requirements and the proper law of contract. These requirements constitute the cornerstone of every contract as their absence renders the contract non existent. The Chapter started with offer and acceptance. An offer was defined as a promise to do or refrain from doing some specified thing in the future, conditioned on an act, forbearance, or return promise being given in exchange for the promise or its performance. Its local application and application under conflict of laws situation were canvassed. The offeree's assent of the offeror's offer is the acceptance. Acceptance could be express or implied.

Also its application under the domestic and conflict of laws situation were discussed. For example, what constitutes offer and acceptance under Nigerian law is not what constitutes offer and acceptance under German, Italian or Swiss laws. In Nigeria, a contract is concluded once a letter of acceptance is posted. The place of posting constitutes the conclusion of the contract - ENTORES LTD's case.[11] However, under German or Swiss law, unless the letter of acceptance

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11. *Supra*., at p. 327.

is received by the offeror, there is no valid acceptance which could result into a valid contract. Under German law, silence on the part of the offeree constitutes a valid acceptance and a valid contract, while under Nigerian law, it does not.

Under Nigerian law, any contract without consideration is void, therefore something such as an act, a forbearance or a return promise bargained for and received by a promisor from a promisee must be present in a contract for it to be valid under Nigerian law. However, under Italian law a contract is valid without consideration; reference was made to the case of RE BONACINA.[12]

Capacity of parties to enter into a contract varies under the legal systems of different countries and this creates problems when parties finally enter into such contract. Under Nigerian law, a person aged eighteen is capable of entering into a contract. This is a constitutional guarantee[13] therefore two Nigerians aged eighteen can enter into a valid contract. However if a German aged sixteen enters

12. *Supra*., at p. 394.
13. s29(3)(a) Constitution of the Federal Republic of Nigeria (CFRN) 1999.

into contract with a Nigerian aged eighteen, under Nigerian law this contract is invalid because of incapacity of the German while under German law, the contract is valid assuming the legal age to enter into a contract in Germany is sixteen. Where the issue of whether parties have capacity to enter into a contract is brought before the court, the court will determine this by the application of the rules of the proper law of the contract.

Performance of the contract is the climax as it constitutes the carrying into effect i.e. in practical terms, the terms and conditions of the contract. Under Nigerian law where parties enter into contract within Nigeria, the general presumption is that the terms shall be carried out in accordance with Nigerian law. If the contract is to deliver cola nuts from Oyo State to a merchant in Kaduna State, the two states Sale of Goods Law shall govern the performance of this contract. However, if the contract is to deliver same product by the Kaduna merchant to a German merchant, the problem arises as a result of differences in the law of the two countries and therefore the law to govern the contract will definitely pose problems. The

court in resolving this problem shall apply the rule for determining the proper law of the contract.

Therefore what constitutes performance under French law may not constitute performance under Swiss law. For example, under French law, in a loan agreement, it is the requirement that money to be borrowed should be transferred to the borrower as an essential requirement of a valid performance while under Swiss law, the mutual consent of the parties is enough to create contractual rights of the borrower to receive and of the lender to recover the money. The proper law determines the resolution of any dispute arising out of this contract.

On illegality, under Nigerian law, certain contracts are expressly prohibited by legislation[14] such contracts if entered by parties shall be declared void and unenforceable. However, under conflict of laws situation, what constitutes an illegal contract in Nigeria may not under German or Italian law. For example, it is illegal to import foreign

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14. Exchange Control (Anti Sabotage) Act Cap. 114 Laws of the Federation of Nigeria (LFN) 2004.

fabrics into Nigeria, it may not be illegal to import same product under Italian law. Restraint of trade term in a contract of employment is illegal under South African law[15] but not under Nigerian or English law.

The interpretation of the contract arises where the meaning of certain terms in a contract, or words and phrases in a Statute, Will or other legal documents are before the court for resolution. Where the proper law is Nigerian law, interpretation of the words or phrases shall be governed by Interpretation Act.[16]

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15. South African Breweries' case, *supra*., at p. 173.
16. Interpretation Act Cap. 192 Laws of the Federation of Nigeria 2004.

5.2. RECOMMENDATIONS

From the observations made, the following recommendations or suggestions are hereby given:

(1) In the determination of the proper law which governs the contract, the courts should apply more than one proper law in resolving contract disputes; particularly where weighty issues raised in the contract connects another country other than the country of the proper law originally chosen.

(2) Injustice and other undesirable consequences can be avoided by splitting the proper law in a contract. In RE UNITED RAILWAYS OF THE HAVANA AND REGLA WAREHOUSES LTD[17] the court held that "the fact that one aspect of a contract is to be governed by the law of one country, does not necessarily mean that that law is to be the proper law of the contract as a whole."

(3) Where Nigeria is the system of law with which the contract has its closest and most real connection and where English law has no connection whatsoever with the contract, notwithstanding their long

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17. (1960) Ch. 52 at p. 92.

years of commercial advancement, the parties should choose Nigerian law as the proper law of that contract.

(4) Nigerian business community should enter into business partnership or co-operation with their foreign counterparts and always challenge any irregularity or breaches of the terms of the contract in court and pursue such actions to their logical conclusion. Such attitude of Nigerians will facilitate the development of private international law as it relates to international contracts. It will also make students research more easier when they make reference to local law reports containing cases involving Nigerians and their foreign partners.

5) In order to create legal awareness on the rights and obligations of Nigerian business community, the Nigerian Bar Association (NBA) should create International Business Section whose duty is to organize conferences, seminars, workshops etc for all Nigerian stakeholders in international business. The resource persons should be drawn from the members of the Bar and Bench, Legal Practitioners and University Dons. Such a section will not only be an eye opener to our businessmen and women, it will also be an avenue of generating huge funds for the NBA.

(6) University lecturers on Private International Law should be encouraged to write books on the subject of International Contracts by giving them research grants and allowing them to go on sabbatical for such research overseas.

(7) Where parties to a contract have in good faith and genuinely chosen the law to govern their contract expressly, the law chosen should be the proper law and should be respected by the courts.

(8) Where the law validly chosen by the parties is prima facie invalid by reason of a mandatory law, the purpose of such invalidating law should be inquired into, if it has no connection with the particular contract, then it should be ignored and that law chosen by the parties applied.

(9) The courts have sometimes accepted the proposition that the parties must have intended their contract to be effective as a relevant factor in ascertaining an implied or inferred choice of the proper law in cases where there is no express choice, that is the law to govern their contracts should be that which validates it rather than the one which nullifies it. Since parties do not always express

their choice, the courts in inferring or implying an intention should avoid as far as practicable the law which would invalidate the contract but should look at the contract as a whole.

(10) Nigerian courts should not apply English or foreign cases indiscriminately but should consider the social policies that underlie foreign pronouncements.

(11) The Economic Community of West African States (ECOWAS) should borrow a leaf from the former European Economic Community (now European Union) Contractual Obligations Convention 1980 (usually referred to as the Rome Convention) which seeks to bring about uniformity in choice of law rules for contracts among member states. A similar convention should be drafted to cover and bind member states of ECOWAS.

(12) The international community should rise up and provide stiff legislation against cyber frauds, because if left unchecked, it could affect business co-operation among businessmen and women the world over.

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