

CHALLENGES TO THE CONCEPT OF DOMICILE IN NIGERIA IN THE 21ST CENTURY*

Abstract

The emergence of information technology which defies all known international boundaries and legal systems is a development which prompts various legal issues and problems, most of which can or ought to be resolved by Private International Law. The concept of domicile in conflict of laws in Nigeria has been challenged by this development. Domicile as a traditional concept becomes meaningless as a connecting factor in the face of information communications technology revolution. Through the doctrinal research method, this article has found that for internet torts, it is difficult to find who is liable for a tort committed in cyber space unlike in traditional libel law where every participant in the communication is liable. It also found that the concept of domicile becomes inappropriate as a connecting factor to determine the choice of law and the applicable law in internet transactions. It recommends that, in view of the realities of the 21st century world of globalization and the inappropriateness of domicile as a connecting factor, laws should be enacted to provide for the issues of choice of law and internet jurisdiction in order to accommodate the developmental needs of Nigeria and to enhance justice delivery.

Keywords: Domicile, Internet, Internet torts, Internet Contracts, Internet Marriages, Challenges

1. Introduction

Domicile is the legal relationship between an individual (*Propositus*) and a territory with a distinctive legal system which invokes that system as his personal law. The determination of domicile of an individual has great legal significance. It helps in identifying the personal law by which an individual is governed in respect of various matters such as the essential validity of a marriage, the effect of marriage on the proprietary rights of husband and wife, jurisdiction in divorce and nullity of marriage, illegitimacy, legitimation and adoption and testamentary and intestate succession to movables. Each person who has, or whom the law deems to have, his permanent home within the territorial limits of a single system of law is domiciled in the country over which the system extends and he is domiciled in the whole of that county even though his home may be fixed at a particular place within it.¹

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¹ J. J. Fawcett and J M Carruthers, Cheshire, *North and Fawcett Private International Law* (14th edn, Oxford University Press, 2008) 154.

Domicile as a connecting factor has been used in determining the choice of law to be applied in situations such as contracts, torts, marriages and commerce. However, with the advent of the Information Communications Technology (ICT) in the 21st Century, new challenges have emerged. In other words, the concept of domicile in these areas as emphasised in cases of conflict of laws is now challenged by the growth of Information Communications Technology (ICT). This article shall address these areas such as internet torts, internet contracts and internet marriages and see how inappropriate domicile becomes, as a connecting factor.

2. Conceptual Clarifications

i. Domicile

The concept of domicile is not uniform throughout the world. To a civil lawyer, it means habitual residence, but at Common law, it is regarded as the equivalent of a person's permanent home.² *Black's Law Dictionary* has defined domicile in two perspectives. The first definition is, 'The place at which a person has been physically present and that the person regards as home, a person's true, fixed, principal and permanent home, to which that person intends to return and remain even though currently residing elsewhere.' The second definition refers to domicile as, 'The residence of a person or corporation for legal purposes.'³

In *Mitchell v US*, the Supreme Court of America defined domicile as:

A residence at a particular place accompanied with positive or presumptive proof of an intention to remain there for an unlimited time... By the term domicile, in its ordinary acceptation, is meant the place to be his domicile until facts advanced establish the contrary.⁴

Domicile is also in the Nigerian case of *Omotunde v Omotunde* defined as:

The place at which a person is physically present and that which the person regards as home, a person's true, fixed, principal and permanent home to which that person intends to return and remain even though currently residing elsewhere – same is also termed permanent abode.⁵

The basic idea of domicile was that of permanent home. Lord Cranworth in *Whicker v Hume*, observed: 'By domicile we mean home, the permanent home. And if you do not understand your permanent home, I'm afraid that no illustration drawn from foreign writers

² *Whicker v Hume* (1858) 7 HL Cas 124 at 160.

³ B. A. Garner, *Black's Law Dictionary* (10th edn, Thomson Reuters 2014) 592.

⁴ 88 US 350, 352 (1874).

⁵ (2001) 9 NWLR (Pt. 718) 252 at 281 (Per Adekeye, JCA).

or foreign languages will very much help you to it.’⁶ Though the idea of permanent home is the central practical feature of domicile, Lord Cranworth’s definition has a deceptive simplicity; for domicile is a conception of law which, though founded on circumstances of fact, gives to these circumstances an interpretation frequently different from that which a layman would give them.⁷ For instance, while it is acknowledged that a domicile must be imputed to everyone, yet there are some persons who lack a home in the conventional sense of the word and others who have more than one home.⁸

A consideration of both the dictionary and case law definitions of domicile would lead to the irresistible conclusion that domicile is the connecting link between a person and a particular legal system for the determination of his personal laws.

ii. Internet

Oxford Advanced Learners Dictionary,⁹ defines Internet as ‘an international computer network connecting other networks and computers from companies, universities, etc.’ It has also been defined by Cambridge Dictionary as the large system of connected computers around the world that allows people to share information and communicate with each other.¹⁰ The internet is also a global system of interconnected computer networks that uses the internet protocol suite (TCP/IP) to communicate between networks and devices. It is a network of networks that consists of private, public, academic, business, and government networks of local to global scope, linked away by a broad array of electronic, wireless and optical networking technologies.¹¹ Nsude defines the internet as ‘a global network of networks connecting millions of computers. It is an inter connection of large and small network around the globe.’¹² To Kanyip, the internet is the medium through which the affairs of mankind are now woven around the globe.¹³

The word internet is derived from international networking. It is the global networking of individual computers across the globe. Internet is known with other names such as net, web, information super high-way and cyber space. Linking together of computers in different

⁶ Whicker (n 2).

⁷ R H Graveson, *Conflict of Laws* (7th edn, Sweet and Maxwell 1974) 185.

⁸ C O Ndifon, *Issues in Conflict of Laws* (Vision Connections Digital Publishers 2001) 319-320.

⁹ (8th edn, Oxford University Press 2010) 786-787.

¹⁰ <<https://dictionary.cambridge.org/dictionary/english/internet>> accessed 16 May 2020.

¹¹ Wikipedia <https://en.m.wikipedia.org/wiki/internet> accessed 16 May 2020.

¹² I. Nsude, ‘A Historical Analysis of the Internet as a Modern Communication Medium and its role in Globalization’ [2004] (1) (3) UNN, 105.

¹³ B. B. Kanyip, ‘Consumers, globalization and the paradox of protection’ [2003] 2 *Benue State University Law Journal*, 29.

locations brings information to individuals who care to be part of networking group. Information is not the only resource shared among the users of the internet technology, power of sophisticated equipment is also shared. The motive behind the internet technology is to create a virtual global village where information flow cannot be disrupted.

3. Challenges to the Concept of Domicile in Nigeria in the 21st Century

‘The law cannot be and is not ignorant of modern business methods and must not shut its eyes to the mysteries of the computer.’¹⁴ As stated in the above quotation, every aspect of the law is challenged by the development of information technology in recent times. The law itself is not ignorant of the situation, and must not shut its eyes to the mysteries of information technology.

The law of domicile under Private International Law is one of the most highly affected areas of the law by information technology development, spearheaded by the internet. This article critically analyses the challenges posed on this aspect of the law by information technology in the following areas:

a. Internet Torts

Internet torts are the torts of libel and slander and are collectively known as defamation laws which are common features in the legal system of several Commonwealth Countries including Nigeria and the United States. The contemporary torts of libel and slander originated primarily from the English defamation law which permits an aggrieved party to initiate an action for libel for any printed, broadcast or published false statement that harms reputation, diminishes respect, defames character, or causes a reasonable person to have a low esteem of the individual or entity. However, government entities cannot institute or maintain actions for defamation although an offended government official can sue for libel for statements or allegations made against the official in his individual capacity.¹⁵

The revolution in the information technology and the evolution of internet publishing over the years has introduced a new dimension to the law of libel and has brought a new challenge to the world of communication. According to Stiles,

Internet publishing is easy and has become common place in our technology focused society. Although this type of publication can be exciting and helpful for those interested in communicating an idea, the issue of anonymous speech on the internet has created some complications in the rather established tort of

¹⁴ *Esso Petroleum Ltd v Oyegbola* (1969) NMLR 198.

¹⁵ K. Oladele, ‘*Internet Libel and the Law of Defamation: Justice without Borders?*’ <www.saharareporters.com/topic> accessed 18 October 2013.

defamation... The proliferation of the internet over the last few years has added a new dimension to the world of communication and media, not only does the internet provide endless sources of information for the general public, it also provides members of public the opportunity to become a source of information themselves, web boards, websites, listservs and chat rooms are only a few of the cyber-forums where anyone with internet access can share their opinions and public statements of facts.¹⁶

One thing about the internet is that anybody can circulate materials freely and unedited or contribute to discussion groups or chat rooms from the comfort of their homes without any fear of being censored. Internet users may choose not to mention their names or if they do, chances are that such names do not exist or are pseudonyms or worse still, some are simply anonymous thereby making it difficult for a plaintiff in internet defamation case to know the true identity of the prospective defendant except if the plaintiff possibly approaches the network service provider. Because it is usually very difficult to track down the culprit, many internet users regularly defame their victims and often times get away with it. Sometimes, even if the identity of the user is revealed, the status and personality of the user may not be worth the time and resources to pursue the litigation against him.

The scenario can be more complicated than demonstrated above. One of the foremost issues is the question of who should be held liable for internet tort or cyber tort (a tort committed in cyber space). For example, who should be held liable when someone in a news group posts a defamatory flame (an online message in which one attacks another in a harsh, often personal terms?). Should an Internet Service Provider (ISP) be liable for the remark if the ISP was unaware that it was being made? Other problems associated with the internet torts could be finding the appropriate jurisdiction for initiating law suit and the choice of law to be applied.

In traditional libel law, generally speaking, every participant in the communication is liable (subject to the defence of innocent dissemination). For example, if a person "A" composes a defamatory letter, and a person "B" types and post on the internet, they are both liable for its consequences. Like other torts, defamation is governed by state law and the elements of the tort can vary from state to state. Accordingly, there is a rule in Canadian Libel law exposing 'everyone involved in a communication,' to liability for that communication, subject to the 'innocent dissemination' defence.¹⁷ In Nigeria just like in most

¹⁶ Everyone's a Critic; Defamation and Anonymity on the Internet cited in Oladele (n 15) 3.

¹⁷ D. F. Sutherland, 'Defamation on the Internet' <<https://www.adidem.org/articlesDss.html>> accessed 18 August, 2008.

other countries, this general rule is subject to the ‘innocent dissemination’ defence, where a person who plays some part in disseminating libelous publication is absolved from liability if he did not know that it contained libelous matter.¹⁸ It would therefore be ridiculous to suggest that the mail person who delivers snail mail, or sorts it, should be liable for the unread contents of an envelope. Nigerian Postal Agency (NIPOST) cannot be sued for the consequences of defamation materials usually unread by its officers, but delivered through its facilities.

Newspapers, magazines and television and radio stations may be held liable for defamatory remarks that they disseminate, even if these remarks are prepared or created by others. Under the United States of America Communications Decency Act,¹⁹ however, Internet Service Providers (ISP), or ‘interactive computer service providers’ are not liable with respect to such material as they are completely immune from liability for material posted by third parties.²⁰ In *Blumenthal v Drudge*,²¹ under a licensing agreement with America Online Inc. (AOL), the Drudge Report, an online political publication, was made available free to AOL subscribers. According to the agreement, AOL could remove content that it determined was in violation of AOL’s ‘standard terms of service’. One issue of the Drudge Report contained an article charging that Sidney Blumenthal, an assistant to the President of the United States, ‘has a spousal abuse past that has been effectively covered up’. Blumenthal’s spouse, Jacqueline Blumenthal, also worked in the White House as the Director of a Presidential Commission. When the Report’s editor, Matt Drudge, learned that the article was false, he printed a retraction and publicly apologized to the Blumenthals. The Blumenthals filed a suit in a Federal District Court against Drudge, AOL, and others, alleging in part that the original remarks were defamatory. AOL filed a motion for summary judgment. The court held that AOL was nothing more than a provider of an interactive computer service on which the Drudge Report was carried, and Congress has said quite clearly (in the communications Decency Act (CDA) of 1996) that such a provider shall not be treated as a “publisher or speaker” and therefore may not be held liable in tort. The court granted AOL’s motion for summary judgment. The court held that under CDA, an Internet Service Provider (ISP) is not liable for failing to edit, withhold, or restrict access to defamatory remark which it disseminates but which it did not create.

¹⁸ *Awolowo v Kingsway Stores Ltd* (1968) 2 ALL NLR 217.

¹⁹ 1996, 47 USCS.

²⁰ *Ibid* s. 230.

²¹ 992 F Supp 44 (DDC 1998).

Jurisdiction in Cyber Defamation and Choice of Law

On the question of finding the appropriate jurisdiction and the relevant choice of law, it is not in doubt that many e-mails and all websites are inter-jurisdictional. Therefore, conflict of laws steps in to address the issue on which state or states courts may be used by an aggrieved victim and the system of law to be applied. Under most jurisdictions, the Plaintiff can usually choose to sue in any of the jurisdictions wherein the Defendant is domiciled or carries on business or in which the tort was committed. Once the Plaintiff has chosen a Court system, the procedural rules of that jurisdiction are applied to the case. The substantive rules of jurisdiction chosen will be presumed to be applicable unless some party establishes that the law of a different province or state ought to be applied to the case. If the application of the law of that jurisdiction is challenged as inappropriate, courts will usually apply the law of the jurisdiction which has ‘a real and substantial connection’ with the defamation in issue. In Canada for instance, the law of defamation is largely a provincial matter, being property and civil rights, and therefore is governed by the legislation of the applicable Canadian province or territory.²²

Usually, if the substantive law of the forum (*lex fori*) is applied, the cases would be more efficient since foreign law need not be proved. Forum-shopping however, will lead to inefficiencies, since claims will be brought in otherwise inconvenient locations, simply because the law is thought by Plaintiffs to be more favourable in that jurisdiction. If as an alternative, the substantive law of the jurisdiction in which the Plaintiff is domiciled and carries on business (the location of at least some of the damage) is deemed to be the appropriate law to be applied, then multinationals have an advantage; that is, choice of jurisdictions, while the less-travelled typical individual person would be restricted to the law of his or her lowest jurisdiction. It is submitted that applying the law of the locations of the website or the domicile of its sponsor could give rise to a phenomenon different from private radio stations and therefore would be an inappropriate means of resolving the conflict of laws question undermining the very law sought to be enforced.²³

Forum shopping for laws and courts that are particularly ‘Plaintiff-friendly’ otherwise known as ‘libel tourism’ is very rampant in many libel cases involving multiple jurisdictions and diversity of parties.²⁴ This has become a very big problem to the British Courts, as

²² Sutherland (n 17) 3.

²³ Ibid.

²⁴ Oladele (n 15) 4.

foreign litigants feel comfortable with the British legal system as one of the most preferred destination and the jurisdiction more likely to give favourable decisions in libel cases even where British Courts obviously lack both the subject matter and personal jurisdiction and the case has no contact whatsoever with the United Kingdom.²⁵ However, for a libel Plaintiff who chooses to sue the operator of an interactive web page in England because of its favourable substantive law and suitable procedural law, that choice may not always work out. The Plaintiff may encounter difficulty with enforcement or collection of damages. If defendants do not have English assets or a steady income from English sources, the Plaintiff may be forced to pursue the Defendants where they are domiciled. The United States for example, enacted the Free Speech Protection Acts of 2008, 2009 and later the Speech Act of 2010 all of which bar the United States Federal Courts from recognizing or enforcing foreign libel judgments in the United States that do not pass the Almighty First Amendment Formula or such libelous statement upon which the judgment was based would not constitute a libel under the United States defamation laws.

Many countries including Nigeria are yet to enact laws on internet torts. The law is not settled on the issue of liability of web providers and the issue of personal jurisdiction under the common law states of which Nigeria is a member. To have *in personam* jurisdiction over a defendant, such a person must have been properly served with the writ and then the Courts will assume jurisdiction over such a defendant. The service of a writ within Nigeria is regulated by the provisions of the Sheriff and Civil Process Act,²⁶ and the various High Court Civil Procedure Rules of the States.²⁷ The issue is, how can a court exercise *in personam* jurisdiction over a wrong committed on the internet. Going by the *in personam* jurisdiction rule at Common law, most wrongs committed on the internet will go unredressed. However, the American approach adopted by its courts over internet transactions is commendable. The Court's exercise of jurisdiction depends on the amount of business that an individual or firm transacts over the internet. The standard is that of a 'sliding scale'. Thus, in *Zippo Manufacturing Co. v Zippo Dot Com Inc.*,²⁸ the United States District Court of Pennsylvania ruled that if a defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the internet, personal jurisdiction is proper.

²⁵ Ibid 5.

²⁶ Cap 56 Vol 14 LFN 2004 s 96-9.

²⁷ For example, The Benue State High Court (Civil Procedure) Rules 2007 Order 7.

²⁸ 955 F Supp 1119 (USDC 1997).

At the opposite end are situations where a defendant has simply posted information on an internet website which is accessible to users in foreign jurisdictions. A passive website that does little more than make information available to those who are interested in it is not grounds for the exercise of personal jurisdiction. The middle ground is occupied by interactive websites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interacting and commercial nature of the exchange of information that occurs on the website. The court therefore, held that it has jurisdiction over parties who conducted substantial businesses in its jurisdiction excessively over the internet.

In the Blumenthal's case, the District Court of Colombia applied the Zippo case and found jurisdiction against the defendant who transmitted the defamatory material from Los Angeles, California via his world wide website. The rule was also applied in the Canadian defamation case of *Braintech Inc v Kostiuk*,²⁹ to found jurisdiction.

American courts seised of internet defamation cases in inter-jurisdictional situations have also been applying the 'effects test' set forth by the United States Supreme Court in *Calder v Jones*,³⁰ to assert *in personam* jurisdiction. In that case, the American Supreme Court found *personam* jurisdiction in California over a Florida defendant who wrote allegedly defamatory statements concerning the activities of a California resident 'based on the effects of the Florida conduct in California'. It held that the allegedly tortuous conduct was directed at California and the defendant knew that the effect of that conduct would be most felt in California where the alleged defamatory statements were most widely circulated.

In *Edias Software Intern v Basis Intern Ltd*,³¹ an Arizona Court confirmed that libelous statements by a non-resident can form the basis of jurisdiction in the plaintiff's forum. The Court held that e-mail, web page and forum message were directed at Arizona and allegedly caused foreseeable harm to the plaintiff. This conferred *in personam* jurisdiction on the Arizona Court.

The effect of the various approaches is to do away with the common law requirement of physical presence, and its place, establish a 'web presence rule' which is more reasonable in a 'globalised village'. The American approach is therefore suggested for law reforms in place of the application of the 'real and substantial connection' of the substantive law of the forum.

²⁹ (1999) BCJ No 622 QC.

³⁰ 465 US 782 (1984).

³¹ 947 F. Supp 413 (D Ar 121996).

b. Internet Contracts

The law of contract is one of the areas of law challenged by the development of the internet. Sagay,³² defines a contract as an agreement which the law will enforce or recognize as affecting the legal rights and duties of the parties. Marco Van Der Merwe and Francis Janse Van Vuuren³³ have defined an Online Contract (Internet Contract) as a contract created wholly or in part through communications over computer networks, by e-mails through websites, via electronic data interchange and other electronic combinations.

From the above, a contract can be defined as an agreement, recognized and enforceable by laws. That is to say, not all agreements are recognized by law, and as such, not all agreements are contracts. For a contract to be valid and recognized by law there must be an offer, an acceptance of the offer and consideration. The parties must have intended to create legal relations between them and they must all have the requisite capacity to contract. The contract must not also be illegal. Once all these conditions are met, the contract becomes valid and legally enforceable.

The popularity of the internet is rapidly growing.³⁴ Increasing number of businesses set up their internet sites and offer pages in the World Wide Web (www). They offer goods and services to customers, who usually pay by credit card or electronic cash. In the case of sale of goods, the only physical transaction is the shipping of goods. If the contract is for the supply of services on the Internet (e.g. supply of software or database access), no physical transaction takes place at all. The vast majority of those contracts are consumer contracts, the supplier being a professional business and the purchaser being a natural person usually buying goods and services for private purposes.

The two most common ways of entering into contracts on the World Wide Web are by exchange of email or by what is known as web-click whereby a shopper visits the website of an e-merchant and selects the item(s) or orders the services that he is after.³⁵ There are certain preliminary considerations that apply to both types of contracts, such considerations include: whether a valid contract can be concluded wholly electronically at all and if it can, how can

³² I. E. Sagay, *Nigerian Law of Contract* (2nd edn, Spectrum Law Publishing 2000) 1.

³³ B. Reinhardt *Internet Contract and Cyber Law*, (Van Sheik Publishers 2000) 156.

³⁴ R. Schu 'Consumer Protection and Private International Law on Internet Contracts' <www.ijit.oxfordjournals.org> accessed on 30 January 2013.

³⁵ G. Bamodu 'Information Communications Technology and E-Commerce. Challenges and Opportunities for the Nigerian Legal System and Judiciary 2004 (2)'. *The Journal of Information Law and Technology (JILT)* <<http://www.2.warwick.ac.uk/bamodu>> accessed 30 January, 2013.

such a contract be authenticated and attested to by a legally valid signature, if necessary, and also what is the legally acceptable proof of the contract?

It seems taken for granted, that a contract can be concluded validly over the World Wide Web.³⁶ In general, this is true. In the Common Law tradition to which the Nigerian legal system belongs, apart from a few specific exceptions, a contract may be concluded by any means including writing, orally or by conduct. Other countries may require that contracts, especially involving above a set amount of money, should be in or evidenced in writing. In such a case, the question that arises is whether an internet contract satisfies the requirement. Under pre- internet era traditional law, such a contract would not normally satisfy the requirement of writing because that would require visible representation in tangible form whereas computer data is strictly speaking intangible. This problem has however been resolved in many countries through the passing of legislation that operate a 'functional equivalence' approach of giving the same legal effect to data messages as paper based documents.³⁷ In Nigeria, the problem has also been resolved by section 84 of the Evidence Act,³⁸ which provides for admissibility of computer generated document or document downloaded from the internet. The section provides as follows:

84 (1) In any proceedings, a statement contained in a document produced by a computer shall be admissible as evidence of any fact stated in it of which direct oral evidence would be admissible, if it is shown that the conditions in subsection (2) of this section are satisfied in relation to the statement and computer in question.

S.84 (2) The conditions referred to in subsection (1) are:

- a) That the document containing the statement was produced by the computer during a period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period, whether for profit or not, or by any individual;
- b) That over that period there was regularly supplied to the computer in the ordinary course of those activities information of the kind contained in the statement or of the kind from which the information so contained is derived;
- c) That throughout the material part of that period the computer was operating properly or, if not, that in any respect in which it was not operating properly or was out of operation during that part of that period was not such as to affect the production of the document or the accuracy of its contents; and

³⁶ Ibid 11.

³⁷ Ibid.

³⁸ Cap 18 2011.

- d) That the information contained in the statement reproduces or is derived from information supplied to the computer in the ordinary course of those activities.

By the provision of subsection 1 of section 84, electronically generated evidence is admissible if the conditions in the preceding subsections are fulfilled. The law does not distinguish between criminal and civil actions but all proceedings for which direct oral evidence is admissible. Electronic evidence is viewed as a specie of documentary evidence and as such the rule against admissibility of hearsay evidence also applies to electronically generated evidence. Also by this law, the word document means paper based documents or any other form by which the statement is contained, for instance, a disc, data messages.

The Nigerian Evidence Act in section 93 has provided the needed succour for electronic commerce thereby bringing our law to international standards. The section provides as follows:

- 93 (1) If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the hand writing of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting.
- (2) Where a rule of evidence requires a signature, or provides for certain consequences if a document is not signed, an electronic signature satisfies that rule of law or avoids those consequences.
- (3) An electronic signature may be proved in any manner, including by showing that a procedure existed by which it is necessary for a person, in order to proceed further with a transaction, to have executed a symbol or security procedure for the purpose of verifying that an electronic record is that of the person.

The above provisions of the Evidence Act have made it imperative that, the maker of the document authenticates the document by indicating that he is the maker and adopting the contents of the documents thereby making it legally binding on him.

According to Bamodu, concerning the formation of an electronic contract, the basic rules concerning the formation of a contract apply equally to electronic contracts among other things, there must be an 'offer' which is met with a matching and unconditional 'acceptance'. With regard to e-mail contracts, it is relatively clearer to identify which party is making the offer ('offeror') and which party is making the acceptance by going through the exchange of mails to determine which party is finally agreeing to a set of terms proposed by the other party.³⁹ Even at that, there are still a couple of not so straight forward questions that might

³⁹ (Bamodu (n 35)) 12.

have an important bearing on the parties' legal rights. After identifying the party who makes the acceptance, the questions following then are where and when did the acceptance become effective? This has a bearing on determining the precise moment that a contract was made as well as in the case of a contract connected to more than one country especially, where the contract was made, the latter possibly having an effect on which country's law should govern the contract. For example, Dave in Lagos sends an offer by e-mail to Tina in Ohio, Tina sends an acceptance by e-mail from Ohio to Lagos. The e-mail is sent in Ohio at 11:00 GMT but does not reach Lagos until 11:15 GMT and is not seen by Dave until 13:00 GMT, was the contract made in Lagos or Ohio? Was it made at 11:00, 11:15 or 13:00 GMT?

With regard to web-click contracts, Bamodu stated that, establishing which party is making an offer and which one is accepting may actually be more complicated and could have far more serious and potentially financially dangerous consequences.⁴⁰ In the first instance, the online business (owner of a business website) advertises products for sale at its website usually with a price tag. An online purchaser makes an order by selecting desired items through clicks and takes the items to the check out where the sale is confirmed and payment made.

The first question is whether the online seller is the one that makes an offer by advertising products online or whether it is the buyer who makes an offer by selecting items and presenting them at check out. In one case in the UK, a company (Argos) advertised television sets on its website mistakenly for £2.99 instead of £299. It was reported that orders to the tune of £1million were very quickly placed for television sets including several (1,700) by one lawyer – astutely or discredibly? It is not entirely clear how the case was ultimately resolved, it seems that no legal proceedings were brought especially with Argos arguing that those who made the orders must have realized that the quoted price was a mistake and also that they themselves had reserved the right to accept orders placed with them and accordingly, no contract could be made until they accepted any such orders.⁴¹

In another example, this time from the USA, a company (buy.com) advertised a Hitachi VDU monitor for sale at \$165 on its website. The price should have been \$588! 7000 orders were received but only 143 were in stock. The company initially insisted it would only

⁴⁰ Ibid 13.

⁴¹ Ibid.

honour the first 143 orders but it had to settle the subsequent class action for \$575,000 with legal bills totalling up to \$1m.⁴²

The above fiasco is caused possibly because the offer of products on the website is taken as amounting to an offer as treated at law and not as invitation to treat as most advertisements are treated by law.⁴³ Assuming that the formal validity of the contract is assumed, a subsequent litigation arising from the contract be it for breach of contract or specific rights of parties to cancel the contract, will inevitably raise questions of jurisdiction and choice of law. The consumer, ready to sue the supplier has to decide in which country to bring the action. Both in the UK and in the US, courts will first decide whether they have jurisdiction to hear the case. They will then determine the applicable law by applying their own choice of law rules which can lead to different results. Thus, a US or Nigerian Court could apply English law, Nigerian law or vice versa.

Parties to the contract will have reasonable expectations as to which law applies to their transaction. The closer a contract is connected to a particular jurisdiction, the more justified is the expectation of either party that the law of that jurisdiction apply. But since distance selling contracts and contracts for the supply of services across borders are usually not unequivocally most closely connected to one jurisdiction, parties expectations might conflict; the consumer expects the protection of the law of the country where he is habitually resident whereas the supplier relies on the application of the law of the country where he has his place of business. Article 5 (2) of the EC Contractual Obligations Convention,⁴⁴ makes mandatory consumer protection rules of the consumers country of residence applicable in situations where the consumer can reasonably expect them to apply.

In an internet environment, can certain connecting factors be used to determine the applicable Law so as to meet parties' expectations as to which law applies to their transaction? The answer is definitely in the negative hence the world wide web is structured logically not geographically. Notions relying on geographical locations, such as 'contract made with supplier or his agent in country of consumer's residence', 'marketing in consumer's country', 'services rendered outside consumer's country must be meaningless for the determination of the parties' expectations.⁴⁵ Expectations and interests of consumers and suppliers are different inside the online world from those when contracting in the real world.

⁴² Ibid.

⁴³ *Pharmaceutical Society of Great Britain v Boots Cash Chemists* (1952) 2 QB 795.

⁴⁴ Rome Convention 19 June 1980; Contracts (Applicable Law) Act 1990 s 3 (3) (a).

⁴⁵ *Schu* (n 34) 17.

A consumer for instance, shopping in cyber space knows that the other party to the contract will most likely be foreign. But unless the supplier provides the physical address of his place of business, the consumer is not even able to find out which is, apart from the law of her residence, the other potentially applicable law. The supplier on the other hand, faces similar problems. Unless the contract is for the shipment of goods to the purchaser's residence, that place might be difficult for the supplier to ascertain.⁴⁶

It is seen from the above discourse that, the place where services are to be rendered or the place and form of marketing activity on the net are in some cases not appropriate as connecting factors to determine the applicable law. Moreso, where the contract is for the supply of online services, the connection with the country of the consumer's residence is weak for there is no physical delivery to that place and the services are rendered at the fortuitous location of the information resource which makes it difficult to ascertain the applicable law.

c. Internet Marriages

Marriage is a universal institution, in that all societies have a concept of marriage. Since the time when man in primitive society, decided to live in groups and formed the society, marriage and family are the institutions which are considered to be not only a union of man and woman but as a sacrament of which society at large was deeply interested for a long time. Things have however changed with technological developments made by mankind and marriage is not an exception to this. The forum and formalities required for marriages too have changed now particularly for those celebrated on the internet.

The law governing marriage is complex and varies with community or religion. Every community has its own personal law governing the issues relating to marriage.⁴⁷

It is well established that questions on the validity of marriage are divided into those regarding the formal validity of the marriage and those concerning the capacity of the parties to marry or the essential validity of the marriage. The distinction between formal parameters and others has always been made by English law as *lex fori* which Nigerian law is similar to. Generally, as regards the formal validity of a marriage, the law of the place rules the deed (*Locus regit actum*) in that the formal validity of the marriage is governed by the *lex loci celebrationis* (law of the place of celebration).⁴⁸

⁴⁶ Ibid 38.

⁴⁷ G. Narula, 'Digital Marriage' <www.naavi.org/C/_editorial_05/narula_cyber_matrimony> accessed 18 January 2013.

⁴⁸ *Scrimshire v Scrimshire* (1752) 2 Hag. Com. 395.

A marriage will therefore be formally valid if the formalities required by the law of the place where it was celebrated have been observed. It does not matter whether these formalities are wholly secular or wholly religious or a mixture of the two, provided what is done has the effect under the law of the place of celebration of establishing the relationship as a marriage.⁴⁹ If the local law has special rules for certain types of foreigners, compliance with those rules will be required.⁵⁰ In the case of *Ogden v Ogden*,⁵¹ it was held that formalities include the licensing, certification and publicity requirements, the form of ceremony, what has to be said, number of witnesses, officials present and whether proxies can be used. The formal validity of a marriage under the Nigerian legal system is governed by the Matrimonial Causes Act.⁵² Therefore, where the parties are both Nigerians, they must comply with the provisions of the Matrimonial Causes Act. Any marriage celebrated in contravention or where there has been flagrant disregard of the provisions of the Matrimonial Causes Act will be *void ab initio*.

Essential validity of a marriage has been fixed by the Matrimonial Causes Act and it essentially deals with the legal capacity of the parties to contract the marriage.⁵³ These include:

- (i) None of the Parties must be already married.
- (ii) Prohibited degrees of consanguinity and affinity.
- (iii) Parental consent
- (iv) Consent of the parties
- (v) Sanity
- (vi) Age

All these requirements must be satisfied before a person can contract an essentially valid marriage. Other countries have similar provisions such as these. Essential validity of a marriage is governed by personal law. Under English law just like Nigerian law, domicile is the determinant of the personal law. All questions of parties marrying each other will be referred to the *lex domicilii* of the parties. Therefore, when the test for essential validity of the marriage discloses incapacity as a result of the *lex domicilii*, the marriage is generally void.

⁴⁹ *Berthiaume v Dastous* (1930) AC 79.

⁵⁰ *Hopper v Hopper* (1959) 2 All ER 575.

⁵¹ (1909) 46.

⁵² Cap M7 LFN 2004.

⁵³ *Ibid* s. 3.

An area that has brought disagreement among legal scholars is the possibility of Digital marriage or marriage with use of internet.⁵⁴ The main point of their disagreement is the relaxation of the requirement of physical presence. The point being made here is whether an internet marriage is formally valid depends on the law of the place where it is celebrated. The issue pertains to how the *lex loci celebrationis* can be ascertained where both parties to an internet marriage are resident in their respective countries and the marriage is ‘celebrated’ in cyber chapels which cannot be linked with any particular country or state. Private International Law has no answer to this question since the internet is not a state or country in the legal and political sense and cannot make law to govern any situation. Therefore, such marriages concluded on the internet are illegal marriages having not met the requirements of the law of the place of celebration. Such marriages constitute a serious challenge to the rules of private international law.

At present, marriage under the Hindu Marriage Act cannot be performed in the cyberspace as traditional Hindu law emphasizes on the ceremony of ‘*Saptapadi*’ as an essential ceremony for the validity of it which cannot be performed without physical presence of both parties to the marriage.⁵⁵ But such a marriage would be equally valid if there is a custom to the contrary that allows the party to marry by simply accepting each other as husband and wife.

According to Narula, as far as marriage under the Hindu Marriage Act or Special Marriage Act,⁵⁶ and Muslim Marriage are concerned, they can be performed in the cyberspace since facilities of digital signature and video conferencing can be used for this purpose.⁵⁷ Similarly, marriage under the Muslim law where marriage is essentially a contract is possible on the internet provided the following conditions are fulfilled. These are:

1. The parties to the marriage must be competent;
2. The consent of the parties or their guardians must be free consent;
3. The required formalities are duly completed and
4. There must not be any prohibition or impediment in contracting the marriage.

The same conclusion cannot however be reached for a marriage under the English Common Law whereby although marriage is regarded as a contract is different fundamentally, from a commercial contract in the following ways:

⁵⁴ Narula (n 47).

⁵⁵ Ibid 2.

⁵⁶ 1954.

⁵⁷ Narula (n 54).

- (a) As a general rule, it can only be concluded by a formal public act and not through telephone calls, letters and so on.
- (b) It can only be dissolved by a formal public act through a decree of a court.
- (c) It creates a status which is taken into account in relation to succession, tax, legitimacy of children and to some extent immigration laws.

From the foregoing discourse, it does appear that an internet marriage both in England and in Nigeria is not legally binding. In order for a marriage to be legal, a couple has to have a marriage license, which is granted by legal entities. In most areas, marriage licenses can be obtained through the local country court house, city hall, provincial or magistrate offices or a department such as a Registrar of Marriages. It is submitted that once a marriage performed with the use of the internet fails to satisfy the essential and formal validities of the marriage discussed above, such a marriage will ultimately be void. Hence, these marriages have posed a challenge to the rules of private international law especially on the ascertainment of *lex loci celebrationis*, and with the possessive improvements in technology, it is possible that such marriage may become legally valid someday, somehow. One of the functions of legislation is that of foresight and Nigerian legislature and the Law Reform Commission are enjoined to attempt solving the problems even before they are encountered. Indeed, it appears the time is now with the emergence of the COVID – 19 pandemic and the complications in the regulation of human relations.

4. Conclusion

This article has examined the challenges posed to the concept of domicile in the 21st century in the wake of the phenomenon of the internet in matters such as internet torts, internet contracts and internet marriages. The challenges of information technology are that the connecting factor domicile becomes inapplicable in selecting the choice of law and jurisdiction in order to determine the applicable law. A way forward is for the Nigerian legislature and the Law Reform Commission to enact laws to provide for the challenges identified herein. This work has made some recommendations on how this can be done and how the challenges can be surmounted.

5. Recommendations

On the liability for internet torts and the issue of jurisdiction, it is recommended that laws should be enacted to provide for the issues. However, in the absence of such laws, when problems arise the ‘web presence rule’ could be used in the place of the ‘real and substantial connection’ test in holding the defendant liable in internet defamation cases.

On the appropriate connecting factor to determine the applicable law in internet contracts, it is recommended that the place of business of the supplier which has the most substantial connection to the contract and the law of that country should apply in the absence of a choice, provided the supplier has informed the consumer of that place. If he fails to do so, the burden of ascertaining a physical location from a network address cannot be placed on the consumer, thus the law of his residence should be applied despite its weak connection. Again, where the supplier has, by the substantial content of his marketing, caused the impression that he subjected himself to the law of consumer's residence, that law should apply and the parties should not be allowed to derogate from that by a choice of Law Clause.⁵⁸ The above approach should be considered in Nigeria when faced with the challenges of problems caused by the internet hence the connecting factor of domicile would be inappropriate for an online environment.

Finally, in Nigeria, the essential validity of a marriage has been fixed by the Matrimonial Causes Act and it essentially deals with the legal capacity of the parties to contract the marriage.⁵⁹ All the requirements contained in the said section must be satisfied before a person can contract an essentially valid marriage. Essential validity of a marriage is governed by personal law; under English Law just like Nigerian Law, domicile is the determinant of the personal law. All questions of parties marrying each other will be referred to the *lex domicilii* of the parties. Therefore, where the test for essential validity of the marriage discloses incapacity as a result of the *lex domicilii*, the marriage is generally void. Internet marriage both in England and in Nigeria is not legally binding as a result. It is suggested that the *lex celebrationis* of internet marriages should be the law of the place of the country where the internet service provider conducting the marriage is situated, or its principal place of business, reason being that it is the place having the closest connection with the marriage since the 'Chapels' the marriage certificates and the 'entire solemnization' are made possible and in fact, conducted by the ISPS.

⁵⁸ Schu (n 34). Also, Arbitration and Conciliation Act Cap A 18 LFN 2004 s 47 (1).

⁵⁹ Matrimonial Causes Act Cap M 7 LFN 2004 s. 3.