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ORIGINAL SCIENTIFIC ARTICLE

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THE OVERDEPENDENCE OF AFRICAN COURTS AND BUSINESSES ON ENGLISH LAW AND FORUM: THE NEGATIVE REPERCUSSIONS ON THE DEVELOPMENT OF AFRICAN LEGAL AND ECONOMIC SYSTEMS

> *"Temures promised the garrison of Sebastia, that, if they would surrender, no blood should be shed. The garrison surrendered: and Temures buried them all alive. Now Temures fulfilled the promise in one sense, and in the sense too in which he intended it at the time; but not in the sense in which the garrison of Sebastia actually received it, nor in the sense in which Temures himself knew that the garrison received it: which last sense, according to our rule, was the sense in which he was in conscience bound to have performed it."*
>
> William Paley**

***Abstract*:** *The uncritical transplantation of English law by Anglophone-African legislators and judges, and their failure to sufficiently adapt English legal concepts to suit the idiosyncratic socioeconomic conditions in Africa, arguably contribute to the perpetuation of English law's hegemony therein. It is argued that the overdependence on English law and courts by African businesses in resolving contractual disputes is not necessarily due to any alleged stellar qualities of the former, but largely due to the over-marketing of the English legal system's competence by its apologists. The analysis uses piquant examples to elicit some adverse effects of using/overreliance on the English law and forum by African businesses in resolving contractual disputes.*

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** Paley, W., 1785, *The Principles of Moral and Political Philosophy*, Carmel, Liberty Fund, p. 80.

To reposition from the lengthened shadow of English law, Anglophone African legislators, judges and legal scholars, must craft autochthonous legal processes that suit Africa's tastes and socioeconomic milieu.

Key words: Forum selection clauses, English law and forum, The rule in Gibbs, Anti-deprivation rule, African business enterprises, Boilerplate clauses, Wrotham Park damages, Debt restructuring, Legal transplantation, Afrocentricity.

1. Introduction

Commercial agreements between two African business parties, containing an exclusive application[1] of the English law and forum for dispute resolution, are regularly found in many Anglophone African countries (hereinafter: Anglophone Africa, or Africa).[2] Using clause 10 of an Ugandan case to exemplify this obsessive regard for English law, an English applicable law and jurisdiction clause is often worded as follows: "This agreement shall be construed in accordance with English Law and subject to the exclusive jurisdiction of the English Courts." This was the exact wording of clause 10, being the applicable law and jurisdiction clause in *Uganda Telecom v. Rodrigo Chacon t/a Andes Alpes Trading HCMA* (hereinafter: *Rodrigo*).[3] When the matter was brought for adjudication (in relation to the breach of the English law and forum clause), the court held as follows:

> "This clause is clear and certain. Under this clause the parties have not only chosen English law to govern the agreement, but have unequivocally submitted to the exclusive jurisdiction of the English courts. In the circumstance, I agree with Mr. Nyakairu *that the high Court of*

1 Buxbaum, H. L., 2018, The Interpretation and Effect of Permissive Forum Selection Clauses under US Law, *American Journal of Comparative Law*, Vol. 127, pp. 135–140.

2 In this article, the term "Anglophone Africa" refers to African countries which were the former colonies of Britain. While there are tens of such countries in Africa, for the purpose of this article, and for reasons of space, only the legal systems of Nigeria (representing West Africa), and Kenya and Uganda (representing East Africa), will be focused upon. The author of this article is also familiar with these three legal systems owing to his years of teaching and supervising academic works of graduate students from these countries. Moreover, the socioeconomic and legal experiences of these three African countries are somewhat similar to the rest of the Anglophone Africa, owing to their common British colonial heritage. Although South Africa does not perfectly fit into the preceding description of "Anglophone Africa", its statutes and case law are nonetheless included in the analysis, because English is one of its official languages.

3 *Uganda Telecom versus Rodrigo Chacon t/a Andes Alpes Trading HCMA* 337/08 arising from High Court Civil Suit No. 644 of 2007.

> *Uganda has no jurisdiction to adjudicate this dispute*, the parties having chosen the exclusive jurisdiction of the English courts. *The fact that the agreement was negotiated, performed and possibly breached in Uganda is immaterial*, according to the authorities referred to herein. [...] In conclusion, however, giving the words in clause 10 of their agreement their natural and ordinary meaning, and in the absence of any reason why the clause should be set aside, I hold that the clause has *ousted* the jurisdiction of this court."[4]

The clause 10 type of jurisdiction clause and its eventual interpretation as an ouster clause by African courts, is hardly atypical of the experiences of many contracting parties in Anglophone Africa.[5] The central question that concerns this article is reflected in its title: why do many African businesses see the English law and forum as irresistibly attractive, and rely heavily on them to resolve contractual disputes, irrespective of the numerous socio-legal and economic disadvantages that typically accrue from the overdependence?[6] The article is similarly concerned with a corollary question of why African courts frequently interpret foreign (English) jurisdiction clause, typified by the *Rodrigo* case above, as an ouster clause? While the mainstream answer (as championed by the apologists of English law) refers to English law and forum's alleged excellence, this article argues that closer scrutiny reveals a different picture: some factors other than excellence are arguably responsible for the overdependence, which, according to the last analysis, has some negative repercussions on the development of Africa's legal and economic systems.

The methodologies employed in this article maintain a bold and decolonial focus. The article laments on the abnormality of African countries' overdependence on English law and courts for their contractual dispute resolution. It is argued that the factors that breed and perpetuate the overdependence are against the African interest and should therefore be

4 *Ibid.*, per Justice Stella Arach-Amoko. Emphasis by author.

5 "This agreement shall be governed, construed and enforced in accordance with English law and the parties submit to the exclusive jurisdiction of the English courts." This is clause 19 of the disputed contract in *Transstrack v. Damco Logistics Uganda Ltd* (Miscellaneous Application No. 394 of 2010) [2011] UGCommC 202. The court held that it lacked jurisdiction to entertain the matter owing to the jurisdiction clause favoring English law and courts.

6 Afrocentricity, logic, and the legal-functional approach, which this article employs as the methodological tools of inquiry, are admittedly insufficient to fully answer the question posed on this footnote. It is acknowledged that the answer to this question can also be (partly) given by empirical research, *i.e.*, actual surveys of African businesses aimed at obtaining their views and reasoning on the subject-matter; however, such empirical approach is methodologically outside the scope of this article.

eradicated. Afrocentricity and the legal-functional approach[7] are thus employed as the main methodological tools to assist in the relentless search for the African interest amidst the compost heap of English case law and statutes, including those that were transplanted to Anglophone Africa. It is believed that a true independence of African jurisprudence and courts will emerge from this endeavor. Using these tools, the article proceeds on the assumption that the contemporary interactions between England and its former colonies, such as the Anglophone African countries, draw from their colonial relationship, which was, by default, oppressive to the latter in all ramifications. To buttress this view, the article, especially Part 2, draws explicatory perspectives from other neighboring disciplines of law, such as history, literature, politics, and economics.

Similarly, Afrocentricity is used as an analytical tool in constantly searching for the African interest in the postcolonial relationship, irrespective of any disguising labels that purport to show equal relations. This article, in relation to Africa's legal and economic development, generally views English law as well as its transplantation to Anglophone Africa, as a Trojan Horse,[8] which, although it may seem innocuous at the point of entry, later on works untrammeled against the efficacy of local safeguards and remedies. In light of this perception, English law and its transplants in Africa must be adapted to suit local conditions, and the adaptations must be monitored closely. The forced adoption of English law in the context of colonialism, and its subsequent transplantation in the postcolonial era, continue to cause many Anglophone African countries to suffer, and to kneel before the English legal system in trepidation and in search for answers to simple problems. The article's methods, therefore,

7 Regarding the meaning of "legal-functional approach", the article adopts Ralf Michaels's description: a legal-functional approach to law "focuses not on rules but on their effects, not on doctrinal structures and arguments, but on events." In other words, the functional method tests the efficacies of legal theories and doctrines (irrespective of their origins or beautifications) with social facts, as well as the experiences of people in society. Also, as Michaels puts it, "institutions, both legal and non-legal, even doctrinally different ones, are comparable if they are functionally equivalent, if they fulfil similar functions in different legal systems." Indeed, the forgoing perspective of Michaels would likely empower the African business community to be able to locate or craft their own local (but functionally equivalent) solutions on par with those of English law and courts. See Michaels, R., The Functional Method of Comparative Law, in: Reimann, M., Zimmermann, R., (eds.), 2006, *The Oxford Handbook of Comparative Law*, Oxford, Oxford University Press, p. 342. Also see generally Duggan, A. J., Commercial Law and the Limits of the Black Letter Approach, in: Worthington, S., (ed.), 2003, *Commercial Law and Commercial Practice*, Oxford, Hart Publishing, p. 595.

8 See generally Sparks, B. A., 1971, The Trojan Horse in Classical Art, *Greece & Rome*, Vol. 18, No. 1, pp. 54–70.

aim to raise awareness of this chronic and seemingly intractable problem of overdependence, as well as the ensuing repercussions.

The article has four parts: this introduction and three other parts. Part 2 provides the overall context of the article through a preliminary establishment of the historical linkages between the British colonialism in Anglophone Africa, and the latter's consequent overdependence through an unbridled consumption of English law. The article hypothesizes that the cause of overdependence is not due to any alleged stellar qualities of English law as advanced by its apologists – *e.g.*, the Law Society of England and Wales, English politicians, scholars and judges – but due to their aggressive level of marketing English law and forum, as well as the lingering colonial legacies and structures that altogether perpetuate English law's hegemony in Africa.

Part 3 uses piquant examples of two boilerplate clauses ("termination" and "damages" clauses) that are frequently used in commercial contracts to illustrate the negative repercussions that emanate from Africa's overdependence on English law. This part discusses some English contract law principles that are encapsulated in the aforementioned boilerplate clauses and used regularly as weapons against the interests of African businesspeople seeking to resolve their contractual disputes before English courts. These boilerplate clauses, which were developed naturally in the course of English mercantile activities, still bear the original stamp of the age in which they were first hammered out.

Needless to add that they are largely inconsistent with the contemporary African experience and interests.[9] Inarguably, there is a dire need to reconcile their underlying legal philosophies (without any jurisprudential pretensions whatsoever) to suit the African life, interests, and commercial realities. One such example of interest that lawmakers consider can be buttressed by the consequences of corporate insolvency owing to cash-flow distresses: the high costs of resolving commercial disputes in England by two African businesses may cause or expedite their insolvency and winding up. Winding up of a corporate business impacts adversely the company's stakeholders, such as the shareholders, creditors, employees and business ecosystem. In the case of employees, their predicament is doubled if their insolvent/liquidated employer was also their landlord, in which case they will lose both their sources of income and dwelling.

Part 4 is the conclusion and points out the decolonial need for African judges and legislators to simultaneously look backward and forward

9 See generally Radin, M. J., Boilerplate Today: The Rise of Modularity and the Waning of Consent, in: Ben-Shahar, O., (ed.), 2007, *Boilerplate: The Foundation of Market Contracts*, Cambridge, Cambridge University Press, pp. 189–191.

in their interactions with English law in order not to lose sight of African interests. This part draws lessons from some English cases (*e.g.*, *The Eleftheria* and *Gibbs*) that have boldly perpetuated Anglocentric interests, as well as promoted the English courts to the level of ultimate superintendence over their foreign peers for over a century.

2. The Entry Points of the Overdependence Problem

2.1. THE FIRST ENTRY POINT: THE UNADAPTED TRANSPLANTATION OF ENGLISH LAW

The article's inquiry begins with a historical assessment and tracing of English law's infiltration and influence in common law countries, particularly in Anglophone Africa.[10] As part of their colonial heritage, Anglophone Africa acquired its contemporary contract law from the English common law of contract. For example, English contract law's contemporary influence in Anglophone Africa could be found in Section 2 of the 2012 Law of Contract Act of Kenya, which categorically stipulates that English contract law and rules apply in Kenya.[11] In Nigeria, as well, English common law, equity, statutes of general application, in force in England on or before 1 January 1900, are still fully applicable.[12] In the post-colonial era, much of the development in contract law within the African experience has struggled to reconcile or keep pace with the legal developments in England and Wales (hereinafter: England).[13] The hegemony of English law is clearly visible in the judgments of the courts in Anglophone

10 Cote, J. E., 1977, The Reception of English Law, *Alberta Law Review*, Vol. 15, p. 29.

11 See Section 2 of the Law of Contract Act (Kenya), which states that: "(1) Save as may be provided by any written law for the time being in force, the common law of England relating to contract, as modified by the doctrines of equity, by the Acts of Parliament of the United Kingdom applicable by virtue of subsection (2) of this section and by the Acts of Parliament of the United Kingdom specified in the Schedule to this Act, to the extent and subject to the modifications mentioned in the said Schedule, shall extend and apply to Kenya: Provided that no contract in writing shall be void or unenforceable by reason only that it is not under seal." Also see Schreiner, O. D., 1967, *The Contribution of English Law to South African Law; and the Rule of Law in South Africa*, London, Stevens; Kumar, M., Heidemann, M., 2022, Contract Law in Common Law Countries: A Study in Divergence, *Liverpool Law Review*, Vol. 43, No. 2, pp. 133–147.

12 See generally, Obilade, A. O., 1979, *The Nigerian Legal System*, Ibadan, Spectrum Books, chap. 1.

13 Gower, L., 1967, *Independent Africa – The Challenge to the Legal Profession*, Cambridge, Harvard University Press, pp. 95–96.

Africa, where some judges frequently defer to undiluted English reasoning in understanding both the old and evolving contract doctrines, especially on those matters that have received a significant amount of attention in English courts.[14]

2.2. THE SECOND ENTRY POINT: THE INCOMPATIBILITY OF ANGLOCENTRIC LEGAL EDUCATION WITH THE AFRICAN EXPERIENCE

The grudging admiration and overdependence on English scholars and judges by their African counterparts vis-à-vis the English law of contract is not surprising considering that legal education in Anglophone Africa is Anglocentric and mimics the legal education in England, owing to the British colonial heritage.[15] Thus, Africans studying and practicing law in Anglophone Africa tend to be Anglocentric and sometimes imitate a similar thinking pattern as English scholars and lawyers due to the similarity in legal education.[16] The practical effect of this, for instance, may be found in the facts and decision of the Kenyan case: *Health & Water Foundation v. Intervita Onlus*,[17] where the court (influenced by the doctrine of "freedom of contract")[18] accepted that the English law and forum clause in the parties' contract ousted its jurisdiction from ever determining the merits of the matter brought before it.[19] The effect of colonialism coupled with the wholesale transplantation of English law may be the background reason why lawyers in Anglophone Africa often fail to recognize the

14 Ibhawoh, B., 2009, Historical Globalization and Colonial Legal Culture: African Assessors, Customary Law, and Criminal Justice in British Africa, *Journal of Global History*, Vol. 4, pp. 431–432; Tetteh, E. K., 1971, Law Reporting in Anglophone Africa, *The International and Comparative Law Quarterly*, Vol. 20, No. 1, pp. 87–98.

15 Boon, A., Webb, J., 2008, Legal Education and Training in England and Wales: Back to the Future?, *Journal of Legal Education*, Vol. 58, No. 1, pp. 79–121.

16 Makoni, S., Makoni, B., English and Education in Anglophone Africa: Historical and Current Realities, in: Wong, M. S., Canagarajah, S., (eds.), 2009, *Christian and Critical English Language Educators in Dialogue: Pedagogical and Ethical Dilemmas*, Abington, Routledge, pp. 106–119; Flood, J., 1999, Legal Education, Globalization, and the New Imperialism, in: Cownie, F., (ed.), *The Law School: Global Issues, Local Questions*, Aldershot, Ashgate.

17 [2015] eKLR.

18 For a scholarly commentary on the freedom of contract doctrine, see Atiyah, P. S., 1979, *The Rise and Fall of Freedom of Contract*, Oxford, Oxford University Press, p. 135; Trebilcock, M. J., 1993, *The Limits of Freedom of Contract*, Cambridge, Harvard University Press, pp. 136–38.

19 Oppong, R., 2007, Choice of Law and Forum Agreements Survive a Constitutional Challenge in the Kenya Court of Appeal, *Commonwealth Law Bulletin*, Vol. 33, No. 1, p. 158.

underlying negative repercussions in advising their clients to use the English law and forum to resolve contractual disputes even in the absence of any real connection,[20] given that the parties, as well as the "matrix of facts"[21] underscoring their transaction, are entirely of African origin.

It is widely accepted that the common law contract rules and litigation developed based on the natural dealings of English merchants, as well as the English culture. Devlin, referring to the English legal system, once remarked that "commercial law ought to be a reflection of the constantly changing ideas of conduct which merchants may have."[22] He also blamed written contract for killing the customs of English merchants, thereby impeding the efficacy of commercial transactions.[23] One lesson from Devlin's extrajudicial opinion is that English (contract) law is enmeshed and inseparable from the customs of English merchants and knowledge of these customs is inevitable in appreciating English law. In terms of knowledge of English law or its transplants, African judges are hardly diffident: they usually project a hard exterior of confidence irrespective of their ostensible lack of knowledge on the customs of English merchants. Similarly, given that these judges are situated in different socioeconomic and cultural environments,[24] they are inherently less knowledgeable in English common law rules, and are therefore unlikely to explore their full creative energies in the process of adjudication, even though they may think otherwise.[25]

20 See *The Eleftheria* [1969] 2 All ER 641, where Brandon developed the real connection test in assessing the possibility of either assuming jurisdiction in breach of a forum selection agreement before an English court or staying the proceeding in deference to the forum selection agreement. Brandon's test empowers the English judge to either enforce or disregard a forum selection agreement. See generally, Tanya, J. M., 2019, When Forum Selection Clauses Meet Choice of Law Clauses, *American University Law Review*, Vol. 69, pp. 325–333.

21 "Matrix of facts" was coined by Lord Wilberforce in *Prenn v. Simmonds* [1971] 1 WLR 1381, 1384, to refer to the background information (including the pre-contractual negotiations) surrounding the formation of a contract.

22 Devlin, P., 1951, The Relation Between Commercial Law and Commercial Practice, *Modern Law Review*, Vol. 14, No. 3, p. 250.

23 *Ibid*., p. 251. However, see Baker, J. H., 1979, The Law Merchant and the Common Law before 1700, *Cambridge Law Journal*, Vol. 38, No. 2, p. 298 ("Shifting usages can hardly be treated as common law. They can explain contracts, but cannot create obligations.").

24 Chanock, M., 2001, *The Making of South African Legal Culture, 1902–1936: Fear, Favour and Prejudice*, Cambridge, Cambridge University Press, pp. 23–25.

25 Aguda, T. A., 1985, The Judiciary in Africa, *The Fletcher Forum*, Vol. 9, No. 1, pp. 13–35. Also see generally, Caenegem, R. V., 1988, *The Birth of the English Common Law*, Cambridge, Cambridge University Press; Milsom, F. C. S., 1981, *Historical Foundations of the Common Law*, 2nd ed., Oxford, Oxford University Press; Baker, J. H., 2019, *An Introduction to English Legal History*, Oxford, Oxford University Press.

Also, as an offshoot of the British colonialism that was the vehicle through which English law diffused across the globe,[26] its imposed familiarity to African businesspeople who frequently indicate the English law and forum in their contracts for dispute resolution, contributes to the strong maturity of English law, thereby swelling its experience and global reputation, as well as enhancing its magisterial outlook. This view enjoys the ardent support of Hobhouse who opined in *Shogun Finance Ltd v. Hudson,*[27] that "the rule that other evidence may not be adduced to contradict the provisions of a contract contained in a written document is fundamental to the mercantile law of this country; the bargain is the document; the certainty of the contract depends on it. [...] This rule is one of the great strengths of English commercial law *and is one of the main reasons for the international success of English law in preference to laxer systems which do not provide the same certainty.*"[28]

2.3. THE THIRD ENTRY POINT: A DISREGARD OF OLIVER WENDELL HOLMES'S ADMONITION ABOUT THE LIFE OF LAW

One of the negative repercussions of the wholesale adoption of the English contract law by Anglophone African countries is the insufficient knowledge and experience on how to modify and adapt it regularly to suit the ever-changing African experience on contractual issues.[29] The tools of contract law interpretation, as well as the contract principles that developed under English law, continue to favor English experience even as these principles are being used by African businesses and considered for interpretation in African courts.[30] Using the Afrocentric and legal

26 Chanock, M., 1985, *Law, Custom and Social Order: The Colonial Experience in Malawi and Zambia*, Cambridge, London, Cambridge University Press.

27 [2003] UKHL 62.

28 *Ibid*., para 49. Emphasis by author.

29 Gbadegesin, A. O., 2023, Lost in Transplantation: Revisiting Indigenous Principles as a Panacea to Natural Resource Sustainability in Nigeria, *Journal of African Law*, Vol. 68, No. 1, pp. 41–57.

30 For example, in *Uganda Telecom Ltd v. Rodrigo Chacon t/a Andes Alpes Trading* [2008] UGCOMMC 77, (https://ulii.org/ug/judgment/commercialcourt/2008/77, 10. 12. 2023), the parties agreed that their contract "be construed according to English Law and subject to the exclusive jurisdiction of the English Courts." In breach of the forum selection agreement, the plaintiff brought proceedings against the defendant in the High Court of Uganda. The defendant applied for a declaration that the court had "no jurisdiction over the [d]efendant in respect of the subject matter of the claim" and sought a dismissal of the suit as well as an award of cost against the plaintiff. Justice Stella Arach-Amoko granted the defendant's request and accepted that the "High Court of Uganda has no jurisdiction to adjudicate this dispute" because "the clause has ousted the jurisdiction of this Court." A historical analysis of the origin of

functional analytical tools,[31] this article aims to be a consciousness-raiser for African judges, and to empower them with the timeless admonitions of Justice Oliver Wendell Holmes, who wrote audaciously in 1881, that "the first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community, whether right or wrong,"[32] and according to Holmes, "at the bottom of all private relations, however tempered by sympathy and all the social feelings, *is a justifiable self-preference*."[33]

Holmes's strong belief was that "the life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics."[34] In deference to Holmes, the article would use the aforementioned analytical tools to reassess and question the frequent choice of the English law and forum by the African business community in resolving their contractual disputes.[35]

To expatiate the forgoing problem, the article will point out the essential vices in the tools of contractual interpretation used by the English courts,[36] as well as contract principles and terms that are typically found in boilerplate contracts,[37] which diffused to Anglophone Africa through comparative law (Anglocentric books and scholarly articles of a comparative nature), as well as the unadapted legal transplantations that

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the deep-rooted nature of English law in Africa may be found in Chanock, M., South Africa, 1841–1924: Race, Contract, and Coercion, in: Hay, D., Craven, P., (eds.), 2004, *Masters, Servants, and Magistrates in Britain and the Empire, 1562–1955*, Chapel Hill, University of North Carolina Press, p. 362.

31 Asante, K. M., 2007, *An Afrocentric Manisfesto*, Cambridge, Oxford, Boston, New York, Polity Press.

32 Holmes, O. W., Howe, M. D. W. (ed.), 1963 (1881), *The Common Law*, Cambridge, Harvard University Press, p. 36.

33 *Ibid.*, p. 38. Emphasis by author.

34 *Ibid.*, p. 1.

35 The Law Society of England and Wales has been marketing English law aggressively to the world. See Law Society of England & Wales, 2007, *England and Wales: The Jurisdiction of Choice*.

36 McCamus, J. D., 2012, Three Recent Works on Contractual Interpretation (Part 2), *Canadian Business Law Journal*, Vol. 52, No. 2, pp. 300–321.

37 On the general problems of boilerplate clauses, see Choi, S. J., Gulati, M., Scott, E. R., 2017, The Black Hole Problem in Commercial Boilerplate, *Duke Law Journal*, Vol. 67, No. 1, pp. 1–75; Christou, R., 2015, *Boilerplate: Practical Clauses*, 7th ed., London, Sweet & Maxwell.

are used regularly for commercial transactions and dispute resolution.[38] It also argues the necessity for African judges, lawmakers, lawyers, and the business community to rethink the existing legal framework and practice that tend to favor the unbridled consumption of English contract law and forum, thus shipping away African jobs to English lawyers, as well as strengthening the maturity of English courts at the expense of the growth and development of the legal systems in Anglophone Africa.[39] Due to the partial loss of law related job opportunities to English lawyers, African lawyers who participate in enabling this situation seem to have become increasingly impecunious.[40]

As stated above, owing to the frequent patronage English law has received from the business community in Africa, who use it and its forum to regularly resolve their contractual disputes, English law has consequently accumulated a lot of experience in the different facets of commercial activity.[41] Thus, from the compost heap of case law, there seems to be sufficient guidance on most aspects of commerce, which could provide definite direction for contracting parties.[42] African legal systems have, however, not enjoyed steadfast and uninterrupted growth. Following the Berlin

38 For a penetrating treatment on this, see Okeke, C. N., 2011, African Law in Comparative Law: Does Comparativism Have Worth?, *Roger Williams University Law Review*, Vol. 16, No. 1, pp. 1–50; Snyder, F. G., Mirabito, A. M., 2019, Boilerplate: What Consumers Actually Think About It, *Indiana Law Review*, Vol. 52, No. 3, pp. 431–433.

39 The extent of English law's influence in Anglophone Africa is evidenced by the fact that Kenya has abolished its customary court system altogether, but has no problem retaining the direct application of English law in Kenya, under section 2 of its Law of Contract Act. See Menski, W., 2006, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa*, 2nd ed., Cambridge, Cambridge University Press.

40 A recent case in Nigeria may help illustrate the point. In 2020, the Lagos High Court enforced a foreign jurisdiction clause in *Sqimnga Nigeria Limited v. Systems Applications Nigeria Limited*, Suit No.: LD/ADR/3116/2020 (unreported). The defendant was represented by one of the leading law firms in Nigeria, ÆLEX, which published a story about their success on the firm's website as follows: "ÆLEX successfully canvassed the position of law on the sanctity of a foreign jurisdiction clause in the contract of parties." (https://bit.ly/3PAfWWU, 10. 11. 2023). This at least shows that many African lawyers do not yet recognize the dangers of foreign jurisdiction clauses being allowed to operate as ouster clauses, and how the outcome is the cannibalizing of jobs in the African legal industry. Empirical evidence, *i.e.*, actual surveys of African lawyers, may be required to prove the claim of consequent impecuniosity.

41 In 2012, a study of 4,427 international contracts showed that English law was the most utilized by parties indicating a law other than their own domestic laws. This was analyzed and published in Cuniberti, G., 2014, The International Market for Contracts: The Most Attractive Contract Laws, *Northwestern Journal of International Law & Business*, Vol. 34, p. 455.

42 Legal UK, 2021, Economic Value of English Law, (https://legaluk.org/wp-content/uploads/2021/09/The-value-of-English-law-to-the-UK-economy.pdf, 16. 2. 2024), pp. 13–15.

Conference of 1884–1885, the dispute resolution system in Anglophone Africa was greatly interrupted and undermined by the British colonial rule, which introduced English law and English-styled courts for dispute resolution, as integral elements of the colonial rule.[43] In the wake of independence, following a century of colonial rule, the Anglophone African countries, as a matter of necessity, had to continue importing the English common law and equity[44] to sustain the English-styled legal system that was left behind, even though this has been done with limited knowledge and experience, and may have aggravated and precipitated their slow pace of economic development.[45]

The overall effect of British colonialism on Anglophone Africa may be likened to what happened to Winston Smith, the protagonist in George Orwell's *Nineteen Eighty-Four.*[46] Winston's initial refusal to embrace *doublethink,*[47] and instead pursue the ambition of resisting and overthrowing Big Brother, was punished by subjecting him to a period of psychological manipulation and physical torture. The torture continued until he had become uncertain of whether two plus two makes four or five. The tortuous process only abated after he had given up all resistance, professed his love for Big Brother, and surrendered to the idea that two plus two is whatever Big Brother says it is.[48] By comparison, in today's Anglophone Africa, by virtue of unadapted legal transplantation from the UK, the law tends to be whatever the UK Parliament and Supreme Court say it is.[49]

These Anglophone countries have further been disrupted by neocolonialism and political instabilities, which consequently slow down

43 For instance, see Chanock, M., 2001, chap. 2.

44 Goodhart, W., Jones, G., 1980, Infiltration of Equitable Doctrine into English Commercial Law, *Modern Law Review*, Vol. 43, p. 486.

45 See Kibwana, K., 1993, Enhancing Co-Operation Among African Law Schools: Comparative Law Studies Within The African Context, *Centre for Human Rights, University of Pretoria*, (https://www.chr.up.ac.za/images/publications/centrepublications/occasional_papers/occasional_paper_4.pdf, 10. 10. 2023).

46 Orwell, G., 2021, *Nineteen Eighty-Four*, London, Penguin Classics. First published 1949 by Secker and Warburg (London).

47 As used in George Orwell's 1984, *doublethink* refers to the ability to hold two completely contradictory thoughts at the same time while believing both of them to be true. In the postcolonial era, many African countries had no choice but to embrace *legal pluralism* (*i.e.*, the co-existence of the conflicting notions of English law and indigenous law, as well as the underlying efforts, often fruitless, in achieving a harmony), as the only way to thrive.

48 Orwell, G., 2021, part 3, chaps. 2–3.

49 See, for example, Section 2 of the 2012 Law of Contract Act of Kenya, which categorically states that English contact law would apply in Kenya. In Nigeria also, the common law, equity, statutes of general application in force in England on or before 1 January 1900, are fully applicable.

homegrown solutions to contemporary legal and socioeconomic issues. Thus, updating the English contract law or case law has to inevitably follow developments in England,[50] so as to obviate any radical disruption in the structure and function of crystallized notions of rights and obligations that were founded on the philosophy of English law. In many cases, lawmakers in Anglophone Africa transplanted English statutes in totality into their own legal systems without adapting the statutes (which are impervious of and naturally suppress the African experience) to suit local conditions.[51]

Although this article does not propose the somewhat radical approach (at least for now) of the United States, vis-à-vis its restructuring of English law, it draws inspirations from its farsightedness and shared belief in the inevitability of progress. The United States was a former colony of Britain until its independence in 1776. Its efforts in weaning itself off the English law, and creating an autochthonous and rationally organized system of law, were marked by ferocious jurisprudential battles. These efforts eventually yielded a great success in total independence in legal philosophy, which achieved maturity, stability and a general acceptance by the American people, who had to cope with the dizzying pace of socio-legal change.

As Grant Gilmore documented in *The Ages of American Law*,[52] Americans went as far as passing legislation that "forbade the citation not only of any English case decided later than July 4, 1776, but also (apparently without limitation of time) of any [English] compilation, commentary, digest, lecture, treatise, or other explanation or exposition of the common law... Even in states which did not go to the New Jersey extreme, it was, we may confidently assume, the part of professional wisdom for both judges and counsel to avoid, in their opinions and arguments, anything that might look like undue deference toward the common law of England."[53]

2.4. THE FOURTH ENTRY POINT: THE [UN]KNOWN UNKNOWNS ABOUT ENGLISH LAW

Donald Rumsfeld, former U.S. Secretary of Defense is credited with classifying factual knowledge into: "known knowns", "known unknowns",

50 *Ibid.*

51 Cuniberti, G., 2014, p. 491. For examples, the Nigerian and Kenyan insolvency and company legislations seem largely impervious to local affairs because they were transplanted wholesale, without any meaningful adaptation from their English counterparts. The copy and paste habit of most African legislators is evident in most of the statutes they claim to have enacted.

52 Gilmore, G., 1977, *The Ages of American Law*, New Haven, Yale University Press.

53 *Ibid.*, pp. 22–23.

and "unknown unknowns".[54] In relation to the routine insertion of English law by African businesses to govern their contracts, the underlying risks may revolve either around *known unknowns* and/or *unknown unknowns*. The problem that is astonishingly latent when contracting parties in Africa indicate that the English law and forum would govern their contract is the habitual forgetfulness that "English law" in that context invariably extends to the public law and policy of England.[55] In fact, public policy's intervention in law has enjoyed an enduring recognition from early English decisions. In *Low v. Peers*,[56] Wilmot C. J., opined that "[i]t is the duty of all courts of justice to keep their eye steadily up on the interests of the public, ... and when they find an action is founded up on a claim injurious to the public ... to give no countenance or assistance *in foro civili*." Based on the hierarchy of laws, contract law, which is private law, is subservient to public law, and in the event of any conflict – the latter prevails.[57] In other words, an English law-governed contract that is contrary to any English law statute or public policy would be deemed illegal by statute, and therefore, unenforceable.[58]

Denning also offered a pellucid elucidation in *Bennett v. Bennett*[59] about the fate of such contracts. He held that although they "[a]re not 'illegal', in the sense that a contact to do a prohibited or immoral act is illegal, they are not 'unenforceable', in the sense that a contract within the Statute of Frauds is unenforceable for want of writing. These covenants lie somewhere in between. They are invalid and unenforceable."[60] If contractual rights are unenforceable by the court, the loss arising from

54 Rumsfeld, D., 2002, The US Department of Defense News Briefing (https://usinfo.org/wf-archive/2002/020212/epf202.htm, 10. 10. 2023). Rumsfeld said: "We also know there are known unknowns; that is to say we know there are some things we do not know. But there are also unknown unknowns – the ones we don't know we don't know."

55 Greenhood, E., 1886, *The Doctrine of Public Policy in the Law of Contracts: Reduced to Rules*, Chicago, Callaghan & Company, p. 2, ("The strength of every contract lies in the power of the promise to appeal to the courts to appeal to the courts of public justice for redress for its violation. The administration of justice is maintained at the public expense: the courts will never, therefore, recognize any transaction which, in its object, operation, or tendency, is calculated to be prejudicial to the public welfare."). Also see Shand, J., 1972, Unblinkering the Unruly Horse: Public Policy in the Law of Contract, *Cambridge Law Journal*, Vol. 30, No. 1, p. 144.

56 (1770) 97 Eng. Rep. 138 (Ex. Ch.).

57 Ghodoosi, F., 2016, The Concept of Public Policy in Law: Revisiting the Role of the Public Policy Doctrine in the Enforcement of Private Legal Arrangements, *Nebraska Law Review*, Vol. 94, pp. 685–736.

58 See Beale, H., 2021.

59 *Bennett v. Bennett* [1952] 1 KB 249, per Denning.

60 *Ibid.*, p. 260.

breach of the contract would remain where it had fallen, on the authority of *Tinsley v. Milligan*,[61] and the injured party would be left without a remedy.[62] Anecdotal evidence confirms the suspicion that irrespective of the regular use of public law to qualify or render contractual rights unenforceable, many businesses in Africa that utilize the English law and forum to resolve disputes are hardly knowledgeable of English public law and policy, including novel issues of data protection and how these may impact their contracts.[63] It is possible, indeed likely, that the overpowering public law rules would lead to a lack of remedy in the event of breach.[64]

Anecdotal evidence also confirms the perception that many business entrepreneurs in Anglophone Africa seem to heartily dislike their own domestic courts because of the perception of judicial slowness. They tend to generally think of systemic speed and efficiency when choosing the English law and forum to govern their contractual transactions.[65] Arguably, this choice is largely dictated by the forced adoption and adherence of English law across Anglophone Africa, as well as the inexhaustible storehouse of the English case law and scholarly materials that have extensively analyzed its various aspects.[66] It being a regular choice may also be based on an incomplete picture of how English law works as a whole, especially by those observing from a distance, such as the African businesspeople. Even though England and the United States are frequently indicated as forums for dispute resolution by African businesspeople, their rules on attorney fees differ significantly and thus show why prospective litigants cannot afford to insert foreign forums at random, based on the target destination being a common law system. In support of this view, Eisenberg and Miller opined that "the American rule for attorney fees requires each

61 *Tinsley v. Milligan* [1994] 1 AC 340. However, see *Patel v. Mirza* [2016] UKSC 42, where the Supreme Court held a contrary view on the basis that the *Tinsley* line of thought undermines the English legal system.

62 *Ibid.*

63 Tajti, T., 2023, A New Frontier: The Challenges Surrounding the Deepening Impact of Data Protection Regulations on Bankruptcy Law, *Pravni Zapisi*, Vol. 15, No. 2, p. 238, (discussing comparatively some novel issues of data protection law and insolvency law in the contexts of corporate restructuring and liquidation). Given that public law (*e.g.*, data protection law and insolvency law) applies to private contracts by default, African business parties indicating English law to govern their contracts would have to grapple with the evolving issues of data protection, especially in the context of the default or insolvency of a counterparty.

64 *Tinsley v. Milligan* [1994], p. 340.

65 Cuniberti, A., 2014, p. 492.

66 *Ibid.*

party to pay its attorney, win or lose; the English rule [...] requires the losing party to pay the winner's reasonable attorney fees."[67]

The practice of inserting foreign laws and forums (*e.g.*, English law and forum) to govern contracts is predicated on the erroneous presumption of free movement of Africans across the globe, or to England. Thus, the cost of resolving disputes in England between two African parties is enormous, due to their underlying responsibility of obtaining business visas[68] and flying[69] their own witnesses as well as the documents to be used in establishing evidence in court. There are also the costs of hiring a law firm, wherein senior solicitors could charge up to GBP 1,000 per hour.[70] Then, a barrister would likely be hired for a hearing, and there are the court fees. Altogether, these costs could amount to hundreds of thousands, if not millions of British pounds.[71] Resolving a commercial dispute in England is also dependent on whether the British High Commission would grant travel visas, the duration of such visas, and whether they would be for single or multiple entries.

It is possible that at the formation of the disputed contract governed by the English law and forum, the parties were financially capable of shouldering the possible costs of dispute resolution in England, but had lost that financial ability by the time of the dispute.[72] Like the Kenyan case

67 Eisenberg, T., Miller, G. P., 2013, The English Versus the American Rule on Attorney Fees: An Empirical Study of Public Company Contracts, *Cornell Law Review*, Vol. 98, p. 327; Karsten, P., Bateman, O., 2016, Detecting Good Public Policy Rationales for the American Rule: A Response to the Ill-Conceived Calls for "Loser Pays" Rules, *Duke Law Journal*, Vol. 66, pp. 736–749; Monroe, A. P., 1981, Comment, Financial Barriers to Litigation: Attorney Fees and the Problem of Legal Access, *Albany Law Review*, Vol. 46, p. 167 ("This so-called 'American Rule' generates much criticism given the apparent paradox of requiring the innocent party to finance litigation made necessary by the actions of the wrongdoer.").

68 According to Immigration Advice Service, in 2023, a UK business visa for a Nigerian applicant costs GBP 1,420 (https://iasservices.org.uk, 10. 10. 2023). Using Nigeria as an example to measure the value of GBP 1,420, its GDP per capita in 2022, according to the World Bank, was USD 2,184, (https://data.worldbank.org/indicator/NY.GDP.PCAP.CD?locations=NG, 10. 10. 2023).

69 As of October 2023, an economy class return ticket on British Airways from Lagos to London costs USD 2,075, (https://www.britishairways.com, 10. 10. 2023).

70 Chellel, K., 2016, Top London Lawyers Now Cost More Than £1,000 Per Hour, *Bloomberg*, (https://www.bloomberg.com/news/articles/2016–02–05/lawyers-earning-1–100-pounds-an-hour-put-u-k-justice-at-risk, 10. 3. 2024).

71 See the comprehensive report on the fees charged by London law firms. Diamond, J., 2016, The Price of Law, *Center for Policy Studies*, (https://cps.org.uk/wp-content/uploads/2021/07/160203155938-ThePriceofLaw.pdf, 10. 12. 2023).

72 Emblem, N., Basmadjian, A., 2016, Impecuniosity or Hardship as a Factor in the Award of Costs: Towards a Coherent Framework, *Advocates' Quarterly*, Vol. 45, No. 4, p. 420.

of *Health & Water Foundation v. Intervita Onlus,*[73] the injured party (defendant) successfully objected to the plaintiff, or the impecunious party's desire to use the domestic (Kenyan) court to resolve the dispute on the basis that it conflicted with the forum selection agreement.[74] Yet, the cost, logistics, onerous burden of obtaining visas, undertaking air travels for each time the matter would be heard in English court, hiring English law counsel to handle the matter, may, according to the last analysis, outweigh the benefits accruing from the contract.[75]

One notable lesson from *Grosvenor Casinos Ltd v. Ghassan Halaoui* (a Nigerian case),[76] is that all the expenses and efforts to litigate a matter before the court of first instance in England would become futile if the losing party challenged the enforcement of the English judgment before an African court on the fundamental basis that the issuing court lacked competence.[77] For example, the losing party may allege fraud or breach of certain statutory or constitutional safeguards by the English court and that such a fundamental error makes it compulsory for the appellate court in the African country to retry the matter. This similarly occurred in *Access Bank Plc v. Erastus Bankole Oladipo Akingbola,*[78] where two Nigerian business parties litigated in England, but the winning party was denied enforcement of the English judgment before the Nigerian court on the basis that the English court breached Nigerian statutory rules.[79]

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73 [2015] eKLR.

74 See Dinelli, A., 2015, The Limits on the Remedy of Damages for Breach of Jurisdiction Agreements: The Law of Contract Meets Private International Law, *Melbourne University Law Review*, Vol. 38, p. 1027 ("Say a person promised to sue another, if the need arose, in a particular court. Rather than institute proceedings in that (chosen) court, the person has [sic] sues in another court. He or she has breached that promise. If any loss flows from this breach, the aggrieved party should be compensated. [...] A contract lawyer would not be surprised. But these principles are not so easily applied to jurisdiction agreements.").

75 Coyle, J. F., 2019, Interpreting Forum Selection Clauses, *Iowa Law Review*, Vol. 104, pp. 1836–1837.

76 [2009] 10 NWLR 309.

77 *Ibid.* Also see Olukolu, Y., 2015, The Enforcement of Foreign Judgments in Nigeria: Scope and Conflict of Laws Questions, *African Journal of International & Comparative Law*, Vol. 23, No. 1, p. 129.

78 [2013] EWCA Civ 744.

79 In Suit No FHC/L//CP/469/2014: *Access Bank Plc v. Akingbola* (Unreported, delivered on 17 November 2014), the Federal High Court refused to enforce the judgment on the ground that the court in England, from which the judgment was obtained, had refused the judgment debtor's application for leave to appeal. Also, see section 20 of the Nigerian Admiralty Jurisdiction Act of 1991. For the Kenyan equivalent, see section 9 of the Kenyan Civil Procedure Act of 1924; for Tanzania, see Section 11 of the Civil Procedure Code of 1966; for Uganda, see section 9 of the Civil Procedure

In the South African case of *Jones v. Krok*,[80] a foreign judgment in contract was not recognized and enforced because it awarded punitive damages that amounted to twice what was specifically proven against the defendant. The refusal of enforcement was based on its excessiveness, which contravened with South African public policy. A similar fate of unenforceability would typically befall a foreign judgment that was obtained in contravention of the South African notions of natural justice.[81] In any case (especially where the parties are Africans and do business in an African country), given that the losing party's assets may reside in the African country and the rules of enforcing foreign judgments may differ from the foreign courts where they were obtained,[82] it lacks business sense to spend resources litigating outside the place where each of the party's assets are majorly located.

3. Two Illustrative Examples of the Negative Repercussions of Overdependence on English Law and Forum: The "Termination and "Damages" Clauses

3.1. THE TERMINATION CLAUSE IN CONTRACT (AND THE ENGLISH ANTI-DEPRIVATION RULE)

A typical termination clause[83] that appears in many English-governed contracts to which African businesses are parties, typically spells out the conditions that would trigger the termination clause.[84] Sometimes, it is drafted in a manner that captures the insecurity of a counterparty or when a party's business enterprise is perceived to be financially unhealthy

Act of 1929; for Zimbabwe, see *Coluflandres Ltd v. Scandia Industrial Products Ltd* 1969 (2) RLR 431.

80 *Jones v. Krok* 1996 (1) SA 504. Also see Section 1A of the South African Protection of Businesses Act of 1978.

81 *Rubie v. Haines* 1948 (4) SA 998; *Corona v. Zimbabwe Iron & Steel Co. Ltd* 1985 (2) SA 423 at 426.

82 For example, see the South African case of *Zwyssig v. Zwyssig* 1997 (2) SA 467 on the factors a South African court would normally consider in assuming a jurisdiction to enforce a foreign judgment.

83 Randall, J., 2014, Express Termination Clauses in Contracts, *Cambridge Law Journal*, Vol. 73, No. 1, p. 113.

84 It is common to see in the termination clauses of such contracts that an insolvency process commenced against a party (or even a lingering news about insolvency) would trigger the clause, and empower the counterparty to repossess asset-collateral or immediately stop performance.

and in the threshold of insolvency.[85] Under English common law, property rights are categorized as either legal or equitable,[86] and the latter is considered subservient in the event of conflict.[87] In retention of title (ROT) transactions,[88] such as conditional sale,[89] equipment leasing,[90] or hire purchase,[91] the legal title resides with the seller or owner of assets; while the equitable right resides with the buyer in possession of those assets who makes use of them "in the ordinary course of business."[92] ROT transactions in England are not required to be registered in the collateral registry for a third party effectiveness,[93] even though this generates the problem of ostensible ownership, due to the lack of an objective manner for the public to ascertain that such a ROT asset (being used in the ordinary course of business) does not fully belong to the user.[94]

In relation to ROT transactions, the lessor/seller or owner of assets would normally indicate that in the event of the lessee's/buyer's or hirer's insolvency, the former would repossess their ROT assets. The rationale for this business practice is anchored on the fact that ROT transactions are not treated as a security on par with fixed charges or chattel mortgages, and if the assets subject of ROT are left in the insolvent lessee's or buyer's possession, they would eventually form part of the pool of assets to be

85 Randall, J., 2014, p. 131. Also see Iheme, W. C., Mba, S. U., 2021, A Doctrinal Assessment of the Insolvency Frameworks of African Countries in Coping with the Pandemic Triggered Economic Crisis, *Stellenbosch Law Review*, Vol. 32, No. 2, p. 315.

86 Schnebly, M. I., 1926, "Legal" and "Equitable" Interests in Land Under the English Legislation of 1925, *Harvard Law Review*, Vol. 40, No. 2, p. 248.

87 *Ibid.*, p. 289.

88 See the landmark case of *Aluminium Industrie Vaassen B. V. v. Romalpa Aluminium Ltd* [1976] 1 WLR 676. For scholarly analyses on retention of title, see McCormack, G., 1995, *Reservation of Title*, 2nd ed., London, Sweet & Maxwell; Parris, J., 1986, *Effective Retention of Title Clauses*, Oxford, Blackwell; Davies, I., 1991, *Effective Retention of Title*, London, Fourmat Publishing.

89 Some of the early cases on conditional sale are *Bishop v. Shillito* (1816)106 ER 387; *Walker v. Clyde* (1861)142 ER 500; *Bateman v. Gren and King* [1868] IR 2 Ch 607, *McEntire v. Crossley Brothers Ltd* [1985] 1 AC 457.

90 Its origin could be traced to the old English case of *Nurse v. Barns* [1664] 83 ER 43. See Tajti, T., 2017, Leasing in the Western Balkans and the Fall of the Austrian Hypo-Alpe-Adria Bank, *Pravni Zapisi*, Vol. 8, No. 2, p. 155.

91 *Helby v. Matthews* [1895] AC 471, where the court defined the five essentials of a hire purchase agreement.

92 *Illingworth v. Houldsworth* [1904] AC 355, p. 358.

93 *Armour v. Thyssen* [1991] 2 AC 339, where the court held that an effective ROT clause does not create a security interest.

94 Mooney, C. W., 1988, The Mystery and Myth of "Ostensible Ownership" and Article 9 Filing: A Critique of Proposals to Extend Filing Requirements to Leases, *Alabama Law Review*, Vol. 39, p. 683.

distributed equally (*pari passu*) to the unsecured creditors who had extended credit to the lessee or buyer on the basis of those ROT assets.

The problem here is that since the last two decades, many African countries have succumbed to the intolerable pressures of the International Monetary Fund and World Bank[95] to reform their economic laws (*e.g.*, secured credit law, insolvency law, company law), as a precondition for receiving loans from these institutions.[96] In response, most of the Anglophone African countries have transplanted the U.S.-styled secured transactions law found in Article 9 of the Uniform Commercial Code (UCC).[97] Under UCC Article 9 (similar to the current laws of secured transactions of the Anglophone African countries on the subject),[98] there is no categorization of rights as either legal or equitable,[99] and a secured party has the

95 Stone, R. W., 2004, The Political Economy of IMF Lending in Africa, *American Political Science Review*, Vol. 98, No. 4, p. 577.

96 Gathii, J. T., 1999, Corruption and Donor Reforms: Expanding the Promises and Possibilities of the Rule of Law as an Anti-Corruption Strategy in Kenya, *Connecticut Journal of International Law*, Vol. 14, p. 408; Oko, O., 2001, Subverting the Scourge of Corruption in Nigeria: A Reform Prospectus, *NYU Journal of International Law & Policy*, Vol. 34, p. 439.

97 See generally Dubovec, M., Gullifer, L., 2019, *Secured Transactions Law Reform in Africa*, Oxford, Hart Publishing. In his seminal paper, Tajti discussed some general issues that are typically found in cross continental transplantation efforts especially in relation to the U.S.-styled secured transactions law, which developed in a much more capitalist economy, compared to the Continental European systems (and by extension, to the Anglophone African countries) vis-à-vis personal property security law. See Tajti, T., 2014, Could Continental Europe Adopt a Uniform Commercial Code Article 9-Type Secured Transactions System, *Adelaide Law Review*, Vol. 35, pp. 149–178.

98 For scholarly commentaries that have tracked the development of secured transactions law in Nigeria, other Anglophone countries, and elsewhere, see Iheme, W. C., Mba, S. U., 2017, Towards Reforming Nigeria's Secured Transactions Law: The Central Bank of Nigeria's Attempt Through the Back Door, *Journal of African Law*, Vol. 61, No. 1, p. 131; Iheme, W. C., 2016, *Towards Reforming the Legal Framework for Secured Transactions in Nigeria: Perspectives from the United States and Canada*, Switzerland, Springer International Publishing; Iheme, W. C., 2021, The Defects of Nigeria's Secured Transactions in Movable Assets Act 2017 and their Repercussions on Access to Credit: A Comparative Analysis and Lessons from Anglo-American Law, *Comparative Law Review*, Vol. 27, p. 9; Iheme, W. C., 2020, Remedying the Defects in India's Credit and Insolvency Frameworks with Adapted Solutions from the Anglo-American Legal Scholarships, *Pravni Zapisi*, Vol. 11, No. 2, p. 580; Gikay, A. A., 2017, Rethinking Ethiopian Secured Transactions Law through Comparative Perspective: Lessons from the Uniform Commercial Code of the US, *Mizan Law Review*, Vol. 11, No. 1, p. 153.

99 For example, Section 63 of the Nigerian Secured Transactions in Movable Assets Act 2017 (STMA), defines "security interest" to "[m]ean a property right in collateral that is created by agreement and secures payment or other performance of an obligation, regardless of whether the parties have denominated it as a security interest but it does

right to repossess its debtor's collateral (without the breach of peace),[100] upon the latter's default.[101] This understanding (which differs from English law) may form the baseline thought in the formation of a contract between two business enterprises in Africa who had indicated English law to govern their contract. English law (based on the formal approach),[102] and U.S. law (based on the functional approach),[103] differ philosophically on secured credit financing law, and the former's secured credit regime, unlike the latter, does not have a statutory right of repossession by means of self-help.[104]

Additionally, the English Insolvency Act (IA) of 1986 voids contractual rights that empower a party to repossess an insolvent party's assets on account of the latter's insolvency;[105] this is known as the Anti-Deprivation Rule.[106] In assessing the "relevant time"[107] to determine whether a party's

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not include a personal right against a guarantor or other person liable for the performance of the secured obligation." And Section 23 thereof, states that "the priority between perfected Security Interests in the same Collateral shall be determined by the order of registration." Both sections prove that the longstanding categorization of rights which drew from English law does not apply under the STMA.

100 Article 9–609, paras (a)–(b) state that: (a) After default, the secured party: (1) may take possession of the collateral; and (2) without removal, may render equipment unusable and dispose of collateral on a debtor's premises under Section 9–610. (b) A secured party may proceed under subsection (a): (1) pursuant to judicial process; or (2) without judicial process, if it proceeds without breach of the peace. See generally, McRobert, R., 2012, Defining "Breach of the Peace" in Self-Help Repossessions, *Washington Law Review*, Vol. 87, p. 569.

101 Article 9–609, Uniform Commercial Code. However, many Anglophone African countries that modelled their secured transactions law in line with the legal underpinnings of UCC Article 9, adapted the possibility of repossessing by self-help as stipulated under Article 9 to suit their own local conditions. See Gullifer, L., 2022, The UNCITRAL Model Law and Secured Transactions Law Reform, *Brooklyn Journal of Corporate, Financial & Commercial Law*, Vol. 17, No. 1, pp. 105–115.

102 Bridge, M. G. *et al.*, 1994, Formalism, Functionalism and Understanding the Law of Secured Transactions, *McGill Law Journal*, Vol. 44, p. 567. Also see Steyn, 1996, Does Legal Formalism Hold Sway in England?, *Current Legal Problems*, Vol. 49, pp. 43, 58.

103 Davies, I., 2004, The Reform of English Personal Property Security Law: Functionalism and Article 9 of the Uniform Commercial Code, *Legal Studies*, Vol. 24, No. 3, p. 295.

104 See Tajti, T., 2002, *Comparative Secured Transactions*, Budapest, Akademia Kiado; Tajti, T., 2022, The Overlooked Building Blocks of Secured Transactions Law Reforms: Policing and the Role of Organized Industries, *Uniform Law Review*, Vol. 27, No. 2, p. 320. Roy Goode identified "self-help" as one of the eight cardinal principles of commercial law. See Goode, R., 1988, The Codification of Commercial Law, *Monash University Law Review*, Vol. 14, p. 148.

105 Sections 238–240, Insolvency Act of 1986.

106 Worthington, S., 2012, Good Faith, Flawed Assets and the Emasculation of the UK Anti-Deprivation Rule, *Modern Law Review*, Vol. 75, p. 112.

107 See Section 240 Insolvency Act of 1986 on the definition of "relevant time".

repossession of ROT assets is in violation of the English Insolvency Act, repossessions that occurred within two years prior to the counterparty's insolvency could be assessed for a possible violation of insolvency rules, and thus voided by the administrator or liquidator.[108]

Similarly, Sections 423 and 425 of IA 1986, are designed to attack a debtor's preference transfers that are prejudicial to their creditors' interests.[109] These statutory provisions give life to the Anti-Deprivation Rule by providing for the avoidance of transactions intended to help keep corporate assets out of the reach of creditors. The gatekeeping effect of these English insolvency rules may present a challenge for African businesspeople, who, although they indicate English law to govern their contracts, are indeed operating outside the *mindset* of English law. Using the example of Section 40 of the Nigerian Secured Transactions in Movable Assets Act (STMA) of 2017,[110] which provides for a self-help repossession in the event of a default, a debtor's assets repossessed in Nigeria under the statutory impression of Section 40 STMA 2017 in the context of an English law governed contract, would most likely be voided by an English court due to the overpowering provisions of the English Insolvency Act.[111]The main consequence of voidance is the stripping of the secured status in the amount owed by the insolvent counterparty. Thus, the formerly secured credit converts to an unsecured credit, and the holder is repaid *pari passu* alongside other unsecured creditors.[112]

Another challenge that results from a typical termination clause is that it could be a trigger to the crystallization of a floating charge.[113]

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108 *Ibid.* Also see Fletcher, I., 1991, "Voidable Preferences" Judicially Explained, *Journal of Business Law*, p. 71; Fletcher, I., Voidable Transactions in Bankruptcy: British Law Perspectives, in: Ziegel, J., (ed.), 1994, *Current Development in International and Comparative Corporate Insolvency Law*, Oxford, Clarendon Press, p. 309.

109 On "preference transfers," see generally Countryman, V., 1985, The Concept of a Voidable Preference in Bankruptcy, *Vanderbilt Law Review*, Vol. 38, p. 713.

110 Section 40 thereof states that "[i]n the case of default by a borrower, a creditor shall give the borrower and the Grantor a notice of the default and intention to repossess the collateral. [...] A creditor may repossess collateral under this Act [...] without judicial process if the Grantor consented to relinquishing possession without a court order in the Security Agreement." For the Kenyan equivalent of self-help repossession in movable assets of a debtor following their default, see Section 71 of the Movable Property Rights Security Act of 2017 (Kenya).

111 See Sections 423–425, Insolvency Act 1986.

112 On *pari passu* sharing in insolvency, see Calnan, R., 2016, *Pari Passu* Sharing, in: *Proprietary Rights and Insolvency*, Oxford, Oxford University Press, chap. 1; Finch, V., The Pari Passu Principle, in: Finch, V., Milman D., 2017, *Corporate Insolvency Law: Perspectives and Principles*, 3rd ed., Cambridge, Cambridge University Press, chap. 14.

113 Carroll, D. W., 1967, The Floating Lien and the Preference Challenge: Some Guidance from the English Floating Charge, *Boston College Law Review*, p. 243.

In Nigeria, for instance, a floating charge still entitles its holder to appoint a receiver,[114] whereas in England, following the amendment by the Enterprise Act 2002, a holder of a floating charge can no longer appoint a receiver but only an administrator appointed by court, or extrajudicially.[115] Thus, when two business enterprises in Nigeria (as well as their legal advisers) create a floating charge in an English governed contract on the erroneous cum Nigerian-led belief that it would entitle the holder to appoint a receiver, English law (based on the Enterprise Act's amendment of the Insolvency Act of 1986) would modify the right to the appointment of an administrator only, or may simply deem the transaction unenforceable for being in contravention of the Insolvency Act.[116]

3.1.1. Scheme of Arrangement and the English Insolvency Rule in *Gibbs*

Another challenge is when an African (corporate) business party with an English governed contract is not necessarily insolvent but wishes to reorganize its debts under a scheme of arrangement.[117] For instance, under

114 Section 452 of the Nigerian Companies and Allied Matters Act (CAMA) of 2020.

115 See Section 250 of the Enterprise Act 2002; Section 72A of sch B1 to the Insolvency Act 1986; Gullifer, L., 2008, The Reforms of the Enterprise Act 2002 and the Floating Charge as a Security Device, *Canadian Business Law Journal*, Vol. 46, p. 419.

116 *Ibid.*

117 A scheme of arrangement is a Companies Act debt restructuring mechanism without a moratorium. See Part 26 of the English Companies Act 2006. For a judicial commentary on the scheme of arrangement process under English law, see *Re Hawk Insurance Co Ltd* [2001] EWCA Civ 241, para., 12, per Chadwick, L.J.:

> "It can be seen that each of those stages serves a distinct purpose. At the first stage the court directs how the meeting or meetings are to be summoned. It is concerned, at that stage, to ensure that those who are to be affected by the compromise or arrangement proposed have a proper opportunity of being present (in person or by proxy) at the meeting or meetings at which the proposals are to be considered and voted upon. The second stage ensures that the proposals are acceptable to at least a majority in number, representing three-fourths in value, of those who take the opportunity of being present (in person or by proxy) at the meeting or meetings. At the third stage the court is concerned (i) to ensure that the meeting or meetings have been summoned and held in accordance with its previous order, (ii) to ensure that the proposals have been approved by the requisite majority of those present at the meeting or meetings and (iii) to ensure that the views and interests of those who have not approved the proposals at the meeting or meetings (either because they were not present or, being present, did not vote in favour of the proposals) receive impartial consideration."

Kenyan,[118] Nigerian,[119] and South African[120] companies acts, a court may sanction a scheme of arrangement that modifies a solvent corporate debtor's debts, if at least 75 percent of the affected creditors in a class have approved the corporate debtor's proposal. The 25 percent of creditors or less (for each class that refused to approve it) would be *cramdown,*[121] and their debts will be repaid according to their rights in liquidation (winding up).[122]

To further illustrate how the English insolvency law can be inconsistent with the commercial experience and interests of African business enterprises, consider the following hypothetical scenario. If an African corporate debtor has a total of four secured creditors who belong to an asset class, and one of the creditors has an English governed contract representing 10 percent of the total debt value, while the other three creditors' contracts are governed by the domestic law of the African country and represent 90 percent of the total debt value, the corporate debtor restructuring its debt under any of the Companies Acts of Kenya, Nigeria, and South Africa, would ordinarily be able (with the assistance of a local court) to *cramdown* the holder of the English contract who holds 10 percent and repay them (even by the standards of English law) according to their rights in liquidation.[123]

However, the problem that inures from the above hypothetical scenario is that under English law the rule, as developed by Esher in *Antony Gibbs Sons v. La Société Industrielle Et Commerciale Des Métaux* (*Gibbs*),[124] is to the effect that only English law process (in the absence of a specific waiver agreement by the affected creditor) would be able to validly discharge an

118 Sections 922–929, Kenyan Companies Act of 2015.

119 Section 717, Nigerian Companies and Allied Matters Act of 2020.

120 Sections 65, 114–115, of the South African Companies Act of 2008.

121 Cramdown is a term that basically means that a court would disregard the dissent of a minority body of creditors that are in opposition of a debt restructuring proposal if that proposal has been approved by the majority of creditors in the relevant class. In that case, the court would order that the dissenting creditors be repaid according to their rights in liquidation. See *Re MyTravel Group plc* [2004] EWHC 2741 (Ch); *Re Telewest Telecommunications plc* [2004] EWHC 924 (Ch).

122 *Ibid.* See generally, Payne, J., 2014, Debt Restructuring in English Law: Lessons from the United States and the Need for Reform, *Law Quarterly Review*, Vol. 130, p. 282; Payne, J., 2014, *Schemes of Arrangement: Theory, Structure and Operation*, Cambridge, Cambridge University Press.

123 See *Re MyTravel Group plc* [2004] EWHC 2741 (Ch); *Re Telewest Telecommunications plc* [2004] EWHC 924 (Ch). The crammed creditor's right in liquidation would be a repayment of their debt in *pari passu* with other unsecured creditors of the corporate debtor. See Gullifer, L., Payne, J., 2020, *Corporate Finance Law – Principles and Policy*, 3rd ed., Oxford, Hart Publishing, p. 773.

124 *Antony Gibbs Sons v. La Société Industrielle Et Commerciale Des Métaux* (1890) 25 QBD 399 (Court of Appeal).

English governed debt being sought to be restructured in a foreign (African) court.[125] Thus, even where the African court has validly sanctioned a scheme of arrangement owing to their operative company law statute, the minority/dissenting creditor with the English governed debt could revert to the English court on the authority of *Gibbs* to obtain a judgment representing the full value of its debt. Such judgment (based on the reciprocity of recognition and enforcement of foreign judgments)[126] could easily be enforced against the African corporate debtor in any foreign jurisdiction in which it has assets. Incontrovertibly, this Anglocentric possibility presented by *Gibbs*, clearly undermines the interests of African businesses because it could frustrate their ability to restructure corporate debts, and by extension, put a stranglehold on their economic wellbeing.

The *Gibbs* rule is over 130 years old and has helped to maintain the hegemony of English law across the globe at the expense of international comity[127] and universal efforts to harmonize cross-border insolvency law.[128] In England and beyond, there have been scholarly agitations to reform the *Gibbs* rule in line with the UNCITRAL Model Law on Cross-border Insolvency.[129] However, recent English decisions continue to uphold the supremacy of the *Gibbs* rule. For instance, in *Re OJSC International Bank of Azerbaijan*,[130] the Appellate Court of England and Wales held that the Cross Border Insolvency Model Law is merely procedural and cannot impair substantive English-law contract rights protected by the *Gibbs* rule. Similarly, in *Rubin v. Eurofinance*,[131] the UK Supreme Court refused to recognize a transfer avoidance judgment that was rendered by a U.S. court on the basis that, in the UK, a judgment entered *in personam* cannot be enforced against a person who has not surrendered to the jurisdiction of the court that issued the judgment.[132]

Moreover, the UK government has consulted with stakeholders on the necessity of reforming the *Gibbs* rule.[133] At the end of consultations, the

125 *Ibid*., p. 405, per Esher.

126 See generally Castel, J. G., 1971, Recognition and Enforcement of Foreign Judgments in Personam and in Rem in the Common Law Provinces of Canada, *McGill Law Journal*, Vol. 17, No. 1, p. 11.

127 Paul, J. R., 1991, Comity in International Law, *Harvard International Law Journal*, Vol. 32, No. 1, pp. 5–8.

128 Fletcher, I., 2007, *Insolvency in Private International Law*, 2nd ed., Oxford, Oxford University Press.

129 *Ibid.*, chap. 2.

130 [2018] EWCA Civ 2802.

131 [2012] UKSC 46.

132 *Ibid.*, para. 10.

133 The UK Government, 2023, Consultation Outcome: Implementation of Two UNCITRAL Model Laws on Insolvency Consultation, (https://www.gov.uk/government/

White Paper adopted by the government unsurprisingly disagreed with any proposal to jettison the *Gibbs* rule,[134] and the government's position was arguably motivated by the enormous benefits that the *Gibbs* rule has yielded the English system for more than a century.

The Anti-Deprivation rule and the rule in *Gibbs* are two examples (out of several) of how English public law rules can recharacterize contractual rights that are predicated on English law, even though the contractual parties did not contemplate their applications at the outset. Unless they obtain legal advice from English lawyers, which would add to the cost of doing business, it is very likely that the African business entrepreneurs utilizing the English law and forum for disputes resolution would lack sufficient knowledge of how English public law (for example, insolvency law, company law, data protection law, and constitutional law principles) adversely affects the various aspects of their contractual rights at the time of indicating English law to govern their contracts.[135]

3.2. THE DAMAGES CLAUSE IN CONTRACT (AND SOME DEVELOPMENTS IN ENGLAND AFTER *ROBINSON V. HARMAN*)

In common law, a breach of contract could attract some judicial remedies such as specific performance, injunction, or special damages. Given that the purpose of a contract is performance,[136] a court will first consider the possibility of awarding an order of specific performance. Where a specific performance or an injunctive order is not appropriate or possible, the court will award special damages. For a long time, in English contract law, courts maintained the notion that damages in contract must be compensatory and generally refused to turn a compensatory exercise into a "windfall",[137] or "punishment."[138]

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consultations/implementation-of-two-uncitral-model-laws-on-insolvency/implementation-of-two-uncitral-model-laws-on-insolvency-consultation, 10. 11. 2023).

134 *Ibid.*

135 Ironically, under English law, lack of subject-matter knowledge does not adversely affect the right to enter into valid contracts. See *Prime Sight Ltd v. Lavarello* [2013] UKPC 22, [2014] AC 436; *Printing and Numerical Registering Co v. Sampson* (1875) LR 19 Eq 462 (Ch), per Jessel MR. ("If there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice.").

136 *George Mitchell v. Finney Lock (Seeds) Ltd* [1983] 1 All ER 108.

137 *Ruxley Electronics and Construction Ltd v. Forsyth* [1996] AC 344 (HL) 365; See also *Co-operative Insurance Society v. Argyll Stores (Holdings) Ltd* [1998] AC 1 (HL) 15 (Hoffmann).

138 *Addis v. Gramophone Co Ltd* [1909] AC 488 (HL).

3.2.1. Compensatory Damages: *Robinson v. Harman* as the Dominant Notion of Contractual Damages in Anglophone Africa

The earliest case that provided guidance on how compensatory damages in contract should be understood was the 1848 case of *Robinson v. Harman* (Robinson).[139] In this case, Park B., opined that "the rule of the common law is, that where a party sustains loss by reason of a breach of contract, he is, so far as money can do, it to be placed in the same situation with respect to damages, as if the contract had been performed."[140] Six years later, the ratio decidendi in *Robinson* was modified by the *foreseeability* rule in *Hadley v. Baxendale* (Hadley).[141] The rule states that "where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, *i.e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it."[142]

The combined effect of the *Robinson* and *Hadley* decisions arguably produced what economists call the doctrine of efficient breach.[143] The doctrine is of the view that if the cost of performance arithmetically outweighs the quantum of damages that would likely arise from a breach, then it makes more economic sense[144] to breach rather than perform the contract.[145] But the essence of contract is performance, and the doctrine of *pacta sunt servanda*, or sanctity of contract, obligates a party to perform their contract irrespective of an underlying hardship.[146] English law does not recognize hardship or an eroded profit margin as force majeure; it is therefore an insufficient ground to discharge a party from performance.[147] But if that party reneges on performance because it is economically wiser

139 (1848) 154 ER 363.

140 *Ibid.*, p. 366.

141 (1854) 9 Exch 341.

142 *Ibid.*, p. 354.

143 Macneil, I., 1982, Efficient Breach, Circles in the Sky, *Virginia Law Review*, Vol. 68, p. 947; Cunnington, R., 2006, Should Punitive Damages Be Part of the Judicial Arsenal in Contract Cases?, *Legal Studies*, Vol. 26, p. 369.

144 Posner, R. A., 2003, *Economic Analysis of Law*, 6th ed., New York, Aspen, p. 10.

145 McBride, N., 1995, A Case for Awarding Punitive Damages in Response to Deliberate Breaches of Contract, *Anglo-American Law Review*, Vol. 24, p. 369.

146 Maskow, D., 1992, Hardship and Force Majeure, *The American Journal of Comparative Law*, Vol. 40, No. 3, p. 657.

147 See generally Treitel, G., 2004, *Frustration and Force Majeure*, 2nd ed., London, Thomson, Sweet & Maxwell, chaps. 3–6.

to do so,[148] then the available remedy (currently in Anglophone African countries), in respect of damages, is the combined approaches of the *Robinson* and *Hadley* decisions.

Arguably, compensatory damages is no longer an adequate contractual remedy, because, it tends to perpetuate the efficient breach doctrine, by aiding to discharge a deliberate contract breaker, solely on the basis that the contract was no longer profitable.[149] An efficient breach line of thought tends to increase the rate of willful breaches in contract, which invariably decreases good faith in contract,[150] as well as debilitate the ease of doing business.[151] The English system, which created the *Robinson* compensatory damages, has gradually realized its inadequacies: if the sanctity of contract must be preserved as the backbone of commerce, then something more than compensatory damages needs to be crafted to complement the equitable reliefs of specific performance and injunction.[152]

3.2.2. The English Solutions in *Wrotham Park* and *Blake*: These Notions of Contractual Damages Are Yet a Feature in the Contractual Legal Frameworks of Anglophone African Countries

England, in comparison with its former colonies in Anglophone Africa, has made considerable adjustments to the regime of compensatory damages, which used to be solely based on the *Robinson* and *Hadley* line of cases. In 1973, Brightman J. developed the "Wrotham Park" damages for the compensation of breaches of restrictive covenants in contracts for which the plaintiff may not be able to prove a monetary loss.[153] Wrotham Park damages, which developed eponymously from the case of *Wrotham Park Estate Co Ltd v. Parkside Homes Ltd* (Wrotham Park),[154] is anchored on the classical legal doctrine of *ubi jus ibi remedium,* which Holt crafted in the 1703 case of *Ashby v. White*,[155] to the effect that when one's right has been invaded or

148 See generally Gava, J., 2006, Can Contract Law Be Justified on Economic Grounds?, *University of Queensland Law Journal*, Vol. 25, No. 2, p. 253.

149 Rowan, S., 2010, Reflections on the Introduction of Punitive Damages for Breach of Contract, *Oxford Journal Legal Studies*, Vol. 30, No. 3, p. 495.

150 See generally Burton, S. J., 1980, Breach of Contract and the Common Law Duty to Perform in Good Faith, *Harvard Law Review*, Vol. 94, p. 369.

151 Rowan, S., 2010, p. 501.

152 *Experience Hendrix LLC v. PPX Enterprises Inc.* [2003] 1 All ER (Comm.) 830.

153 Rotherham, C., 2008, "Wrotham Park Damages" and Accounts of Profits: Compensation or Restitution?, *Lloyd's Maritime and Commercial Law Quarterly*, p. 25.

154 [1974] 1 WLR 798 (Ch.). Also see *Morris-Garner v. One Step* [2018] UKSC 20, [2018] 2 WLR 1353.

155 (1703) 14 St Tr 695, 92 ER 126.

destroyed, the law would provide a remedy to protect them or award damages for their loss.[156] The assessment of Wrotham Park damages is based on the principle of "price or hire",[157] basically a hypothetical negotiation,[158] or agreement of what reasonable sum the plaintiff would reasonably charge the defendant to relax a particular restrictive covenant.[159]

Similarly, in 2000, the English House of Lords created a gain-based remedy in contract following its decision in *AG v. Blake* (Blake).[160] *Blake,* unlike its *Robinson* predecessor, is a tool that is used in disgorging a contract breaker of the profit they have made as a result of their willful and cynical breach. In other words, a court relying on *Blake* would measure the claimant's loss on the basis of the defendant's profit, when the latter had engaged in a contemptuous and cynical behavior. Arguably, *Blake* has a public policy undertone and has been used to discourage the rampant use of the efficient breach doctrine.

The ultimate challenge for African businesspeople who indicate English law to govern their contracts, is the possible lack of awareness of the developments in English law contractual damages since *Robinson.* This is because the various contract law textbooks used for instructions in most African law schools where lawyers are minted, are yet to feature contractual damages from the perspectives of *Blake* and *Wrotham Park,* and these lawyers may not know about the existence of these types of damages when advising their clients to indicate English law to govern their contracts.[161]

In other words, these types of damages are yet to make their debuts in Anglophone African countries. At the moment, they hardly come to

156 *Ibid.*

157 This principle was developed in *Watson, Laidlaw & Co Ltd v. Pott, Cassels and Williamson* (1914) 31 RPC 104 at pp. 117–118.

158 *Morris-Garner & Another v. One Step Ltd* [2018] UKSC 20, para 3.

159 *Lunn Poly Ltd v. Liverpool & Lancashire Properties Ltd* [2006] EWCA Civ 430; [2006] 2 EGLR 29, para 25 (negotiating damages represent "such a sum of money as might reasonably have been demanded by the claimant from the defendant as a quid pro quo for permitting the continuation of the breach of covenant or other invasion of right."), per Neuberger LJ.

160 [2001] 1 AC 268 (HL).

161 However, one of the anonymous reviewers of this article (presumably an English law professor) reassured that a lack of knowledge of the cases of *Wrotham Park* and *Blake*, as well as the principles they embody, may not pose as much problem to the African business community as this article has envisaged. They admonished as follows: "Your warning about Wrotham Park damages and account of profits (*AG v. Blake*) as being potentially unknown to parties from Africa is generally sensible, but it should not be overstated. Both of these cases/doctrines are very rarely used before English courts even by English parties, so not being fully aware of them is not as big of an issue as might be presented."

mind when African lawyers and their clients discuss contractual damages.[162] Unsurprisingly too, being that judges are drawn from the pool of lawyers, the courts in Anglophone Africa still compute damages in contract from the perspectives of *Robinson* and *Hadley*. Thus, as already mentioned, business entrepreneurs in Anglophone Africa are likely to still think of contractual damages on the basis of *Robinson* when they indicate the English law and forum to govern their contract, only to be surprised in the context of adjudication before an English court, by its application of *Wrotham Park* and *Blake* approaches in assessing the quantum of damages arising from the breach of contract.

4. Conclusion

In conclusion, while realistically, English law in Anglophone Africa may not completely be made a relic of the dead past anytime soon, it is recommended that African legislators and judges reform transplanted English law to suit the African experience. Actualizing this goal would also require a use of the Afrocentric tool to strip English judges of their intimidating trappings of black-robed infallibility: this would help reveal them to African businesspeople as fallible beings whose decisions are sometimes motivated by a wild-eye radical and irrational prejudice, rather than by the rules of law. The overdependence and consumption of English law in Africa have arguably stunted the growth of African legal and economic systems, and have increasingly led some African businesspeople to believe that their commercial disputes are incapable of being satisfactorily resolved in their own domestic legal systems. In Anglophone Africa, legal education in general, and contract law in particular, should start to be exclusively tailored to fit the African experience, following the admonitions of Oliver Wendell Holmes.

To achieve this, local legislative and judicial interventions are imperative and indeed necessary to trim the problematic edges of common law (contractual) principles that no longer fit the African experience and interests. For example, the doctrine of *pacta sunt servanda* and its main-

162 For example, none of the leading textbooks on the law of contract in four Anglophone African countries, such as: Hussain, A., 1993, *General Principles and Commercial Law of Kenya*, Nairobi, East African Publishers; Sagay, I. E., 2001, *Nigerian Law of Contract*, 2nd ed., Ibadan, Spectrum Law Publishing; Naudè, T. *et al.*, 2017, *The Law of Contract in South Africa*, 3rd ed., Cape Town, Oxford University Press; Bakibinga, D. J., 2001, *Law of Contract in Uganda*, Kampala, Fountain Publishers, discuss the *Wrotham Park* and *Blake* types of damages or how they apply to their jurisdictions.

stream meaning could be recast (including legislative restrictions) to align perfectly with the African experience and interests, by ensuring that African courts cease strongly from perceiving foreign forum selection clauses as ouster clauses and thus relinquishing jurisdiction whenever an African business plaintiff institutes an action in breach of a foreign or English law and forum clause. This approach should be explored even if African courts and legislators become paternalistic in the process of assessing and ensuring against the unceasing abuse of the foreign law and forum selection clauses. If business parties consider the African environment as befitting enough to do business and make profits, they should also be willing to utilize its dispute resolution mechanisms to resolve any ensuing disputes; this would provide a sufficient measure of opportunity for the maturity of African contract jurisprudence, and eventually reduce the level of reliance on foreign law and forum.

The recommended approach (*i.e.*, a recharacterization or reinterpretation of the foreign law and forum clause to suit domestic interests) has for example been followed by English courts for several decades, on the authority of *The Eleftheria,*[163] where Brandon J's *real connection test* authorizes English courts to assume jurisdiction irrespective of a foreign selection agreement where the plaintiff has sued in England in breach of it. This Anglocentric decision empowers English courts to whimsically exercise their discretion on whether or not to grant a stay of proceedings or to assume jurisdiction by completely disregarding a forum selection agreement.

Similarly, the rule in *Gibbs* and its supreme reign for over a century, disregarding foreign insolvency proceedings that adversely impact on English governed contracts, shows how little regard English law and courts have for other jurisdictions, and their fervent desire to maximally protect the English interests at the expense of other "laxer systems".[164] The aforementioned cases of *Health & Water Foundation v. Intervita Onlus* (Kenya), *Sqimnga Nigeria Limited v. Systems Applications Nigeria Limited* (Nigeria), and *Uganda Telecom Ltd v. Rodrigo Chacon t/a Andes Alpes Trading* (Uganda), are a few examples of Anglophone African cases in which the courts relinquished jurisdiction rather prematurely, because the defendants in those cases argued that the plaintiffs breached a foreign or an English law and forum clause.

Had, for example, the Kenyan, Nigerian and Ugandan courts been fully aware of the import of *The Eleftheria* and *Gibbs* cases, they probably

163 [1969] 2 All ER 641.

164 In *Shogun Finance Ltd v. Hudson* [2003] UKHL 62, para 49, Hobhouse used the term "laxer systems" to refer condescendingly to other legal systems outside of the UK.

would have exercised their discretion to assume jurisdiction. Given the fact of British colonialism and its negative effect on overdependence, Anglophone African countries have become entangled with English law, which they must carefully unknot to suit the African experience and interests, by "[l]ooking backward and forward at the same time."[165]

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165 Gilmore, G., 1977, p. 99.

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PREVELIKA ZAVISNOST AFRIČKIH SUDOVA I POSLOVNOG OKRUŽENJA OD ENGLESKOG PRAVA I SUDSTVA: NEGATIVNI ODRAZ NA RAZVOJ AFRIČKIH PRAVNIH I EKONOMSKIH SISTEMA

Williams C. Iheme

APSTRAKT

Nekritička transplantacija engleskog prava od strane anglofono-afričkih zakonodavaca i sudija kao i njihov neuspeh da u dovoljnoj meri prilagode engleske pravne koncepte idiosinkratičnim društveno-ekonomskim uslovima u Africi nesumnjivo doprinose održavanju hegemonije engleskog prava. U članku se tvrdi da prevelika zavisnost afričkih kompanija u rešavanju ugovornih sporova od engleskog prava i prakse sudova nije nužno posledica njihovog navodnog izuzetnog kvaliteta, već najpre preuveličavanja kvaliteta i značaja engleskog pravnog sistema od strane njegovih pobornika. Analiza koristi zanimljive primere kako bi se prikazali neki negativni efekti korišćenja/preteranog oslanjanja na englesko pravo i sudstvo od strane afričkih preduzeća za rešavanje ugovornih sporova. U radu se tvrdi da anglofono-afrički zakonodavci, sudije i pravni stručnjaci treba da se izmaknu iz senke engleskog prava i da osmisle autohtone pravne procese koji odgovaraju senzibilitetu i društveno-ekonomskom okruženju Afrike.

Ključne reči: klauzule o izboru suda, englesko pravo i sudstvo, Gibsovo pravilo, pravilo protiv deprivacije, afrička preduzeća, standardne klauzule, Rotam Park (Wrotham Park) odštete, restrukturiranje duga, pravna transplantacija, afrocentričnost.

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