

Examination of Witnesses Abroad via Letters of Request and Special Examiners: Procedure and  
Legality Under Nigerian Law

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### **Abstract**

*This paper critically examines the procedural framework and legal validity of examining witnesses abroad through Letters of Request and Special Examiners under Nigerian law. Rooted in the principle of International Judicial Assistance, these mechanisms are designed to bridge evidentiary gaps in transnational civil and commercial litigation. This paper carefully delineates the statutory basis, procedural steps, and judicial discretion involved in invoking these tools under various Rules of Court in Nigeria. However, the paper raises profound constitutional and evidential concerns, contending that the procedure potentially violates the core tenets of fair hearing, oral evidence, and judicial presence as enshrined in Nigerian jurisprudence. The paper argues that such processes may amount to a form of “trial by correspondence,” thereby undermining the trial Judge’s sensory role in assessing the credibility and demeanour of witnesses. It also highlights the risk of jurisdictional overreach, inconsistency with the composition of the trial court, and the incompatibility of foreign evidentiary procedures with Nigerian legal standards. Drawing lessons from the United Kingdom, the author proposes a progressive approach whereby Nigerian trial Judges may be empowered to act as Special Examiners abroad or employ virtual hearing options to safeguard procedural integrity. Ultimately, the paper calls for a cautious, constitutionally sound application of these international co-operation tools, urging Nigerian courts to prioritize judicial presence, evidentiary fairness, and procedural coherence.*

**Key words: Letters of Request, Special Examiners, International Judicial Assistance, Trial by Correspondence, Fair Hearing**

## 1.0 Introduction

The concept of “*Sovereignty*” under International Law has properly delimited the right of one State to exercise its executive, legislative and/or judicial powers,<sup>2</sup> in any form, in the territory of another State.<sup>3</sup> The territoriality of the jurisdiction of a domestic court denotes that these powers cannot be exercised by a State outside its territory except by a permissive rule derived from international custom or a convention.<sup>4</sup> To circumvent the bottlenecks created by sovereignty, the concept of “International Judicial Assistance” was developed to assist the domestic court in one country (“Requesting Country”) to receive evidence located in another country (“Requested Country”). This assistance is made possible through two avenues. The first is via conventions or treaties concerning mutual legal assistance, which have been acceded to<sup>5</sup> and the second is through *Courtoisie Internationale*.<sup>6</sup>

Letters of Request and Special Examiners are offshoots of International Judicial Assistance, and they are used by a Requesting Country for the examination of witnesses in the territory of a Requested Country in civil and commercial matters. Surprisingly, there is a dearth of judicial decisions from Nigerian Courts on the examination of witnesses in a foreign country owing, probably, to the fact that it is not an area that is frequently traversed and/or tested in civil and commercial litigation in Nigeria. However, various Rules of Court in Nigeria recognize these modes of International Judicial Assistance and prescribe a procedure for their use.

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<sup>2</sup> This is sometimes referred to as “*facultas iurisdictionis*”. It follows the concept of territoriality concerning the power resident in courts to adjudicate. See, Martin Illmer, ‘Jurisdiction (PIL)’ <[https://max-eup2012.mpipriv.de/index.php/Jurisdiction\\_\(PIL\)](https://max-eup2012.mpipriv.de/index.php/Jurisdiction_(PIL))> accessed 19 February 2025.

<sup>3</sup> See, the *Island of Palmas Case (Netherland v. United States of America)* 1928 2 RIAA, 838 (Max Huber, J). This Judgment can be accessed via: <[https://legal.un.org/riaa/cases/vol\\_ii/829-871.pdf](https://legal.un.org/riaa/cases/vol_ii/829-871.pdf)> accessed 19 February 2025. This is also well-captured in the Latin maxim: *Extra territorium jus dicenti impune non paretur*, which literally means “One who gives a judgment outside his territory may be disobeyed with impunity”.

<sup>4</sup> See, *The Case of S. S. Lotus (France v. Turkey)* 1927 PCIJ (Ser. A) No. 10 [45] (Max Huber, J). This Judgment can be accessed via: <<https://law.justia.com/cases/foreign/international/1927-pcij-series-a-no-10.html>> accessed 19 February 2025.

<sup>5</sup> See, for example, the Treaty on Mutual Legal Assistance in Criminal Matters between the Government of the Federal Republic of Nigeria and the Government of the Republic of South Africa (Ratification and Enforcement) Act, 2004.

<sup>6</sup> This is also known as “international courtesy”, “comity of nations” or “international comity”. It refers to a practice among different countries or courts where they mutually recognize each other’s legislative, executive, and judicial acts and allow such acts within their territory with the hope of reciprocity. This practice is not an absolute obligation but only a recognition of goodwill and respect between nations. See, LSDefine, ‘Courtoisie internationale’ <<https://www.lsd.law/define/courtoisie-internationale>> accessed 19 February 2025.

This paper is directed at delineating the practice and procedure, under Nigerian Law, for the examination of witnesses abroad via Letters of Request and Special Examiners. Significantly, this paper will address the lingering question of whether this procedure amounts to “Trial by Correspondence” and will further interrogate the legality of this procedure under Nigerian Law.

## **2.0 Meaning of Letters of Request and Special Examiners**

Letters of Request, also referred to as “Letters Rogatory” or “Commission *Rogatoire*”,<sup>7</sup> are formal requests made by a court in a Requesting Country to a court in a Requested Country, asking the foreign court to assist in obtaining evidence within its territory for an ongoing case in the Requesting Country.<sup>8</sup> The right to make this request is vested in any party to a case insofar as such a party is seeking relevant evidence from a foreign jurisdiction. The advantage of using the Letter of Request procedure is that the foreign court, where necessary, can exercise its power of compulsion to secure the attendance of any named witness or even a relevant witness residing within its territorial sphere of influence.

Special Examiners, within the context of examining witnesses abroad, include Diplomatic Agents in a foreign Convention Country or their deputies appointed by a Requesting Country to take the examination-in-chief, cross-examination, and re-examination, orally, on oath or affirmation, of named and identified witnesses listed by a Claimant or Defendant. However, a Special Examiner is bereft of any ability to compel compliance as the Special Examiner can only “invite” a witness to present himself and give evidence.

## **3.0 Procedure for Examination of Witnesses Abroad Under Nigerian Law**

The examination of witnesses in a Convention Country can be achieved through two avenues. The first is via Letters of Request to a Competent Judicial Authority in a Convention Country, and the second is via appointment of a Nigerian Diplomatic Agent as Special Examiner in a Convention

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<sup>7</sup> See, LSDefine, ‘Letter Rogatory’ <<https://www.lsd.law/define/letter-rogatory>> accessed 19 February 2025; and Tureng Dictionary, ‘Commission Rogatoire’ <<https://tureng.com/en/french-english/commission%20rogatoire>> accessed 19 February 2025.

<sup>8</sup> See, LSDefine, ‘Letter of Request’ <<https://www.lsd.law/define/letter-of-request>> accessed 19 February 2025.

Country. While the practice and procedure in these two avenues appear similar, they differ in several respects. These differences range from the framing of the reliefs, the accompanying documents or forms, and the mandate as well as procedure for execution in the Convention Country. These are highlighted, where necessary, in the succeeding subsections.

### **3.1 Filing of an Application to Examine a Witness in a Convention Country**

A relevant witness may be asked to testify in the country where he is domiciled by means of a Letter of Request or a Special Examiner. In Nigeria, such an application is made by the party who requires the evidence and it is made by way of Motion on Notice,<sup>9</sup> which is an interlocutory application made during the pendency of the case, preferably, after trial has commenced.<sup>10</sup> Since a grant of such an application is at the discretion of the Court, the applicant must sufficiently canvass the need for the Letter of Request<sup>11</sup> or the appointment of a Special Examiner. The applicant must also set out the details of the case and the particular evidence, be it oral or documentary. This is because the procedure cannot be used as an avenue to fish for evidence.

### **3.2 Reliefs Sought in an Application to Examine a Witness in a Convention Country**

Where an applicant elects the option of “Letters of Request to a Competent Judicial Authority in a Convention Country,” such an applicant must seek, from the Nigerian Court handling the matter, an order for the issuance of a Letter of Request to take evidence in a foreign country. Such order is to be directed at a competent judicial authority or such other person, as according to the Convention Country’s procedure, is competent to take the examination of witnesses.<sup>12</sup> Under this approach, the

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<sup>9</sup> See the unreported Ruling in the case of *Rebecca Adodo v. Rain Oil Limited* (“*Adodo’s Case*”), Suit No. NICN/LA/298/2018 delivered by Honourable Justice O. A. Obaseki-Osaghae, J., of the National Industrial Court, Lagos Judicial Division, on the 23<sup>rd</sup> day of July, 2020. This Ruling can be accessed via: <<https://nicnadr.gov.ng/judgement/details.php?id=5066>> accessed 19 February 2025.

<sup>10</sup> *ibid.*

<sup>11</sup> Where a party applies to the Court for the issuance of a Letter of Request, such an application should clearly state the nature of the case; the specific evidence needed; the identity of the potential witness; and the questions to be asked, ensuring compliance with the legal requirements of the foreign court.

<sup>12</sup> See the following provisions of the various Rules of Court providing for and enabling this relief: Order 40 Rule 6 of the High Court of the Federal Capital Territory (Civil Procedure) Rules, 2025; Order 20 Rule 6 of the Federal High Court (Civil Procedure) Rules, 2019; Order 40 Rule 7 of the National Industrial Court of Nigeria (Civil Procedure) Rules, 2017; Order 36 Rule 7 of the High Court of Lagos State (Civil Procedure) Rules, 2019; and Order 30 Rule 8 of the Akwa Ibom State High Court (Civil Procedure) Rules, 2024.

prayer prioritizes a “Competent Judicial Authority” in the Convention Country to take such evidence<sup>13</sup> and the relief can be phrased as follows:

An Order that a Letter of Request to take evidence be issued to a Competent Judicial Authority of [*the Convention Country*] in the [*Name of the State, City and/or Judicial Division*] of [*the Convention Country*] to summon [*Name(s) and Address(es) of the Witness(es) in the Convention Country*] as witness(es) (and such other witnesses as the agents of the claimant and defendant shall request in writing) to attend at a time and place as the Competent Judicial Authority of [*the Convention Country*] shall appoint to be examined, upon the interrogatories which accompany the Letter of Request and *viva voce*, touching the said matters in question in the presence of the agents of the claimant and defendant or any of them.

The party making the application for Letters of Request is expected to file at the Registry of the Nigerian Court an undertaking to be responsible for all expenses incurred by the Ministry of Foreign Affairs on the Letter of Request and to pay same upon due notification by the Chief Registrar of the Nigerian Court issuing the Letter of Request.<sup>14</sup> The said Undertaking shall be accompanied by the following:

- i. A request,<sup>15</sup> which will be in the form provided for in the relevant Rules of Court<sup>16</sup> but modified to meet the peculiarity of the case. Where the language of the country in which the request is to be executed is not English, a translation must be done.

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<sup>13</sup> See, Form 21 of the High Court of the Federal Capital Territory (Civil Procedure) Rules, 2025; Form 18 of the Federal High Court (Civil Procedure) Rules, 2019; Form 54 of the National Industrial Court of Nigeria (Civil Procedure) Rules, 2017; Form 24 of the High Court of Lagos State (Civil Procedure) Rules, 2019; and Form 25 of the Akwa Ibom State High Court (Civil Procedure) Rules, 2024.

<sup>14</sup> See, Order 40 Rule 6(a) and Form 20 of the High Court of the Federal Capital Territory (Civil Procedure) Rules, 2025; Order 20 Rule 6(a) and Form 17 of the Federal High Court (Civil Procedure) Rules, 2019; Order 40 Rule 7(1) and Form 53 of the National Industrial Court of Nigeria (Civil Procedure) Rules, 2017; Order 36 Rule 7(a) and Form 23 of the High Court of Lagos State (Civil Procedure) Rules, 2019; and Order 30 Rule 8(a) and Form 24 of the Akwa Ibom State High Court (Civil Procedure) Rules, 2024. See also, *Adodo’s Case* (n 9) where the Claimant/Applicant complied with this requirement.

<sup>15</sup> This request is the “*Letter of Request to take Evidence Abroad (Convention Country)*”.

<sup>16</sup> See the following Forms in the various Rules of Court providing for and enabling this request: Form 21 of the High Court of the Federal Capital Territory (Civil Procedure) Rules, 2025; Form 18 of the Federal High Court (Civil Procedure) Rules, 2019; Form 54 of the National Industrial Court of Nigeria (Civil Procedure) Rules, 2017; Form 24 of the High Court of Lagos State (Civil Procedure) Rules, 2019; and Form 25 of the Akwa Ibom State High Court (Civil Procedure) Rules, 2024.

- ii. A copy of the Interrogatories<sup>17</sup> (if any) to accompany the request(s), with a translation, if necessary.
- iii. A copy of cross-interrogatories<sup>18</sup> (if any), with a translation, if necessary.<sup>19</sup>

Where a party elects the second option, which is, the “Appointment of a Nigerian Diplomatic Agent as Special Examiner in a Convention Country,” such an applicant must seek from the Nigerian Court handling the matter, an order for the examination of the witness before the Nigerian Diplomatic Agent in any foreign country with which a convention in that respect has been made.<sup>20</sup> A copy of the Interrogatories and cross-interrogatories (if any) shall also be filed in this respect.<sup>21</sup> The costs of the application for appointing the Special Examiner and the costs for such examination (incidental costs inclusive), shall be costs in the action.<sup>22</sup> Under this approach, the prayer would be for an Order for the appointment of the Nigerian Diplomatic Agent as “Special Examiner” in the foreign country<sup>23</sup> and the relief can be phrased as follows:

An Order that the Nigerian Diplomatic Agent or his deputy at [*the Convention Country*] be appointed as “Special Examiner” for the purpose of making the

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<sup>17</sup> Interrogatories are a set or series of written questions drawn up for the purpose of being propounded to a party, witness, or other person having information of interest in the case. They consist of written questions about the case submitted by one party to the other party or witness. The answers to interrogatories are usually given on oath, that is, the person answering the questions signs a sworn statement that the answers are true. See the case of *Abubakar v. Yar Adua* (2008) 4 NWLR (Pt. 1078) 465 (SC) 497 – 498 [F] – [A].

<sup>18</sup> Cross-interrogatories, as the name suggests, are cross-questions. They are written questions that are submitted to an opposing party in a case. It is a type of interrogatory that is sent by a party who has received a set of interrogatories. In simpler terms, it is a question that one side asks the other side during an ongoing case to get more information. See, LSDefine Dictionary, ‘Cross-interrogatory’ <<https://www.lsd.law/define/cross-interrogatory>> on 12 February 2025.

<sup>19</sup> See, Order 40 Rule 6(b)(i) – (iii) of the High Court of the Federal Capital Territory (Civil Procedure) Rules, 2025; Order 20 Rule 6(b)(i) – (iii) of the Federal High Court (Civil Procedure) Rules, 2019; Order 40 Rule 7(2)(a) – (c) of the National Industrial Court of Nigeria (Civil Procedure) Rules, 2017; Order 36 Rule 7(b)(i) – (iii) of the High Court of Lagos State (Civil Procedure) Rules, 2019; and Order 30 Rule 8(b)(i) – (iii) of the Akwa Ibom State High Court (Civil Procedure) Rules, 2024.

<sup>20</sup> See the following provisions of the various Rules of Court providing for and enabling this relief: Order 40 Rule 7 of the High Court of the Federal Capital Territory (Civil Procedure) Rules, 2025; Order 20 Rule 7 of the Federal High Court (Civil Procedure) Rules, 2019; Order 40 Rule 8 of the National Industrial Court of Nigeria (Civil Procedure) Rules, 2017; Order 36 Rule 8 of the High Court of Lagos State (Civil Procedure) Rules, 2019; and Order 30 Rule 9 of the Akwa Ibom State High Court (Civil Procedure) Rules, 2024.

<sup>21</sup> These accompaniments were relied upon and captured in the phraseology of the reliefs sought in the application for the appointment of a Special Examiner in *Adodo’s Case* (n 9).

<sup>22</sup> On this point, see the last sentence in the following Forms: Form 22 of the High Court of the Federal Capital Territory (Civil Procedure) Rules, 2025; Form 19 of the Federal High Court (Civil Procedure) Rules, 2019; Form 55 of the National Industrial Court of Nigeria (Civil Procedure) Rules, 2017; Form 25 of the High Court of Lagos State (Civil Procedure) Rules, 2019; and Form 26 of the Akwa Ibom State High Court (Civil Procedure) Rules, 2024.

<sup>23</sup> See, Form 22 of the High Court of the Federal Capital Territory (Civil Procedure) Rules, 2025; Form 19 of the Federal High Court (Civil Procedure) Rules, 2019; Form 55 of the National Industrial Court of Nigeria (Civil Procedure) Rules, 2017; Form 25 of the High Court of Lagos State (Civil Procedure) Rules, 2019; and Form 26 of the Akwa Ibom State High Court (Civil Procedure) Rules, 2024.

examination, cross-examination and re-examination, viva voce, on oath or affirmation, of [*Number of Witnesses and their Names*] witnesses on the part of the [*Claimant or Defendant, depending on the party making the Request*] at [*the Convention Country*].

### 3.3 **Hearing and Determination of the Application by a Nigerian Court**

After the relevant processes have been filed and exchanged by parties, the application will be heard by a Nigerian Court and a decision given one way or the other. This decision is an exercise of discretion<sup>24</sup> and a Nigerian Court will review the application to ascertain if the request is legitimate, relevant and meets the ends of justice in the ongoing case. The Federal High Court endorsed this position in the case of *Industrial Bank Limited (Merchant Bankers) v. Central Bank of Nigeria*,<sup>25</sup> when it held that an application of this kind will be refused where the evidence to be adduced is not directly relevant and “*where it appears under the procedure of the foreign court, the witness will not be cross-examined in the ordinary way as it is done in Nigeria.*”<sup>26</sup>

Nothing bars a Nigerian court from being persuaded by decisions from common law jurisdictions on the factors to be considered in the exercise of this peculiar discretion.<sup>27</sup> In the case of *I. C. Corporation v. Daewoo Corporation & Ors.*,<sup>28</sup> the High Court in Bombay, India, provided a template in this respect when it commented as follows:

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<sup>24</sup> See the following cases on the proper exercise of discretion in this wise: *Industrial Bank Limited (Merchant Bankers) v. Central Bank of Nigeria* (1998) FHCLR 72, 73 and 79; and *Coch v. Allcock & Co.* (1888) LR 21 QBD 178, 181.

<sup>25</sup> (1998) FHCLR 72 (a decision of the Federal High Court).

<sup>26</sup> *ibid* 73 and 78 (Odunowo, J). This case was cited at page 190 of the cerebral work of Schleiffer Marais and Prisca Christina Leonie, ‘Cross-border Taking of Evidence in Civil and Commercial Matters in Switzerland, South Africa, Botswana, Namibia, Nigeria, and Uganda’, accessible via: <<https://cdm21069.contentdm.oclc.org/digital/collection/pp11/id/442001/>> accessed 12 February 2025.

<sup>27</sup> See the following cases from common law jurisdictions on the exercise of discretion in granting Letters of Request or appointing a Special Examiner: *Emmanuel v. Soltykoff* (1892) 8 TLR 331, 332 (Esher, M.R.); *In Re Boyse, Crofton v. Crofton* (1882) 20 Ch. D 760, 770 (Fry, J); *Jaya Shanker Mills (Barsi) Limited v. Hazi Zakaria Hazi Ebrahim*, AIR 1962 A.P 435 (Kumarayya, J); *Ehrmann v. Ehrmann* (1866) 2 Ch. D 611, 614; *New v. Burns* (1894) 64 LJ QB 104, 105; *Ross v. Woodford* (1894) 1 Ch. 38, 40.

<sup>28</sup> Chamber Summons No. 1125 of 1989 in Suit No. 1211 of 1985, decided on 27 October 1989. Accessed via: <<https://lextechsuite.com/IC-Corporation-Versus-Daewoo-Corporation-and-others-1989-10-27>> accessed 12 February 2025.

The exercise of discretion should be based on the balancing of the effect of examining a witness in the Court and outside the Court. Examination of a witness by a commission or on a letter of request has three consequences:

**(i) If the defendant's witnesses are examined on commission, the plaintiff is denied the right to cross-examine the witnesses before the Judge who has seen the witnesses of the plaintiff in the box.**

**(ii) The judge is denied the advantage of observing the demeanour of the witness.**

**(iii) The system of questioning, the cross-examination rules of evidence of another country may place one or the other party at a serious disadvantage.**

The disadvantage evident from the three consequences set out above is the first principle that should be considered in exercising discretion.<sup>29</sup>

Furthermore, a Nigerian Court will examine the application to ascertain whether it complies with Nigerian law and international treaties. For example, it is a pre-condition under Nigerian law that there must be in existence a ratified Treaty, Agreement or Convention between Nigeria and the foreign country where the said witness is domiciled which permits the examination of such a witness abroad.<sup>30</sup> This issue was considered by the National Industrial Court of Nigeria in the case of *Rebecca Adodo v. Rain Oil Limited*<sup>31</sup> where an application for the appointment of a Special Examiner to take evidence in Sweden was refused because Nigeria is not a party to the *Convention on the Taking of Evidence Abroad in Civil or Commercial Matters 1970*<sup>32</sup> (the Hague Evidence

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<sup>29</sup> *ibid* [11] – [12] (Guttal, J) (emphasis added).

<sup>30</sup> See the following provisions in the various Rules of Court in Nigeria which requires that a “*Convention*” must be in existence between the Requesting Country (Nigeria) and a Requested Country: Order 40 Rules 6 and 7 of the High Court of the Federal Capital Territory (Civil Procedure) Rules, 2025; Order 20 Rules 6 and 7 of the Federal High Court (Civil Procedure) Rules, 2019; Order 40 Rules 7 and 8 of the National Industrial Court of Nigeria (Civil Procedure) Rules, 2017; Order 36 Rules 7 and 8 of the High Court of Lagos State (Civil Procedure) Rules, 2019; and Order 30 Rules 8 and 9 of the Akwa Ibom State High Court (Civil Procedure) Rules, 2024.

<sup>31</sup> *Adodo's Case* (n 9).

<sup>32</sup> *Convention on the Taking of Evidence Abroad in Civil or Commercial Matters*, Mar. 18, 1970, 23 U.S.T. 2555, 847 U.N.T.S. 23.

Convention) and there was no convention between Nigeria and Sweden permitting the examination of witnesses abroad. The Court unmistakably held:

The affidavit evidence is that the claimant has relocated to Sweden. **The question that arises is whether there is a convention ratified by Nigeria for the examination of a witness or witnesses abroad**; or put in another way, **whether there is a convention that Nigeria and Sweden are both signatories to that permits the examination of witnesses or evidence taken abroad and in this instance outside the shores of Nigeria. This must first be established before the consideration of whether or not to grant the order sought.** Learned counsel to the claimant/applicant has referred to the Hague Evidence Convention 1970 and has stated that “Sweden is a convention country” without stating whether Nigeria is a member state or a signatory to this convention. Nigeria is however not a member state of the Hague Convention, neither is it a signatory to the Hague Evidence Convention 1970 and so it is not applicable in respect of taking the claimant’s evidence in Sweden.

.... In the circumstances, the application is refused. The claimant may wish to use other procedures as contained in the Practice Directions 2020 for Covid-19 sittings.<sup>33</sup>

#### **3.4 Issuance and Transmission of the Letter of Request or Order for Appointment of a Special Examiner to a Convention Country**

A Nigerian Court will grant the application once it considers it to be meritorious and order the issuance of a Letter of Request which will be addressed to the relevant foreign judicial authority.<sup>34</sup> The duly issued Letter of Request will be sent through the diplomatic channels to the foreign court for necessary action. The procedure for the issuance and transmission of an order for the

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<sup>33</sup> *ibid* (emphasis added).

<sup>34</sup> This Letter of Request will contain the details of the case; the witnesses and their addresses; and the relevant evidence sought.

appointment of a Special Examiner in a Convention Country is similar to the foregoing except that it will be directed at the Nigerian Diplomatic Agent or his deputy in the Convention Country.

### **3.5 Execution of the Letter of Request or Order for Appointment of a Special Examiner in a Convention Country**

The practice and procedure for the execution of a Letter of Request or Order for the Appointment of a Special Examiner in a Convention Country varies depending on the identity of the executing authority. The practice and procedure for these two categories are treated separately below.

#### **3.5.1 Execution by a “Competent Judicial Authority” in a Convention Country**

Where the Convention Country receives the Letter of Request from a Nigerian Court, it will direct its competent judicial authority or such other person that is competent to take the examination of witnesses, as permitted by its procedure, to summon the named and identified witnesses and such other witnesses as the agents of the Claimant and Defendant may request in writing. The summoned witnesses shall attend at a time and place appointed by the Competent Judicial Authority and be examined orally and via the interrogatories accompanying the Letter of Request concerning the identified matters. This examination takes place in the presence of the agents of the Claimant and the Defendant or any of them as shall, on due notice given, attend such examination.<sup>35</sup>

The Competent Judicial Authority of the Convention Country will then permit the agents of both the Claimant and the Defendant or any of them present to examine such witnesses orally and via interrogatories and give room for the other party to cross-examine the witnesses orally and via cross-interrogatories on the subject matter or arising out of the answers. The party producing the witness for examination will have the liberty to re-examine him orally.

The Competent Judicial Authority of the Convention Country will cause all answers of the said witnesses, and all additional oral questions asked during examination-in-chief, cross-examination

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<sup>35</sup> On this procedure, see Form 21 of the High Court of the Federal Capital Territory (Civil Procedure) Rules, 2025; Form 18 of the Federal High Court (Civil Procedure) Rules, 2019; Form 54 of the National Industrial Court of Nigeria (Civil Procedure) Rules, 2017; Form 24 of the High Court of Lagos State (Civil Procedure) Rules, 2019; and Form 25 of the Akwa Ibom State High Court (Civil Procedure) Rules, 2024.

or re-examination to be reduced into writing and all books, letters, papers, and documents produced in the course of the examination to be duly marked for identification.<sup>36</sup>

### **3.5.2 Execution by a Nigerian Diplomatic Agent Appointed as “Special Examiner” in a Convention Country**

The Nigerian Diplomatic Agent or his deputy in the Convention Country is appointed as “Special Examiner” to make the examination-in-chief, cross-examination, and re-examination, orally, on oath or affirmation, of named and identified witnesses listed by the Claimant or Defendant. The Special Examiner is given the liberty to invite the attendance of the said witnesses and the production of documents, but shall not exercise any compulsory powers, otherwise, such examination will be taken in accordance with the Nigerian High Court Procedure.

The Claimant and the Defendant are expected to exchange the names of their agents to whom notice concerning the examination of the said witnesses may be sent. Before the examination of any witness, notice of such examination shall be given by the agent of the party on whose behalf such a witness is to be examined to the agent of the other party, unless such notice is deemed unnecessary.<sup>37</sup>

### **3.6 Transmission of the Evidence Received in a Convention Country to the Nigerian Court**

Where the executing authority is the Competent Judicial Authority in a Convention Country, such an authority will authenticate the examination by the seal of the Court or Tribunal, or in such other manner as is in accordance with the procedure in the Convention Country, and return the same together with, the interrogatories and cross-interrogatories, and a note of the charges and expenses payable for the execution of the Letter of Request, through the Nigerian Ministry of

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<sup>36</sup> *ibid.*

<sup>37</sup> On this procedure, see Form 22 of the High Court of the Federal Capital Territory (Civil Procedure) Rules, 2025; Form 19 of the Federal High Court (Civil Procedure) Rules, 2019; Form 55 of the National Industrial Court of Nigeria (Civil Procedure) Rules, 2017; Form 25 of the High Court of Lagos State (Civil Procedure) Rules, 2019; and Form 26 of the Akwa Ibom State High Court (Civil Procedure) Rules, 2024.

Foreign Affairs from whom the name was received for onward transmission to the Nigerian Court that made the request.<sup>38</sup>

Where the executing authority is the Special Examiner in a Convention Country, such an examiner shall ensure that the depositions when taken together with any documents referred to or certified copies of documents, or extracts, are authenticated by the Special Examiner's signature and transmitted under seal, to the Chief Registrar of the Nigerian Court that made the Order on or before the named date on the Order for Appointment or on such other day as may be ordered, for filing.<sup>39</sup> The trial of the action in the Nigerian Court shall be stayed until the filing of such depositions. Upon resumption of trial of the matter in the Nigerian Court, the Claimant or the Defendant, as the case may be, is at liberty to read and give such depositions made in a Convention Country in evidence, saving all just exceptions.<sup>40</sup>

#### **4.0 Does this Procedure Amount to Trial by Correspondence?**

The Defendant/Respondent in *Adodo's Case*,<sup>41</sup> while opposing an application for the appointment of a Special Examiner to take evidence in Sweden, argued that such a procedure amounts to "Trial by Correspondence", which is unknown to Nigerian law. Unfortunately, the National Industrial Court determined and dismissed the Claimant/Applicant's application on another ground without resolving this particular issue. Nevertheless, the question remains: does this procedure amount to Trial by Correspondence?

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<sup>38</sup> On this procedure, see Form 21 of the High Court of the Federal Capital Territory (Civil Procedure) Rules, 2025; Form 18 of the Federal High Court (Civil Procedure) Rules, 2019; Form 54 of the National Industrial Court of Nigeria (Civil Procedure) Rules, 2017; Form 24 of the High Court of Lagos State (Civil Procedure) Rules, 2019; and Form 25 of the Akwa Ibom State High Court (Civil Procedure) Rules, 2024.

<sup>39</sup> On the requirement of authentication by the signature of the examiner on the original depositions and its onward transmission to the Registry for filing, see, Order 40 Rule 12 of the High Court of the Federal Capital Territory (Civil Procedure) Rules, 2025; Order 20 Rule 12 of the Federal High Court (Civil Procedure) Rules, 2019; Order 40 Rule 14 of the National Industrial Court of Nigeria (Civil Procedure) Rules, 2017; Order 36 Rule 13 of the High Court of Lagos State (Civil Procedure) Rules, 2019; and Order 30 Rule 13 of the Akwa Ibom State High Court (Civil Procedure) Rules, 2024.

<sup>40</sup> On this procedure, see Form 22 of the High Court of the Federal Capital Territory (Civil Procedure) Rules, 2025; Form 19 of the Federal High Court (Civil Procedure) Rules, 2019; Form 55 of the National Industrial Court of Nigeria (Civil Procedure) Rules, 2017; Form 25 of the High Court of Lagos State (Civil Procedure) Rules, 2019; and Form 26 of the Akwa Ibom State High Court (Civil Procedure) Rules, 2024.

<sup>41</sup> *Adodo's Case* (n 9).

The phrase, “Trial by Correspondence”, refers to a legal arrangement or procedure where some aspects of the evidence in an ongoing matter are exchanged through correspondence<sup>42</sup> or written communication (such as letters, notes, or other messages) between the litigating parties and a Court, rather than through a traditional courtroom setting where witnesses are examined from the Witness Box or virtually.

Indubitably, “Trial by Correspondence” is not a recognized mode of trial in Nigeria because the Nigerian legal system emphasizes the importance of oral testimony;<sup>43</sup> direct evidence;<sup>44</sup> in-person examination of witnesses<sup>45</sup> or through approved virtual means. It allows for the opportunity to cross-examine witnesses<sup>46</sup> in open Court<sup>47</sup> before the particular Judge<sup>48</sup> handling the matter to uphold the principles of fair hearing and justice. These requirements are not readily achievable through Trial by Correspondence.

Since the request to a Convention Country for the examination of witnesses before a competent Judicial Authority or before a Nigerian Diplomatic Agent appointed as Special Examiner is by way of correspondence, and the execution of the request and subsequent transmission of written and sealed copies of the proceedings to a Nigerian Court for onward reception of same in evidence is also by way of correspondence,<sup>49</sup> it is the view of this author that this entire procedure amounts to

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<sup>42</sup> The word, “Correspondence”, means “*an interchange of written communications*” and it encompasses “*the letters written by one to another, and the answers thereto*”. See the following sources: The Free Dictionary, ‘Correspondence’ <<https://legal-dictionary.thefreedictionary.com/Correspondence>> accessed 12 February 2025; and The Law Dictionary, ‘Correspondence’ <<https://thelawdictionary.org/correspondence/>> accessed 12 February 2025.

<sup>43</sup> See, Sections 125, 127, 205, 206, 208 and 209 of the Evidence Act, 2011 (as amended).

<sup>44</sup> See, Section 126 of the Evidence Act, 2011 (as amended).

<sup>45</sup> See, Section 36(6)(d) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended). See also, the provisions of Sections 210, 212 and 213 of the Evidence Act, 2011 (as amended) which regulates the order in which witnesses are to be “*produced and examined*” in Court and the circumstances in which witnesses who are physically present may, temporarily, be kept out of Court or prevented from communicating with each other during the trial of a matter.

<sup>46</sup> See the provisions of Sections 214(2), 215, 221(4), 223, 231, 232 and 236 of the Evidence Act, 2011 (as amended) which enables an opposing party to cross-examine the witness of the other party. See also the provisions of Section 246(1) and (2) of the Evidence Act, 2011 (as amended) which permits the particular Judge handling the matter to put questions to a witness in open Court or order the production of any document or thing.

<sup>47</sup> See the provisions of Section 36(1) and (3) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) which mandates that the proceedings of a court in Nigeria “*shall be held in public*”.

<sup>48</sup> See the provisions of Sections 224, 226, 227 and 228 of the Evidence Act, 2011 (as amended) which vest in the particular Judge handling a matter the power to forbid or streamline certain questions that are put forward to a witness in open Court.

<sup>49</sup> See the detailed “correspondence-like” procedure for the examination of witnesses in a foreign country set out in the preceding section of this Paper.

“Trial by Correspondence”, which is an unpardonable abrogation of the Nigerian evidential practice and procedure.

### **5.0 The Legality of Examining Witnesses Abroad via Letters of Request and Special Examiners**

At least five reasons defenestrate any attempt to confer legality, evidential soundness, and procedural regularity on the procedure for examining witnesses abroad. Firstly, and as argued in the preceding subsection of this paper, this entire procedure amounts to “Trial by Correspondence” and it irredeemably violates the sanctity of the Nigerian evidential practice and procedure.

Secondly, the examination of witnesses abroad via Letters of Request and Special Examiners unsettles and alters the composition of a Nigerian Court handling the matter. This reality presents a competence and/or jurisdictional issue because relevant constitutional and statutory provisions establishing various Courts in Nigeria require every proceeding in the trial court and all business arising from it to be tried, heard, and disposed of by a single Judge. Nigerian laws further require all proceedings in an action after the hearing or trial, down to and including the final judgment or order, to be taken before the Judge who conducted the trial or hearing.<sup>50</sup> The letters and spirit of this legal requirement calls for consistency in the composition of the court in all proceedings, examination of witnesses included, and all through the hearing and determination of a case.<sup>51</sup> In the case of *A. O. Eghobamien v. Federal Mortgage Bank of Nigeria*,<sup>52</sup> the Supreme Court counselled:

A trial is a judicial examination of evidence according to the law of the land, given before the court after hearing parties and their witnesses. **A trial must be conducted by the Judge himself and at the end of the hearing he will write a**

<sup>50</sup> On this point, see Sections 253, 254E(1) and (2), 258 and 273 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended). See also, the relevant provisions in the following statutes: Section 46 of the High Court Law, Cap. 63, Vol. 3, Laws of Akwa Ibom State, 2022; Section 23 of the Federal High Court Act, Cap. F12, Laws of the Federation 2004; and Section 25 of the National Industrial Court Act, 2006.

<sup>51</sup> It is the position of this author that the provisions in the various Rules of Court enabling extra-territorial examination of witnesses by third-party adjudicators cannot predominate or detract from the provisions of the relevant statutes creating the various courts and providing that all proceedings must be heard and disposed of by a single Judge. This is because the sky is not the limit concerning the application of the Rules of Court. Where such a conflict or unholy collision arises, the definite and uncompromising provisions of the statute will triumph over the relevant provisions of the Rules of Court. See the case of *Oniwara B. Ibrahim v. Ishola Balogun Fulani & Ors.* (2010) 17 NWLR (Pt. 1222) 241 (CA) 268 [C] – [D]; and *Alhaji Mohammed Dikko Yusufu & Anor. v. Chief Olusegun Aremu Okikiola Obasanjo & Ors.* (No. 2) (2003) 16 NWLR (Pt. 847) 554 (SC) 603 [A] – [D].

<sup>52</sup> (2002) 17 NWLR (Pt. 797) 488 (SC).

**judgment which is the authentic decision based on the evidence he received and recorded, it is a mistrial for one Judge to receive evidence and another to write judgment on it.<sup>53</sup>**

It is hornbook law that the Judge presiding over a matter at the trial court must remain unchanged and must be the one that heard all the witnesses.<sup>54</sup> Failure to adhere to this requirement infringes on the constitutional principle of fair hearing and renders such an exercise “*unlawful and incompetent*”<sup>55</sup> because any defect in composition is fatal to the proceedings.<sup>56</sup> The Supreme Court validated the conclusions reached above in the case of *Francis Shanu & Anor. v. Afribank Nigeria PLC*,<sup>57</sup> where it held thus:

**Where an inquiry is commenced before one adjudicator and completed by another, the second adjudicator cannot as a rule decide upon the evidence given before the first. It is the principle that the judicial discretion which an adjudicator has to exercise in cases brought before him must be based upon the evidence taken before him, and it is not competent for him, generally, to act upon evidence taken before another adjudicator unless there is a statutory provision permitting that procedure.<sup>58</sup>**

<sup>53</sup> *ibid* 501 [E] – [F] (Mohammed, JSC) (emphasis added).

<sup>54</sup> Where variation of the composition of the Court occurs at the trial Court where witnesses testified, it is inappropriate for a Judge who did not hear all the witnesses testify and did not observe their behaviour/demeanour during testimonies to deliver the Judgment. See the following cases on this point: *Senator Nurudeen Ademola Adeleke & Anor. v. Adegboyega Isiaka Oyetola & Ors.* (2020) 6 NWLR (Pt. 1721) 440 (SC) 505 – 506 [G] – [F], 511 [B] – [C], 512 [A] – [C], 512 – 513 [H] – [B]; *Oba J. A. Awolola v. The Governor of Ekiti State* (2019) 6 NWLR (Pt. 1668) 247 (SC) 266 [D] – [E]; *Nana Tawiah III v. Kwasi Ewudzi* (1936) 3 WACA 52; *Akosua Otwiwa & Anor. v. Adjoa Kwaseko* (1937) 3 WACA 230; and *Chief Yaw Damoah v. Chief Kofi Taibil & Anor.* (1947) 12 WACA 167.

<sup>55</sup> See the elegant views of Honourable Justice Uwaifo, JSC, in the case of *A. O. Eghobamien v. Federal Mortgage Bank of Nigeria* (2002) 17 NWLR (Pt. 797) 488 (SC) 502 – 503 [H] – [B] where he commented as follows: “*In the present case, there is an incidental issue as to the propriety of one trial Judge taking all evidence available in a case and another (trial) Judge considering such evidence to arrive at a decision. That becomes a matter of fair hearing which touches on the issue of constitutionality and natural justice, as well as public policy. It is unlawful and incompetent for one Judge to decide on the evidence heard by another Judge. For that to happen is an infringement of the principle that justice must not only be done, but must be seen to be done.*” (Emphasis added)

<sup>56</sup> This position was rightly captured by Honourable Justice Abba Aji, JSC, in the case of *Senator Nurudeen Ademola Adeleke & Anor. v. Adegboyega Isiaka Oyetola & Ors.* (2020) 6 NWLR (Pt. 1721) 440 (SC) 526 [A] – [C], thus: “*What makes it worse is that a judgment or decision came out of it by a member who did not partake in the vital proceedings of 6/2/2019 wherein evidence and cross-examination of vital witnesses took place. It is settled law that a judgment that is a nullity has no legal validity and can confer no right nor impose any obligation on anybody. Any defect in the composition ... is fatal, for the proceedings are a nullity no matter how well they were handled and decided. The defect is extrinsic to the proceedings.*” (Emphasis added)

<sup>57</sup> (2002) 17 NWLR (Pt. 795) 185 (SC).

<sup>58</sup> *ibid* 225 [C] – [E] (Uwais, JSC) (emphasis added).

Thirdly, where the cross-examination of any witness in the foreign country is not going to be conducted in accordance with Nigerian law but foreign law, especially in cases before a competent judicial authority of a foreign country, the fair trial of such a case becomes a serious issue because a party may be placed at a serious disadvantage.<sup>59</sup> In *Re Boyse, Crofton v. Crofton*,<sup>60</sup> the English Court had to consider the advisability of issuing a commission to the French Court to examine a witness. The Court, disapprovingly, had this to say about the procedure:

Mr. Gautier appears to me to be so mixed up with the whole transaction, that he is a person whose evidence it is very important for the Court to have. **If I were now trying the claim I should certainly desire to see M. Gautier in the box, in order that I might hear what he might have to say on all matters (and they are numerous) which are in controversy between the parties. ....**

The [foreign] judge will put questions, and will no doubt do his duty with great ability, but the judge will determine what questions are to be put. **Now in a case of this kind I do not feel inclined [sic] delegate to any foreign tribunal the duty of determining what questions ought to be put ... when the cross-examination of this witness is most material, and will alone enable me to judge of the effect of his examination-in-chief. I decline to delegate my discretion to any other tribunal....**<sup>61</sup>

Even more disturbing is the fact that this procedure makes the authority of the foreign country the eyes, ears, and mouth of the trial court.<sup>62</sup> This means that the examination-in-chief, cross-examination, and re-examination of a witness under this procedure are outsourced and conducted in the presence of a third-party adjudicator and behind the back of a Nigerian trial Judge presiding

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<sup>59</sup> See the ageless views of Honourable Justice Guttal, J., in the case of *I. C. Corporation v. Daewoo Corporation & Ors.* (n 28) [11] and [15].

<sup>60</sup> (1882) 20 Ch D 760.

<sup>61</sup> *ibid* 770 – 771 (Fry, J) (emphasis added).

<sup>62</sup> See, Martin Davies, 'Bypassing the Hague Evidence Convention: Private International Law Implications of the Use of Video and Audio Conferencing Technology in Transnational Litigation' 2007 55(2) *The American Journal of Comparative Law* 205, 207 which was cited with approval at page 43 of the cerebral work of Schleiffer Marais and Prisca Christina Leonie, 'Cross-border Taking of Evidence in Civil and Commercial Matters in Switzerland, South Africa, Botswana, Namibia, Nigeria, and Uganda', accessible via: <<https://cdm21069.contentdm.oclc.org/digital/collection/pp11/id/442001/>> accessed 12 February 2025.

over a matter. In the case of *Senator Nurudeen Ademola Adeleke & Anor. v. Adegboyega Isiaka Oyetola & Ors.*,<sup>63</sup> the Supreme Court evangelized the proper position in the following words:

It must be stressed here, that **cross examination of witness is very vital on a proceeding** as that affords the Judge a sufficient opportunity to watch and assess how credible and reliable that witness being so cross-examined is, by watching his behaviour and demeanour in court when responding to questions he was asked or question that was put to him. **That can only be done in the presence of the Judge anyway.**<sup>64</sup>

It is prominently the duty of a trial court in Nigeria to see, hear and assess witnesses in terms of their credibility.<sup>65</sup> This reasoning informed the decision of the Court of Appeal in the case of *Usang & Ors. v. Okia & Anor.*,<sup>66</sup> where the Court observed that “*evidence taken behind the back of the Judge may not meet the demands of justice*” and that it is “*...essential and mandatory and worthwhile that a trial Judge must be the one to hear the oral evidence and conduct the cross-examination and re-examination of a witness giving evidence in Court in any matter.*”<sup>67</sup> Since the examination of witnesses abroad is a continuation of the proceedings pending in a Nigerian Court, it is an aberration in adjectival law and an abdication of the exclusive role of a trial Judge in adjudication for a Nigerian Court to assign its judicial function of examining witnesses in a pending matter to a third party. In the case of *Francis Shanu & Anor. v. Afribank Nigeria PLC*,<sup>68</sup> the Supreme Court gave visibility to this peculiar role in the following words:

A trial Judge is a peculiar adjudicator. Of all Judges the heaviest, burden and responsibility of deciding a case rest with him. **He normally hears a case by receiving evidence both oral and documentary from witnesses who appear before him in court, are asked questions and cross-examined. In the**

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<sup>63</sup> (2020) 6 NWLR (Pt. 1721) 440 (SC).

<sup>64</sup> *ibid* 521 [D] – [F] (Sanusi, JSC) (emphasis added). See also, the case of *Ade Obu & Ors. v. Chief Gabriel Otoyoye & Anor.* (2021) 12 NWLR (Pt. 1791) 521 (CA) 534 – 535 [D] – [B] (Owoade, JCA).

<sup>65</sup> See, *Odiwe v. Nwajei* (2000) 4 NWLR (Pt. 651) 86 (CA) 94 – 95 [H] – [A] (Ba’aba, JCA).

<sup>66</sup> (2018) LPELR – 45186 (CA).

<sup>67</sup> *ibid* 15 – 28 [A] – [A] (Adah, JCA [as he then was]).

<sup>68</sup> (2002) 17 NWLR (Pt. 795) 185 (SC).

**process, he engages himself to see, listen to and watch them testify.** Not only that, his feelings and impressions are tested from time to time upon one issue or another when, apart from listening, he watches: he takes mental note of the performance of witnesses, their demeanour in the witness box, in particular how they react to questioning and the manner they give answers. **Quite often, it is this that helps the trial Judge as to who and what to believe. The witnesses are telling him what he was not aware of before, the circumstances in which it happened and in respect of which both sides claim that their evidence represents the truth; and the trial Judge will have to take a decision.** So if the trial Judge is up to the demands of his duty, he will continue to size up the witnesses in their oral testimonies. **Is a particular witness lying or prevaricating or just slow in nature, or has he a peculiar idiosyncrasy? That is for the trial Judge to determine.**<sup>69</sup>

Fourthly, another relevant factor is the consideration of the objections to the admissibility of documents that will be tendered in the foreign country. A competent judicial authority in the foreign country will determine such objections, not in line with Nigerian law, but in line with its distinct municipal laws and procedure. A Special Examiner in a foreign country may not be able to decide the objections to the admissibility of the documents forthwith or in accordance with the law in Nigeria or in line with recent judicial authorities in Nigeria. Consequently, it will serve no useful purpose for a Nigerian Court to receive and act on such half-baked proceedings from a foreign country.

Fifthly, Nigerian courts are only enjoined to apply the rules of international law which are not in conflict with Nigeria's fundamental law and/or have not been over-ridden by clear rules of Nigerian domestic law.<sup>70</sup> This legal reality strikes at the heart of this procedure because it changes, albeit

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<sup>69</sup> *ibid* 225 – 226 [G] – [B] (Uwaifo, JSC) (emphasis added).

<sup>70</sup> This precept was laid down in the case of *Joseph Ibidapo v. Lufthansa Airlines* (1997) 4 NWLR (Pt. 498) 124 (SC) 150 [A] – [B], per Wali, JSC, thus: “Nigeria, like any other Commonwealth country, inherited the English common law rules governing the municipal application of international law. The practice of our courts on the subject matter is still in the process of being developed and the courts will continue to apply the rules of international law provided they are found to be not over-ridden by clear rules of our domestic law. Nigeria, as part of the international community, for the sake of political and economic stability, cannot afford to live in isolation. It shall continue to

temporarily, the composition of a Nigerian Court. It eviscerates the right to cross-examination and fair trial before a Nigerian trial Judge, and violates clear rules of evidence under Nigerian law. Furthermore, since this procedure draws its breath and existence from the various Rules of Court in Nigeria, it cannot override the provision for fair hearing in Section 36 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended).<sup>71</sup>

Conclusively, it is the view of this author that the judicial exercise of the all-important sensory function of examining witnesses by a Judge in a pending matter in Nigeria cannot be delegated, assigned or outsourced to another Judge or judicial officer in a foreign jurisdiction. It also cannot be delegated to a Special Examiner in a foreign Country, a diplomatic agent, or any other person. Any attempt to delegate, assign or outsource the exercise of a judicial function nullifies the entire proceedings.<sup>72</sup>

## 6.0 Lessons from the United Kingdom

Comparatively, the jurisprudence in the United Kingdom for the examination of witnesses abroad has evolved in line with socio-legal demands and it is one Nigeria can emulate. In the United Kingdom, a trial Judge is placed in the epicentre of judicial proceedings in a foreign country by permitting such a Judge to exercise his discretion and appoint himself as a “Special Examiner” in a Convention Country, where the merit of the application so warrants. In the English case of *Peer International Corporation v. Termidor Music Publishers Limited*,<sup>73</sup> it was decided that the powers of a High Court Judge under the relevant Rules of Court<sup>74</sup> included the power to appoint himself or herself as the “Special Examiner”.

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*adhere to, respect and enforce both the multilateral and bilateral agreements where their provisions are not in conflict with our fundamental law.*” (Emphasis added) This position was restated by the Supreme Court in the case of *British Airways v. P. O. Atoyebi* (2012) 13 NWLR (Pt. 1424) 253 (SC) 278 – 279 [H] – [D] (Kekere-Ekun, JSC).

<sup>71</sup> Under Nigerian law, Rules of Court cannot override constitutional provisions. See, *Omokuwajo v. FRN* (2013) 9 NWLR (Pt. 1395) 300 (SC) 345 [G].

<sup>72</sup> See, David Andy Essien, ‘Can Visit to Locus in Quo be Delegated by a Court to Another Party?’ (*Barristerng*, 5 August 2023) <<https://barristerng.com/can-visit-to-locus-in-quo-be-delegated-by-a-court-to-another-party-by-david-andy-essien-esq/>> accessed 12 February 2025.

<sup>73</sup> (2005) EWHC 1048 (Ch) (“*Peer’s Case*”). Accessed via: <<https://www.casemine.com/judgement/uk/5a8ff72360d03e7f57ea8536>> accessed 12 February 2025.

<sup>74</sup> See, Rule 34.13(4) of the Civil Procedure Rules, 1998, UK Statutory Instruments 1998 No. 3132 (L. 17) Part 34. Accessed via: <<https://www.legislation.gov.uk/ukSI/1998/3132/part/34/made>> accessed 12 February 2025. This provision of the Rules of Court permits the High Court to appoint a “Special Examiner” to attend a foreign country to take evidence from a person located in that country, provided that this is permissible under the laws of that foreign country.

Recently, in *Gorbachev v. Guriev*<sup>75</sup> a High Court Judge exercised his power to appoint himself as a “Special Examiner” to travel to Dubai to take the evidence from two of the Defendant’s witnesses who were unable to travel to England. *Gorbachev’s Case* is significant because about 19 days before that decision, a similar application was rejected in the case of *Skatteforvaltningen v. Solo Capital Partners LLP & Ors.*<sup>76</sup> However, it is important to clarify that the *Skatteforvaltningen’s Case* did not decide that a High Court Judge did not have this power at all. Rather, it was a case where a High Court Judge had simply declined to exercise the power to appoint himself as a “Special Examiner” and this can be attributed to the peculiar circumstance of the case.<sup>77</sup>

Consequently, and in deserving circumstances, a Nigerian court can be persuaded<sup>78</sup> by the decision in *Peer* and *Gorbachev* to give a progressive and purposive interpretation to the relevant Rules of Court in this respect.<sup>79</sup>

## 7.0 Conclusion and Recommendations

There is every reason to believe that evidence taken by a third-party adjudicator in a foreign Convention country behind the back of the trial Judge handling a matter in a Nigerian Court may not meet the demands of justice. This explains why it is important and mandatory that a trial Judge must be the one to hear oral evidence and preside over the cross-examination and re-examination

<sup>75</sup> (2024) EWHC 247 (Comm), per Pellington, KC (sitting as a High Court Judge) [*“Gorbachev’s Case”*]. Accessed via: <<https://www.casemine.com/judgement/uk/65d792d7065e7924419a214c>> accessed 12 February 2025.

<sup>76</sup> (2024) EWHC 19 (Comm), per Andrew Baker, J. (*“Skatteforvaltningen’s Case”*). Accessed via <<https://www.casemine.com/judgement/uk/65a4bf745de3251386f2b24a>> accessed 12 February 2025.

<sup>77</sup> Surprisingly, the applications in both *Skatteforvaltningen* and *Gorbachev’s Cases* were unopposed. However, two key factors determined the outcome in the respective cases. Firstly, in the *Skatteforvaltningen’s Case*, the witnesses could speak English, while in *Gorbachev’s Case*, there was every possibility that the witnesses would require a translator since they had limited English-speaking ability. The need for smooth translation and effective communication in *Gorbachev’s Case* made in-person examination of the witnesses by the trial Judge ineluctable and probably informed the procedure endorsed by the Court. Secondly, in *Skatteforvaltningen’s Case*, there was copious documentary evidence that could help the Court reach its decision on the issues in contention. However, *Gorbachev’s Case* did not involve significant documentary evidence. In this wise, an in-person examination of the witnesses in *Gorbachev’s Case* by the trial Judge became important for the assessment of their credibility.

<sup>78</sup> It is a well-settled position in Nigerian legal jurisprudence that in the absence of known Nigerian decisions on a particular principle of law, foreign court decisions, particularly those from common law jurisdictions addressing common law issues, could be persuasive and applied by Nigerian courts. See the following cases: *Omega Bank PLC & Anor. v. The Government of Ekiti State & 2 Ors.* (2007) 16 NWLR (Pt. 1061) 445 (CA) 468 [D] – [H], 481 [H] – [B]; *Agbaje v. Fashola* (2008) 6 NWLR (Pt. 1082) 90 (CA) at p. 129, para. H; *Egbue v. Araka* (1996) 2 NWLR (Pt. 433) 688 (CA) 708 [D] – [E]; and *Sifax (Nig.) Limited v. Migfo (Nig.) Limited* (2018) 9 NWLR (Pt. 1623) 138 (SC) 179 [C] – [D], 180 [D] – [E].

<sup>79</sup> Since the examination of witnesses, in this sense, will be conducted before the Nigerian trial Judge in a foreign Convention country, not in his capacity as a “judicial officer” but as a “Special Examiner”, this raises a further legal issue, to wit: the propriety of the evidence obtained by a trial Judge in his capacity as a Special Examiner for subsequent use in his capacity as a judicial officer.

of a witness in any matter pending before a Nigerian Court. Where this is impracticable, a party should resort to any of the following options:

- i. Applying to the Court that a virtual hearing (now generously available in most Rules of Court) be conducted for such a witness.<sup>80</sup> This procedure will allow the other party to cross-examine the witness before the Nigerian trial Judge and will avail the trial Judge an opportunity to watch and assess the credibility, reliability, and demeanour of such a witness.
- ii. Applying to the Court to appoint the Nigerian trial Judge handling the matter as a “Special Examiner” to the foreign Convention Country. The *Peer* and *Gorbachev’s cases*, though persuasive precedents, could sway a Nigerian court in this respect. This will enable the trial Judge to personally take the evidence of the witness(es) in the foreign Convention country.

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<sup>80</sup> See, for example, the provisions of Order 3 Rule (II)(1) and Order 40 Rule 28 of the High Court of the Federal Capital Territory (Civil Procedure) Rules, 2025 permitting virtual proceedings, video conferencing and the giving of evidence via electronic means. See also, *Adodo’s Case* where the Defendant/Respondent, while opposing the application for the appointment of a Special Examiner, suggested the adoption of an “*electronic means via live video*”. The Court, in reaching its decision validated the suggestion by directing the Claimant/Applicant to “*use other procedures contained in the Practice Directions 2020 for Covid-19 sittings*”. With equal fervency, the trial Judge in *Skatteforvaltningen’s Case*, Andrew Baker, J., favoured the giving of evidence via “video link”. In *Gorbachev’s Case*, Pellington, J., rightly reasoned that “*in most cases in the modern era it is highly likely that the balance will favour evidence being given by video link on cost and convenience grounds.*”