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THE CONGENY OF JURISDICTION IN E-COMMERCE IN NIGERIA: LESSONS FROM EU

Revelation Tolulope Ibitoye*

Abstract

The internet has widened the scope of e-commerce and online contracting in recent years. Hence, the hallmark of traditional business activities-“location” at the physical level is no longer significant in e-commerce,¹ that is, contracts entered into online have no physical territorial venue or meeting-point and that is why a consumer in Nigeria can engage in e-commerce transaction with a United States-based company without ever meeting face-to-face. However, if legal issues subsequently arise, location returns to the starting point, that is, when and where a contract is made and the law and tax regimes that will govern the transaction.² Therefore, the issues that arise whenever a dispute occurs and the questions that readily come to mind are: In case a dispute occurs, which court will have power to hear the case? Is it the court in the country where the contract is to be performed, or the court in the country where the seller's place of business or consumer is located? Which law will apply, i.e, the choice-of-law? Are there alternative means of resolving online disputes apart from litigation, and can they be included in the contract terms? As there is no law in existence in Nigeria pertaining to jurisdiction and choice of law rules in online transactions, this article will examine and draw lessons from Brussels I Regulation³ and Rome Convention⁴ (European Union laws); and review the need for a harmonised international law on jurisdiction and choice of law to ensure certainty of decisions in e-commerce transactions globally, and particularly in Nigeria.

Keywords: E-commerce Contracts, Jurisdiction, Choice-of-law, General Jurisdiction, Special Jurisdiction.

Introduction

The rapid growth of the internet has made it possible for parties in different geographical locations to enter into contract virtually, i.e, without meeting physically. This has resulted in the occurrence of cross-border disputes which are greater than those in offline transactions.

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¹ Ian J. Lloyd, *Information Technology Law*, (6th ed.) Oxford, Oxford University Press, (2011), pp.443.

² Ibid.

³ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I).

⁴ Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).

As there exists no traditional location, organizations are worried about the uncertainty of determining online jurisdiction and the jurisdiction of the court to determine an online dispute; choice-of-law; and recognition and enforcement of judgments. The uncertainty is more pronounced because an e-commerce transaction is not performed in one place. Thus, Perritt opined that "...impediments to localization (on the Internet) create uncertainty and controversy over assertions of jurisdiction..."⁵

Therefore, the internet, as beneficial as it is, is bedeviled by so many problems. One is the uncertainty in determining the court to entertain a matter where such a contracting party is a foreigner, or where both are foreigners from different countries.

A good example is the case of *Maharanees of Baroda v Wildenstein*.⁶ In that case, the plaintiff, a French resident, purchased a painting from the defendant, an international art dealer also resident in France. The painting was allegedly made by Boucher. However, when the Maharanees discovered that the painting was probably fake and not by Boucher, she commenced an action for rescission of the contract of sale by serving a writ on the defendant while he was on a brief visit to racecourse at Ascot in England. The most appropriate jurisdiction for this litigation was France because the contract was made in France between two French residents and was governed by French law; but the plaintiff chose an English court and made use of the English law of procedure as *lex fori*: rules of evidence and speed of trial. Eventually, the English court exercised jurisdiction over the matter as no injustice was done for Mr. Wildenstein.⁷

Another problem associated with the internet is that of choice-of-law, that is, the determination of the relevant law which contracting parties 'would reasonably have expected to apply and the law of the country by reference to which they can be deemed to have contracted.'⁸

Hence, where a Nigerian court exercises jurisdiction, the next issue is whether it is automatic for our court to apply the Nigerian law or whether a foreign country's law to which it has

⁵ H Perritt, "Dispute Resolution in Cyberspace: Demand for New Forms of ADR," 15 Ohio State Journal on Dispute Resolution, (2000), pp. 675-676.

⁶ (1972) 2 QB 283.

⁷ However, a different decision may be arrived at today as the English rule of transient is no longer valid for trials covered by Brussels 1 Regulation as suits are now brought at the seller's domicile.

⁸ C.M.V. Clarkson and Jonathan Hill, *The Conflict of Laws*, (3rd ed.) Oxford, Oxford University Press, (2006), pp.6.

close connections will apply. Can a foreign law be more appropriate than our local law in any internet dispute?

Such problem was resolved in the above case of *Maharanee of Baroda v Wildenstein*,⁹ where the court decided whether the legal issue (misrepresentation leading to rescission) was to be governed by English law (*lex fori*) or French law (foreign law). It later resolved that the law applicable to the sale in Paris was irrelevant because the main issue was a problem of facts and evidence.

Looking at possible problems embedded in deciding jurisdictional and choice of law issues in e-commerce transactions, it is, however, sad and unfortunate that presently, Nigeria has no specific rules or laws dealing with internet jurisdiction and choice-of-law. The absence of this legislation invariably will discourage organizations from contracting online, thereby hindering the growth of e-commerce in Nigeria.

Thus, the objectives of this paper is to identify the problems with e-commerce contracts, particularly, jurisdiction and choice of law issues; discuss the Nigerian situation and identify the problems with it; discuss how the problems have been resolved in the European Union (EU) by analysing its Conventions, and finally recommend foreign solutions to the Nigerian problem.

Online Environment in Nigeria and the Relevance of a Viable E-Commerce Regime

The scope of Nigeria conflict of laws ranges from inter-state conflict (diversity among the legislations and case laws of her 36 states) to internal conflict (among over 250 various customary laws), and also extends to international conflict (different laws of independent countries). In response to these conflicts in the offline environment, Nigeria has developed solutions which they derive from the received English Law -majorly, Common Law, doctrine of Equity and Statutes of General Application; decisions of court outside Nigeria, that is, foreign laws; Nigerian legislation; Local/Nigerian laws; and Public International Law.

It should be noted that Nigeria as a country, and the African community as a whole does not have a codified law encompassing issues of jurisdiction and choice of law, particularly with

⁹ Op cit, n. 6.

respect to internet transactions unlike our European counterpart. This has put Nigeria in the same dilemma with other countries in deciding the court of a country which will assume jurisdiction over internet transactions because of the uncertainty as to where a contract is made, performed or where a breach occurs.

Although Nigeria inherited the English choice of jurisdiction rules which confers jurisdiction on a court of the forum court where the defendant is present. However, the Nigerian courts in their practices have granted jurisdiction to courts based on the presence of causes of action in their territories. Virtually all the State High Court Laws and Rules of Courts have provisions relating to conflict situations on inter-state levels and international levels, for instance, Sec. 10 of the High Court Law of Lagos State Law,¹⁰ Order 8, High Court of Lagos State (Civil Procedure) Rules 2012¹¹ and Order 8 Borno State High Court (Civil Procedure) Rules 2006¹² and Sections 96 and 97 of the Sheriff and Civil Process Act¹³.

From the foregoing, it is clear that a contract conducted in an online environment in Nigeria is not safe owing to the fact that there is lack of certainty as to which court to exercise jurisdiction and the law of the country to be applied in the resolution of future dispute between contracting parties. This lack of certainty has consequently robbed-off on e-commerce regime in Nigeria and other nations lacking in this regards. For instance, consumers prefer to enter into offline or traditional contracts where the place of contract performance is certain rather than online transactions. Businesses are also afraid of losing out in the online world due to lack of the unknown, i.e, the court that is chosen by the consumer

¹⁰ Cap H3, Laws of Lagos State, 2003: "The High Court shall, in addition to any other jurisdiction conferred by the Constitution of the Federation or by this or any other enactment, possess and exercise, within the limits mentioned in, and subject to the provisions of, the Constitution of the Federation and this enactment, all the jurisdiction, powers and authorities which are vested in or capable of being exercised by the High Court of Justice in England."

¹¹ "A Judge may allow any Originating Process or other process to be served Originating Process, outside Nigeria where: (a) the whole subject matter of the claim is land situate within jurisdiction, or (b) any act, deed, will, contract, obligation, or liability affecting land or hereditaments situate within jurisdiction, is sought to be construed, rectified, set aside or enforced; or (c) any relief is sought against any person domiciled or ordinarily resident within jurisdiction, or (d) the claim is for the administration of the personal estate of any deceased person, who at the time of his death was domiciled within jurisdiction or for the execution (as to property situate within jurisdiction) of the trusts of any written instrument, which ought to be executed according to the law in force in Lagos State, or (e) the claim is brought against the Defendant to enforce, rescind, dissolve, annul or otherwise affect a contract or to recover damages or other relief for or in respect of a contract..."

¹² "A Judge may allow any originating or other process to be served outside Nigeria where: (a) the whole subject matter of the claim is land situate within jurisdiction, or (b) any act, deed, will, contract, obligation, or liability affecting land or hereditaments situate within jurisdiction, is sought to be construed, rectified, set aside or enforced;"

¹³ The Sheriff and Civil Process Act Cap. 56, vol. 14, L.F.N. 2004.

(forum shopping) and which may probably exercise jurisdiction may be unfavourable to them as seen in *Maharane v Baroda v Wildenstein*.¹⁴

Thus, the reluctance of both contacting parties to e-commerce transactions is indirectly affecting and slowing down the economy. As Nigeria's e-commerce regime is at its early stage, there is need for the government to take proactive actions to develop it, educate consumers and encourage businesses to engage in e-commerce by putting measures in place to ensure a consumer's protection and most especially by making laws to guarantee jurisdictional and choice of law issues.

Consequently, we will look at two European conventions: Brussels 1 Regulation and Rome 1 Convention; deduce significant lessons from them; and apply them in preparing a template for the growth and development of e-commerce in Nigeria and the African community.

Jurisprudence of Jurisdiction (Brussels I Regulation)

The scope of this Regulation covers only civil and commercial matters, and does not extend to revenue, customs, or administrative matters.¹⁵ Before diving deeper into the Regulation, it is pertinent to define what domicile is because its understanding will give us an enhanced view of the whole law. Thus, *Article 60* defines 'domicile' as the statutory seat, central administration; or principal place of business of a company or other legal persons. Jay Forder and Dan Svantesson,¹⁶ defined the domicile of natural persons as 'the place of a person's permanent residence for legal purposes'.

One of the Regulation's very important provisions is *Article 23 of Brussels 1* which is a choice-of-forum clause. It provides that:

If the parties, one or more of whom is domiciled in a Member State, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have

¹⁴ Op cit, n. 6.

¹⁵ Op cit, n. 3, Article 1. Criminal matters are also excluded.

¹⁶ Jay Forder and Dan Svantesson, *Internet and E-commerce Law*, Australia & New Zealand: Oxford University Press, (2008), pp. 23. Also, Her Majesty's Revenue & Customs (HMRC) defined domicile as '...where they have their fixed and permanent home and to which, when they are absent, they always have the intention of returning' - <http://www.hmrc.gov.uk/cto/glossary.htm>.

jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise.

The agreement must either be in writing or evidenced in writing; or in a form which accords with practices which the parties have established between themselves; or usage within the trade. *Paragraph 2* in pari-passu with e-commerce, provides that 'any communication by electronic means which provides a durable record of the agreement shall be equivalent to writing.' Also, no other court shall exercise jurisdiction except where the court chosen have decline jurisdiction.¹⁷

Examples of agreed jurisdictional clauses are provided for in Jumia's and Facebook's terms and conditions. **Jumia's terms and conditions:**

APPLICABLE LAW AND JURISDICTION: These Terms and Conditions of Use shall be interpreted and governed by the laws in force in the Federal Republic of Nigeria. Subject to the Arbitration section...each party hereby agrees to submit to the jurisdiction of the courts of Nigeria and to waive any objections based upon venue.¹⁸

Term 15 of Facebook's terms and conditions:

You will resolve any claim, cause of action or dispute (claim) you have with us arising out of or relating to this Statement or Facebook exclusively in the U.S. District Court for the Northern District of California or a state court located in San Mateo County, and you agree to submit to the personal jurisdiction of such courts for the purpose of litigating all such claims. The laws of the State of California will govern this Statement, as well as any claim that might arise between you and us, without regard to conflict of law provision...¹⁹

Invariably, the second example means that any dispute between Facebook and its user(s) will be settled in no other court other than the Northern District Court of California or a state court located in San Mateo County. As for the applicable law, the laws of the State of California are the only admissible laws in the relevant state or federal court located in Santa Clara County.

¹⁷ Ibid, Paragraph 3.

¹⁸ <http://www.jumia.com.ng/terms-and-conditions/>.

¹⁹ <https://www.facebook.com/legal/terms>.

Another example of agreed jurisdictional clause is acceptable where a website owner inserts a choice of jurisdiction clause into the agreement that the buyer needs to click the “I agree” button to assent to it.²⁰

In the absence of forum selection, **Articles 2, 4 or 5** may apply. Articles 2 and 4 are the general rules of jurisdiction. According to **Article 2**, ‘persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.’ That is, a business will be sued in the court of his domiciled Member State; while **Article 4** provides that

if the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall, subject to Articles 22 and 23, be determined by the law of that Member State.

This implies that the national law of the court of the defendant’s state shall apply.

Although a major objective of the Brussels Regulation is the harmonization of jurisdictional bases in cases involving proceedings brought against defendants domiciled in the states concerned;²¹ however, e-commerce contracts have made it difficult to determine where a defendant is domiciled online, notwithstanding the fact that the plaintiff can identify the party and locate the transaction.²² This is because online contracting is not concluded in one particular place; and a business may have branches in different locations.

Furthermore, **Article 5(1)(a)** is a special jurisdiction clause and an exception to Article 2. It provides that a person domiciled in a Member State may be sued in another Member State where the place of performance of the obligation is in that of the other Member State. **Article 5(1)(b)** states that the place of performance in the sale of goods is the place where the goods were delivered or should have been delivered, whereas in the case of provision of services, the place where the services were provided or should have been provided. However, if subparagraph (b) doesn’t apply, (a) applies.

²⁰ Fawcett, Harris & Bridge (2005), p.511. Such agreement is also known as click-wrap agreement.

²¹ Hill (2005), p.71.

²² Op cit, n. 20, p.511.

(Section 4 Provisions of Brussels 1 Regulation on Jurisdiction over Consumer Contracts).

Generally, a consumer is protected by **Art 15 (1) (c)** if he concludes a contract with a person who

pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State or to several States including that Member States...

or by **Art. 15(2)** if he

enters into a contract with a party who is not domiciled in the Member State but has a branch, agency or other establishment in one of the Member States, that party shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that State.

The protection afforded a consumer is for him to institute proceedings against a business either at the former's domiciled court or at the business' domiciled court while a business seller can bring proceedings against a consumer only in a consumer's domiciled court.²³ In short, a consumer has an option while a seller has none.

The meaning of 'pursue commercial or professional activities' in Art. 15(c) is not clear, but it is wider than a seller advertising and selling his products online in a consumer's state. It suggests more substantial activities in the state than mere presence, probably requiring the physical presence of the trader in the state.²⁴

A US domiciled company should have its physical presence in Nigeria, not its mere web presence for this protection to be utilised.

'Directing such activities' departs from the requirement of physical presence unlike *pursuing*. But when both are read together, it is rather confusing. Therefore, the European Parliament proposed an amendment to the effect that the trader must have purposefully directed his activity in some substantial way to that Member State or to several countries including that Member State.

²³ Art. 16 (1) of Brussels 1.

²⁴ J. Oren, "International Jurisdiction over Consumer Contracts in e-Europe" 52 ICLQ (2003), pp. 676-677 explained that 'pursues' covers 'situations where the vendor is actually physically carrying out some business activities in the Member State in question' regularly by 'himself, or his sales representative(s) through door-step selling or other forms of canvassing, shops, stands at trade fairs, or that he holds licences and/or bank accounts in that state which form a part of the business arrangements.'

'Looking at all the circumstances of the case'.²⁵ This would have excluded seldom or occasional contracts from the ambit of 'directing', but it was rejected by the European Commission on the ground that the existence of a consumer dispute requiring court action presupposes a consumer contract which indicates that the supplier of the goods or services has directed his activities towards the state where the consumer is domiciled.²⁶

Diane Rowland, Uta Kohl and Andrew Charlesworth criticised the Commission's view that it runs contrary to Art. 15 and envisages the possibility of a consumer falling outside the privileged exceptions.²⁷

A perfect interpretation was given by the ECJ in *Peter Pammer v Reederei Karl Schluter GmbH & co KG and Hotel Alpenhof GesmbH v Oliver Heller* where the court looked at the trader's entire business operation and held that the mere use of a website by an online business to attract customers did not mean that it was directed to other Member States. There must be additional evidence²⁸ of its intention to create commercial relations with consumers in the other Member State; such as the international nature of the activity at issue, such as tourism; the use of telephone numbers with the international dialing codes; the use of a top-level domain name other than that of the Member State in which the trader is established, or the use of neutral top-level domain names, such as .com or .eu; the description of itineraries from one or more other Member States to the place where the service is provided; the mention of an international clientele particularly the inclusion of accounts written by such customers; and/or the use of a language or a currency other than that generally used in the trader's Member State.

Furthermore, Hornle views that based on the above criteria on directing, targeting is a question of degree and it is unclear how much targeting is required for a consumer's protection.²⁹

²⁵Amendment 37 (OJ C 146/98, 2001) to the Proposal for a Council Regulation on Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial Matters (OJ C 376/17, 1999.)

²⁶ Amended Proposal for a Council Regulation on Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial Matters (OJ 062 E, 27.2.2001 P.0243-0275), para 2.2.2.

²⁷ Diane Rowland, Uta Kohl and Andrew Charlesworth, *Information Technology Law* (4th ed.), Abingdon, Oxon: Routledge (2012), pp. 261.

²⁸*Peter Pammer v Reederei Karl Schluter GmbH & co KG (C-585/08), and Hotel Alpenhof GesmbH v Oliver Heller (C-144/09) [2005] ECR I-481.*

²⁹L.Edwards and C. Waelde, *Law and the Internet*, (3rd ed.) chapter 3 of Julia Hornle, *The Jurisdictional Challenge of the Internet*, Oxford, Hart Publishing, (2009), pp. 129

However, US courts have applied the 'minimum contracts' doctrine in arriving at their definition of 'directing' in jurisdictional cases.³⁰ It was held that the soliciting of business in the forum state by the appellant corporation's salesmen was sufficient 'minimum contact' with the state to render the appellant liable under the law of that state.

The phrase 'branch, agency or other establishment' means

'to a place of business which has the appearance of permanence, such as the extension of a parent body, has a management and is materially equipped to negotiate businesses with the third parties so that the latter...do not have to deal directly with such parent body but may transact business at the place of...the extension.'³¹

This satisfies 'the appearance test'³² which means that a business like Facebook can be sued at its headquarters (California) or the place of its establishment (Dublin).

Further, a US online business which has a local server hosting its website in Nigeria or some other local electronic agent is not an 'establishment' according to Art.2(c) Electronic Commerce Directive.³³ In Diane Rowland, Uta Kohl and Andrew Charlesworth view, an establishment comprises of local personnel, physically present and responsible for its day-to-day management. Physical presence is compulsory because the location of a server can be easily manipulated by the parties and it is independent of connection with the parties or the dispute with the forum.³⁴

Question of Applicable Choice of Law (Rome 1 Convention)

Rome 1 which is a similar directive in many respects with Brussels 1 is universally applicable, that is, it applies whether or not it is the law of a Member State.³⁵ However, instead of 'domicile,' it provides for 'habitual residence.' **Article 19(1)** defines habitual residence to be the place of central administration in the case of companies and other bodies, corporate or unincorporated; and the principal place of business for a natural person acting in

³⁰ *International Shoe Co v Washington*, 326 US 310.

³¹ *Somafer v. Saar-Ferogas C-33/78* [1978] ECR 2183.

³² *Op cit*, n. 27, pp. 259.

³³ Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') states that '*...The presence and use of the technical means and technologies required to provide the service do not, in themselves, constitute an establishment of the provider.*'

³⁴ *Op cit*, n. 27 pp. 258.

³⁵ *Op cit*, n. 4, Art. 2.

the course of his business activity. **Paragraph (2)** provides that where a branch, agency or any other establishment concludes a contract, the place where the branch, agency or any other establishment is located shall be treated as the place of habitual residence.

Contractual autonomy is also provided for in **Article 3(1)** where

a contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case...³⁶

and parties can wholly or partly choose the law that will apply to their contract.

In an effort to curtail businesses from exploiting consumers, three mandatory sections are included, namely **Articles 3(3), 9 and 21**. The provision of **Article 3(3)** is as follows:

Where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement.

This is of the effect that parties cannot escape a state's mandatory provisions which are closely connected to their contract by opting for another state's law.³⁷ Also, **Article 9** stipulates that mandatory provisions necessary

for safeguarding [a state's] public interests, such as its political, social or economic organisation... irrespective of the law otherwise applicable to the contract under this Regulation will always prevail,³⁸

And **Article 21** rejects any law that is incompatible with the public policy of the forum.

In the absence of choice-of-law, the applicable law for the contract of the sale of goods or provision of services shall be the law of the country of the seller's habitual residence, that is, by **Article 4(1)(b)** -where the contract is not subject to paragraph 1, the applicable law shall be the 'country where the party required to effect the characteristic performance of the contract has his habitual residence'.

But if the law applicable cannot be determined by paragraphs 1 or 2, the contract shall be governed by the law of the country with which it is most closely connected- paragraph 4.

³⁶ Similar to Art. 23 of Brussels 1.

³⁷ For example, *sec. 27(2)(a) of the Unfair Contract Terms Act 1977* provides that UK law shall apply where the law of another country 'have been imposed wholly or mainly for the purpose of enabling the party imposing it to evade the operation of the Act.' Also, *Reg. 9 of the Unfair Terms in Consumer Contracts Regulations 1999*.

³⁸ Examples of the mandatory rules are restrictive practices rule, banking, etc.

(Article 6 of Rome I: Consumer Contracts)

The law of a consumer's habitual residence will apply where a professional pursues his commercial activities in the country where the consumer is habitually resident; or, directs such activities to that country or to several countries including that country.³⁹

This is identical with Art. 15 (1) (c) of Brussels 1 and the above legal arguments will also apply here. In addition, the 'targeting' approach is linked with Article 6(1)(b), meaning the consumer must be targeted in his home market by the business/professional. Mario Giuliano and Paul Lagarde explain that targeting may be an advertisement in the press, radio, television, cinema, by catalogues aimed specifically at the country, or he must have made business proposals individually through a middleman or by canvassing.⁴⁰

Furthermore, Article 6(2) provides that the parties may choose an applicable law but it must not deprive a consumer of his protection which cannot be derogated from by agreement. Article 6(2), according to Christopher Bisping,⁴¹ requires a comparison between the level of protection granted to the consumer under the chosen law and under his home law. Where the former is more protective, it will govern the contract as the consumer is not deprived of protection; whereas, where the latter is more protective, it will render the choice-of-law agreement obsolete.

Judicial Machinery for the Resolution of E-Commerce Disputes

In determining both issues, some actions can be taken; it can be through litigation or Online Dispute Resolution (ODR). Litigation can be handled by the court of the consumer's habitual residence which would apply the substantive law of the forum due to the identical provisions of Art. 15 of Brussels 1 and Art. 6 of Rome 1. This approach is beneficial to both parties because it creates consistency and simplicity in online contracts.⁴²

³⁹ Op cit, n. 4, Article 6(1).

⁴⁰ Mario Giuliano and Paul Lagarde, *Council Report on the Convention on the Law Applicable to Contractual Obligations* OJ C282 (1980) pp. 24.

⁴¹ Christopher Bisping, "The common European sales law, consumer protection and overriding mandatory provisions in private international law", *International & Comparative Law Quarterly* (2013).

⁴² Op cit, n.27, pp.267.

ODR has been acknowledged by the European Parliament as one solution to the difficulty of cross-border litigation; in that it is cheap, simple, fast and beneficial to both consumers and trader.⁴³ UK is presently making open consultations on applying the EU Directive into her law.⁴⁴

Globally, arbitration is a common and effective means of resolving dispute both offline and online. It is better than litigation and the enforcement of its award is easily granted compared to litigation decisions.

For instance, Jumia's arbitration clause provides thus:

Any controversy, claim or dispute arising out of or relating to these Terms and Conditions of Use will be referred to and finally settled by private and confidential binding arbitration before a single arbitrator held in Nigeria in English and governed by Nigeria law pursuant to the Arbitration and Conciliation Act Cap A18 Laws of the Federation of Nigeria 2004, as amended, replaced or re-enacted from time to time.⁴⁵

Thus, it is beneficial to both businesses and consumers because it is less time consuming and its procedures are not open to third parties; thus it has a way of protecting the name and integrity of any business.

A good example of resolving offline dispute is the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York 1958). It is advisable for parties to subject themselves to its choice of law because it has a very wide coverage (about 138 countries are signatories to it, Nigeria inclusive).

Fortunately, in 2005, an adjunct treaty was established to extend to e-commerce transactions called United Nations Convention on the Use of Electronic Communications in International Contracts (New York 2005). The Convention is applicable where the law of a state requires the application of the substantive law of a Contracting State to the resolution of the dispute, and where parties to a contract have chosen its provisions as the law applicable to the contract

⁴³ Regulation No 524/2013 of *The European Parliament and Of the Council on Online Dispute Resolution for Consumer Disputes*. It applies to EU online transactions but not yet in force.

⁴⁴ Department for Business, Innovation & Skills: *Open Consultation, Alternative dispute resolution for consumers*; <https://www.gov.uk/government/consultations/alternative-dispute-resolution-for-consumers> accessed 22/05/2015. Some authors have also commented on the advantages and effectiveness of the ODR like Julia Hornle, *Encouraging online alternative dispute resolution (ADR) in the EU and beyond* (E.L. Rev. 2013, 38(2), 187-208); and Julio César Betancourt and Elina Zlatanska; *Online dispute resolution (ODR): what is it, and is it the way forward?* (Arbitration 79, no. 3, 2013: 256-264.)

⁴⁵ Op cit, n. 18

(choice of law). Interested States may also consider adopting the provisions of the Convention at the domestic level in order to enhance certainty, uniformity, and economizing on judicial and legislative resources. It is particularly recommended for those jurisdictions that have not yet adopted any legislation on electronic commerce.⁴⁶

In spite of the above reasons, arbitration is a better means than litigation because it includes in its clause jurisdiction and applicable law provisions as seen above.

In sum, the best solution in determining these two issues and in avoiding subsequent litigation or ODR is for businesses to engage in forum selection, i.e, always ask their customers for their physical location before contracting with them, including that a consumer would be denied of his protection where he gives a false information. Technology like drop-down menu could be used to block consumers from jurisdictions businesses do not wish to target so as to prevent the latter from contracting with consumers in jurisdictions where their laws are considered as being unfavourable.⁴⁷

In the case of *LICRA v Yahoo! Inc.*,⁴⁸ geolocation, a technology capable of identifying content by geographical source; and similar to drop-down menu was used by France to ensure that Yahoo (an internet website based in the United States) filtered 90 percent of French users from purchasing Nazi memorabilia items posted on its auction site. The court order ensured that Yahoo blocked French users through identification via their IP addresses and nationality disclosures.

Countries like Saudi Arabia and Singapore also filter and censor internet content while South Korea has banned access to gambling Websites. China is not left out in controlling internet accessibility of her citizens.⁴⁹ On a lighter note, filtering technology like drop-down menu and geolocation are means of bringing borders to the so-called “borderless internet”.

⁴⁶ http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2005Convention.html

⁴⁷ Op cit, n. 29, at p. 130.

⁴⁸ *Ligue contre le racisme et l'antisémitisme et Union des étudiants juifs de France c. Yahoo! Inc. et Société Yahoo! France*; 433 F.3d 1199 (9th Cir. 2006) <http://law.justia.com/cases/federal/appellate-courts/F3/433/1199/546158/> accessed 22/05/2015.

⁴⁹ Peter Adeniran, *A practical Guide to Business, Law and the Internet*, London, Kogan Page Limited, (2002), pp. 101.

Conclusion/Recommendations

The purpose of this essay has been to examine the issues that arise in online contracting, particularly in cross-border jurisdiction; the present state of e-commerce in Nigeria; the laws in place in the EU to protect consumers when it comes to identifying the court to exercise jurisdiction and the proper law to be applied in resolving e-commerce disputes.

Therefore, from the EU statutes, it is deduced that the best way of avoiding jurisdiction and choice-of-law issues is by including such clauses in e-commerce contracts.⁵⁰ However, where such clauses are omitted, defendants can be sued in their domiciled countries⁵¹ or in some special circumstances, at the places of performance of their contracts.⁵² Notwithstanding the general or special circumstances, the law favours consumers who are permitted to institute legal actions at the courts of their domicile or the defendant's domicile.⁵³ On the other hand, under Rome 1 Convention, where a business directs its activities to a consumer's country, the mandatory laws of a consumer's habitual residence will apply, even if a choice-of-law clause stipulating a different applicable law is agreed to.

Therefore, in order to minimise and prevent disputes from arising, businesses based in Nigeria, and the Nigerian government should introduce technologies (like drop-down-menu and geolocation) to control Nigerians' accessibility to the internet and block Nigerian consumers from contracting with foreign businesses or websites whose activities are contrary to the Nigerian law. A consumer can also seek redress via litigation at the court of her jurisdiction subject to her applicable law, or access the ODR for fast and effective settlement.

It is perhaps time that these two key issues were taken more seriously by the Nigerian government. A national codified law should be made by the legislature in the nearest future to majorly border on jurisdiction and choice-of-law of internet transactions. Alternatively, African countries or countries all over the world can come together like the European Community and produce harmonised and better laws than Brussels 1 Regulation and Rome 1 Convention to govern African and international e-commerce transactions.

Finally, adherence to these recommendations will remove the uncertainty of jurisdictional and choice-of-law issues in e-commerce contracts and further encourage Nigerians in

⁵⁰ Op cit, n, 3 and 4, Article 23 and Article 3(1) respectively.

⁵¹ Op cit, n. 3, Article 2.

⁵² Ibid, Article 5.

⁵³ Ibid, Article 16.

participating in internet transactions. This on the long run will take Nigeria's e-commerce development to the next level, thereby boosting our economy.

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