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OALP DISPUTE RESOLUTION PRACTICE

NEWSLETTER

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INTRODUCTION

Following the inauguration of the new government administration, a fresh horizon unfolds before us. With eager anticipation, we await the government's policies, legal reforms, and their influence on Nigeria's economy. Remarkably, we have witnessed transformative changes in both our legislative and judicial spheres, meticulously documented.

In this edition of our quarterly newsletter, we delve into two groundbreaking laws shaping our jurisprudence. Additionally, we scrutinize judicial decisions with the potential to redefine our legal landscape.

Consistent with our commitment to international legal excellence, we draw insights from foreign judicial decisions, offering valuable lessons for Nigeria.

We trust you will find this edition both informative and enriching, as usual.

PART A – RECONDITE CASES

In this part, we examine some notable decisions of both Nigerian and foreign Courts including the decision of the Court of Appeal on whether companies who have the duty of collecting VAT must ensure that same is paid notwithstanding that they issued invoices for payment of VAT to their customers and whether these companies can become liable for payment of the unpaid VAT; the decision of the Supreme Court on whether proliferation of issues from a ground of appeal would invalidate the issues and arguments therefrom; the decision of the Canadian Court that thumbs up emoji suffices for demonstrating acceptance of contract and intention to contract. All of these, among other decisions, are the recondite cases that we examined in this edition of the newsletter.

PART B – RECENT ENACTMENTS AND LEGISLATION

In this part, we examine the Amendment to the Evidence Act 2011 and the Nigeria Data Protection Act 2023.

We unpack for you these interesting developments in Nigeria and other jurisdictions and trust that you find this an enriching read.

OUTLINE

RECONDITE CASES

1. The mere proliferation of issues for determination from a fewer number of grounds in the Notice of Appeal will not automatically render the issues formulated incompetent – **Ameh v Ameh [2023] 1 NWLR Pt 1882**
2. Arbitration proceedings must have commenced in a Court-Ordered Arbitration where the parties must have at least issued their statement or notice of dispute. - **United Bank of Africa PLC v Triedent Consulting Limited [2023] LPELR-60643(SC)**
3. A claim for pre-judgment interest can be competently instituted under the Undefended List Procedure – **Nigerian Court of Appeal in Alibro Transport Services Ltd & Anor V. Access Bank Plc [2023] LPELR-60432(CA)**
4. A company who is charged with the duty to collect Value Added Taxes (VAT) and remit same to the Federal Government, but failed to ensure payment of same will be liable to pay the VAT – **Nigerian Court of Appeal in Kandelite Engineering Co. Ltd v. FIRS [2023] LPELR – 60683 (CA)**
5. A Party Waives the Right to Challenge an Arbitral Award on The Basis of an Alleged Irregularity or Impartiality of an Arbitrator When the Party Continues with An Arbitration Proceeding Without Objecting To The Alleged Irregularity. – **English Commercial Court in Radisson Hotels APS Denmark v Hayat Otel Işletmeciliği Turizm Yatırım Ve Ticaret Anonim Şirketi [2023] EWHC 892 (Comm).**
6. Thumbs-up 👍 Qualifies as an Indication of Intention to Create Legal Relationship and Can be Used as Evidence for Acceptance of a Contract – **South West Terminal Ltd v. Achter Land & Cattle Ltd 2023 SKKB 116.**
7. US Supreme Court Clarifies the Standards for the Transformative Use of Copyrighted Works– **in Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith 598 US (2023)**
8. Internet Service Providers may be Immune from Liability Under Section 2333 Of The Anti-terrorism Act where there is Failure to Prove Intentional Provision Of Substantial Aid to Terrorist - **US Supreme Court in Twitter Inc v Taamneh et all No. 21-1496**
9. Litigation Funding Agreements in which the Funder's Remuneration is Calculated by Reference to a Share of the Damages Ultimately Received will now be Unenforceable in England & Wales Unless in Compliance with Certain Conditions – **UK Supreme Court in R (on the application of PACCAR Inc and others) v Competition Appeal Tribunal and others [2023] UKSC 28**

NOTABLE DEVELOPMENT

1. Review of the Evidence (Amendment) Act 2023
2. Nigeria Data Protection Act 2023

PART A – RECONDITE CASES

THE MERE PROLIFERATION OF ISSUES FOR DETERMINATION FROM A FEWER NUMBER OF GROUNDS IN THE NOTICE OF APPEAL WILL NOT AUTOMATICALLY RENDER THE ISSUES FORMULATED INCOMPETENT – **AMEH V AMEH [2023] 1 NWLR PT 1882**

Brief Facts

This is an appeal decided by the Supreme Court in 2023. The Appellant (as Plaintiff) sued the Respondent before the Customary Court in Enugu State for declaration that a piece of land is not a communal land but belongs to him personally.

The Customary Court agreed with the Appellant, and the Respondent appealed to the High Court of Enugu State. The High Court also agreed with the Appellant and the Respondent appealed to the Court of Appeal. The Court of Appeal allowed the Respondent's appeal.

Dissatisfied with the decision of the Court of Appeal, the Appellant appealed to the Supreme Court. The Appellant's Notice of Appeal had two grounds of appeal; and in his Brief of Argument, the Appellant distilled five issues from these two grounds. The Respondent also distilled four issues for determination in their brief of argument.

Before the Court went into the issues for determination, the Court noted that although the Appellant in his Notice of Appeal raised two grounds of appeal, the Appellant distilled 5 issues for determination and the Respondents distilled 4 issues for determination. The Court then went on to examine this point before addressing other issues.

Issues for Determination

The Court considered the validity of the proliferated issues and whether the Court can select valid particulars in a ground in order to make the ground of appeal competent.

Decision of the Supreme Court

On the validity of the proliferated issues, the Court noted that both the Appellant and the Respondents' counsel ate sour grapes in the formulation of their issues but the reason for this conclusion was not simply borne out of the fact that the Appellant distilled more than one issue from a ground of appeal. Rather, the Apex Court stated that issues for determination must fall within the scope of the grounds of appeal. The Court went ahead to state that mere proliferation of issues from a fewer number of grounds of appeal will not render the issues so formulated incompetent and that the proliferated issues would only be incompetent if they do not arise or relate at all to the grounds of appeal.

In this regard, the Court examined the issues for determination distilled by both the Appellant and the Respondents and struck out the issues that did not relate at all to the grounds of appeal. Accordingly, the Court only gave regard to the Appellant's issues 2 and 3 and the Respondents' issues 2 and 3.

On the surviving issues for determination, the Appellant argued that the lower Court was wrong when it sifted through the Respondents' particulars of appeal to select the competent particulars of appeal in sustaining the Respondents' issues for determination. The Appellant argued that the grounds of appeal and particulars of appeal are inseparable, and the ground succeeds or fails with all its particulars.

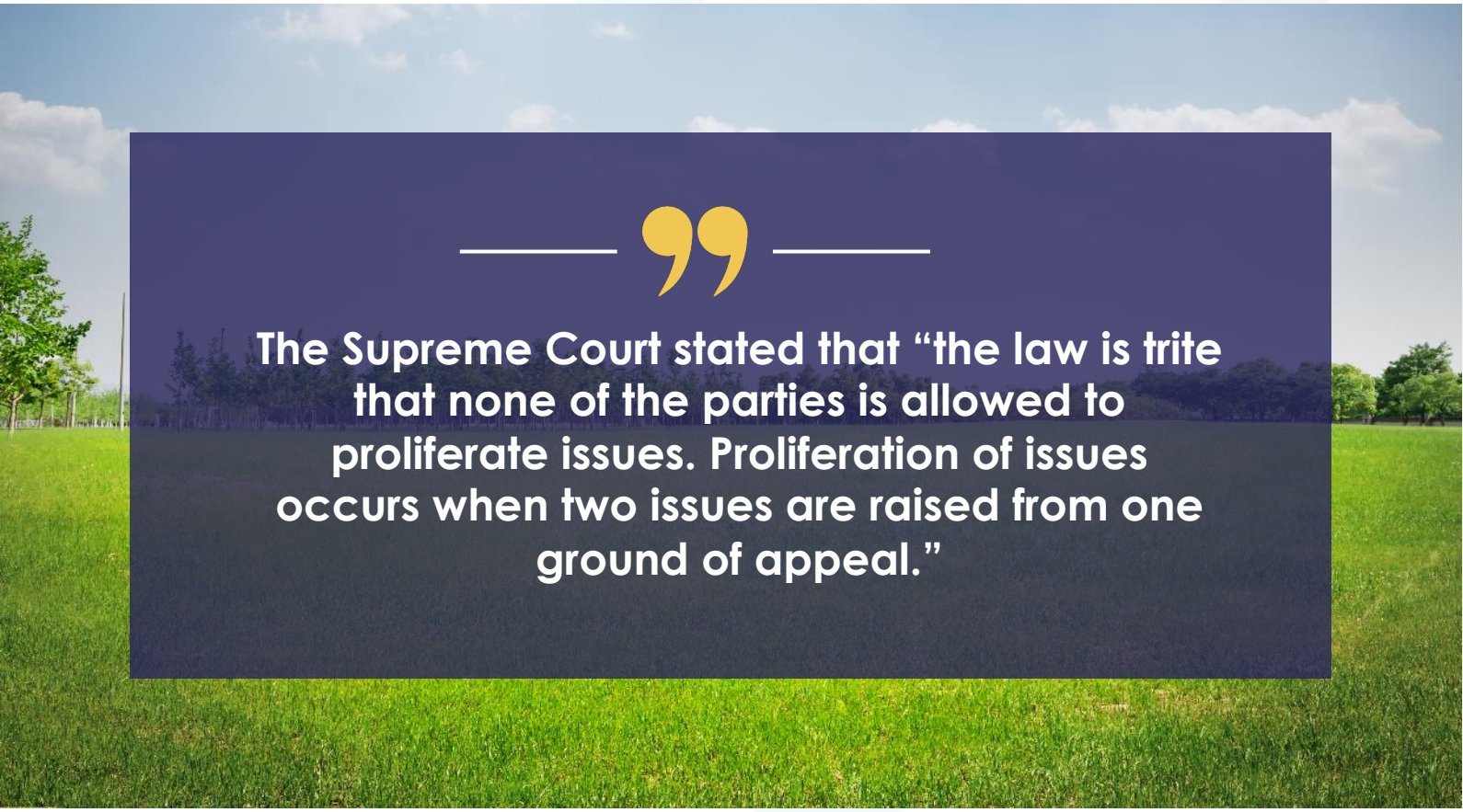
The Supreme Court in relying on the case of **Waziri & Anor v Geidam & Ors** [2016] LPELR-40660 (SC) Pp 17-19, Paras A – F stated that defect in particulars of error should not necessarily translate to the incompetence of the ground of appeal and that the Court should avoid technicalities and determine causes on the merit.

Brief comment on the decision

The decision of the Court in this case that mere proliferation of issues from fewer grounds of appeal will not render issues so formulated incompetent appears to be a departure from a long line of decisions of the Supreme Court that proliferation of issues from fewer grounds of appeal renders the issues so proliferated incompetent.

In the case of **Nwankwo & Ors v Yar'adua & Ors** [2010] LPELR -2109 (SC) p 75, Paras C-F, the Supreme Court stated that where issues are more than the grounds of appeal, the multiple issues distilled from the ground of appeal will be discountenanced. Further, in the recent 2021 decision of **NUP v INEC** [2021] LPELR – 58407 (SC) Pp 8-9, Paras E-B, the Supreme Court stated that "the law is trite that none of the parties is allowed to proliferate issues. Proliferation of issues occurs when two issues are raised from one ground of appeal. When this occurs as in the instant appeal, the issues so raised are incompetent and must be avoided."

In this instant case however, the Court stated that mere proliferation would not render an issue incompetent and that the issues would retain their validity and competence if they relate to and arise from the said ground of appeal. Although the Court did not set aside former decisions where it held that multiple issues proliferated from a single ground is incompetent, it is important to bear this decision in mind as it signifies a shift in the position of the law.



ARBITRATION PROCEEDINGS MUST HAVE COMMENCED IN A COURT-ORDERED ARBITRATION WHERE THE PARTIES MUST HAVE AT LEAST ISSUED THEIR STATEMENT OR NOTICE OF DISPUTE. - **UNITED BANK OF AFRICA PLC V TRIEDENT CONSULTING LIMITED [2023] LPELR-60643(SC)**

Brief Facts

The Respondent had by a writ of summons, commenced an action at the trial court to recover outstanding sums of money to the tune of $489,168.45 (Four Hundred and Eighty-Nine Thousand, One Hundred and Sixty-Eight Dollars, Forty-Five Cents) due and payable to the Respondent from the Appellant under the contract entered between the Appellant and the Respondent. The Respondent also claimed other reliefs viz: (a) 25% pre-judgement interest per annum on the judgement sum from accrual date until final liquidation, (b) N250,000,000 (Two Hundred and Fifty Million Naira) being special and general damages for libel and (c) N32,000,000 (Thirty-Two Million Naira) as Solicitor's fees and cost of prosecution of the Suit.

In response to the originating process served on the Appellant by the Respondent, the Appellant filed an application for stay of proceedings pursuant to the Arbitration and Conciliation Act, seeking to stay proceedings pending the determination of the dispute between the parties by arbitration. The Respondent filed its counter-affidavit and written address in response to the application for stay. Noting that the Appellant had failed to attach a notice of arbitration, nor did it demonstrate willingness to commence arbitral proceedings, the trial court dismissed the application for stay. Dissatisfied with the decision of the trial Court, the Appellant appealed to the Court of Appeal (the lower Court) where the lower Court dismissed the appeal. The Appellant further appealed to the Supreme Court while the Respondent cross appealed.

Issue considered by the Court

The issue considered by the Supreme Court was whether the lower Court was right to hold that before an application for stay of proceedings pending arbitration can be granted, the party applying must demonstrate unequivocally, by documentary evidence, its willingness to submit the dispute to arbitration.

Decision of the Court

In determining this issue, the Supreme Court had to construe the provisions of section 4 and 5 of the Arbitration and Conciliation Act (the **ACA**).

With respect to the above, the Appellant's counsel had contended that the application for stay before the Court falls under the ambit of section 4 of the Arbitration and Conciliation Act (the **ACA**) and not under section 5. It argued that by the provisions of section 4, an applicant is not required to indicate his willingness to arbitrate; and it is up to the Court to order a stay of arbitration and referral to arbitration so far as the application for stay was made before the applicant took further steps with respect to *"the substance of the dispute".*

In reply, the Respondent's counsel argued that section 5 of the ACA was the applicable section in respect of the application for stay before the Court as opposed to section 4 of the ACA. Relying on the provisions of section 5(1) & (2), he submitted that the failure to adduce sufficient reasons as to why a matter should be referred to arbitration necessitated a refusal of the application for stay. Thus, to the extent that the Appellant's application was bereft of any sufficient material to warrant an application of stay in its favour, the Court should refuse it. In interpreting sections 4 and 5 of the ACA, the Supreme Court agreed that there was indeed a distinction between the two sections and their applicability. The points of distinction are highlighted below:

A Arbitration under Section 4 of the ACA is Court-ordered while under Section 5 of the ACA, the stay pending arbitration is pursuant to a party's application and this party must satisfy the Court of its willingness to arbitrate.

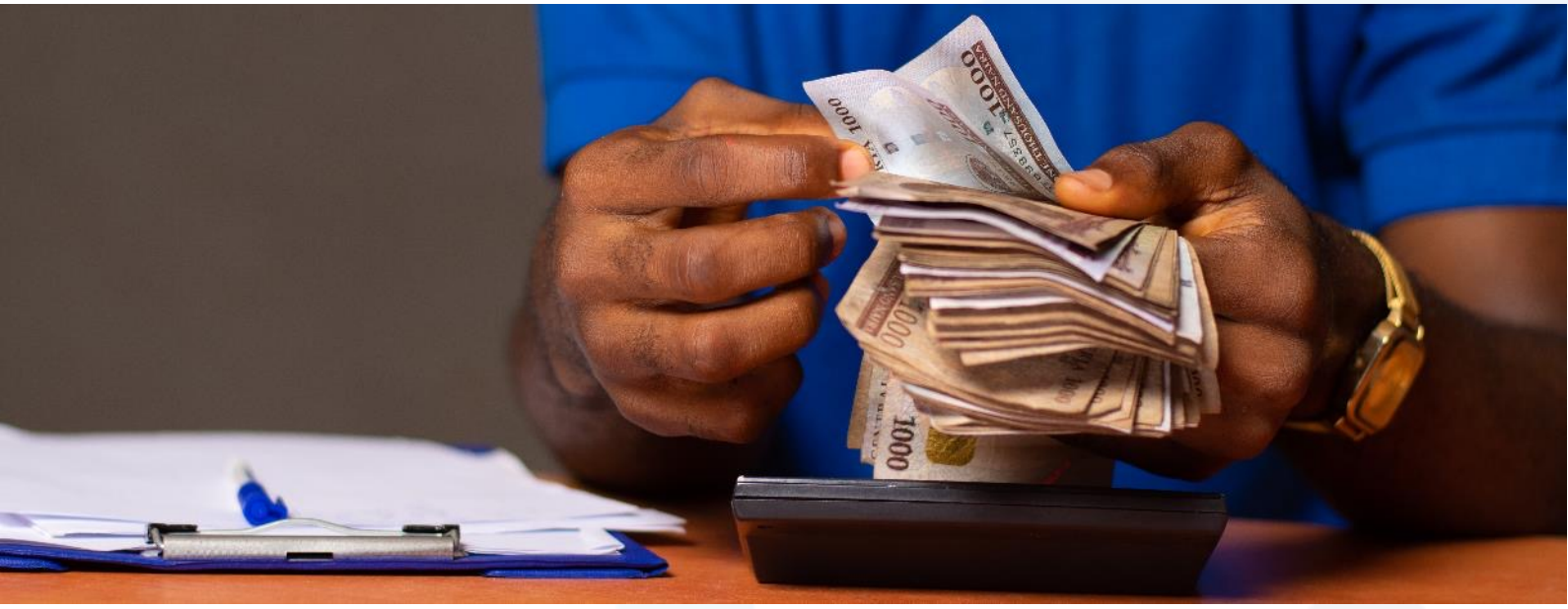
B Failure to obey the order of the Court to submit to arbitration under Section 4 of the ACA amounts to disobedience for which the contemnor could be held in contempt of Court. However, under Section 5 of the ACA, the absence of an order to submit to arbitration translates to the fact that parties have the discretion not to arbitrate and would not be held in contempt.

C The phrase, *"not later than when submitting a statement on the substance of the dispute"* as used in Section 4 of the ACA implies that the arbitral proceedings must have been initiated, that is, the statement of dispute must have been filed. However, under Section 5 of the ACA, an application for stay applies when there is an existing Court proceeding and the applicant has taken no further steps other than filing an appearance in the Suit.

D Although an applicant need not have commenced arbitration under section 5 of the ACA, he must exhibit by documentary evidence, his willingness and readiness to proceed to arbitration.

Having made these distinctions, the Supreme Court held that section 5 of the ACA was the applicable provision to the Appellant's application for stay especially given the absence of any pending arbitral proceeding. More so, the Supreme Court held that the Appellant failed to discharge the evidential burden of adducing documentary evidence in proof of his willingness to arbitrate under section 5 of the ACA and accordingly dismissed the Appellant's appeal.

Notably, the Supreme Court also dismissed the cross-appeal as being a gross abuse of Court process having found the issues canvassed therein to be the same as argued in the substantive appeal.



Brief comment on the decision

The Supreme Court stated clearly here that under the provisions of Section 5 of the repealed Arbitration and Conciliation Act LFN 2004, a party must discharge the evidential burden to prove his willingness to arbitrate by adducing positive documentary evidence. Hence, in addition to demonstrating to the Court that an arbitration agreement exists and that the party has not taken steps in the Suit, this case mandates parties to show by documentary evidence their willingness to proceed to arbitration. This could be by way of correspondence, notice of dispute or notice of intention to proceed to arbitration.

Though it may be argued that this case serves no utilitarian purpose in the light of the recent enactment of the Arbitration and Mediation Act 2023 (the AMA) where this provision of the ACA has been repealed, it is important to note that section 5 of the AMA incorporates and retains some of the language used in section 4 of the ACA. To this end, the phrase, "...not later than when submitting their first statement on the substance of the dispute ..." was retained in the AMA and this would mean that in a Court-ordered arbitration, the parties must at least have submitted their statement of dispute before the Court will refer the matter to arbitration.

A CLAIM FOR PRE-JUDGMENT INTEREST CAN BE COMPETENTLY INSTITUTED UNDER THE UNDEFENDED LIST PROCEDURE - **ALIBRO TRANSPORT SERVICES LTD & ANOR V. ACCESS BANK PLC [2023] LPELR-60432(CA)**

Brief Facts

The Respondent commenced the suit vide a Writ of Summons at the High Court of Federal Capital Territory, Abuja, under the undefended List Procedure claiming the sum of N98,103,795.75 as of 26/07/2018; interest accruing thereon at the rate of 45% per month until full settlement of the debt; and the cost of action against the Appellants.

In response, the Appellants filed a Notice of Preliminary objection challenging the Court's jurisdiction on the ground that the claim is not a liquidated sum, as the suit relates to pre-judgment interest. The Appellant also filed a Notice of Intention to defend, stating that the facility was secured with a legal mortgage.

The trial Court dismissed the Notice of Preliminary Objection of the Appellants and gave judgment in favour of the Respondent. Dissatisfied, the Appellants approached the Court of Appeal asking the Court to set aside the decision of the trial Court.

Issue before the Court of Appeal

The issue before the Court was whether a claim that involves pre-judgment interest can be heard under the undefended list procedure.

Decision of the Court

The Court of Appeal held that a suit which has, as one of the reliefs, a pre-judgement interest claim can be heard under the undefended list procedure, as it is an interest that is awarded to a successful party in an action for recovery of a liquidated sum. It is a compensation for loss of the use of money from the time the claim is determined by the relevant Court or from the date the case was filed till the delivery of judgment.

Furthermore, the Court of Appeal reiterated the principle that the undefended list is used for a liquidated demand; which is an amount that is capable of being ascertained as a mere matter of arithmetic without any further investigation. Relying on the Supreme Court's decision in Maja v. Samouris [2002] LPELR-1824 (SC) 21 – 22, para F, liquidated damages was described as:

i. when the parties to a contract agree on the amount payable by a way of damages, in the event of breach;
ii. where the amount of money being owed as debt together with the interest and/or penalties accruing on the unpaid debt; and
iii. if the sum of money together with a specified and fixed rate of interest or penalty as payable periodically on the unpaid sum is known and agreed by the parties to the transaction.

Therefore, the underlying principle for a liquidated money demand is for the said sum to be ascertainable and in the contemplation of both parties from the onset of the transaction or agreement. The Court of Appeal finally held that where a pre-judgment interest is expressly stated in an agreement by parties without ambiguity and such agreement is precise, ascertainable and capable of precise arithmetic calculation and it is a liquidated debt or money demand, such prejudgment interest can be a claim and a subject under the undefended action.

Brief comment on the decision

The decision of the Court of Appeal is laudable as it speaks to the issue of what constitutes a liquidated sum. It is important to state that not all pre-judgement interest can be competently instituted under the undefended list, rather, such an interest must be one that must have been agreed upon by the parties and is clearly ascertainable. In the instant case, the interest element in the pre-judgement interest had been determined by the agreement of the parties.

This decision represents a departure from the decision of the Court of Appeal in **Maibet (Nig) Ltd & Anor v Access Bank** [2018] LPELR – 44174(CA) where the Court held that a claim that involves pre-judgment interest cannot be heard under the undefended list procedure and ought to be transferred to the general cause list.

A TAXABLE PERSON WILL BE LIABLE TO PAY FOR VALUE ADDED TAX WHERE IT REFUSES TO COLLECT THE VAT FOR GOODS AND SERVICES THAT IT RENDERED NOTWITHSTANDING THAT IT ISSUED THE INVOICES FOR THE VAT - **KANDELITE ENGINEERING CO. LTD V FIRS [2023] LPELR – 60682 (CA)**

Brief Statement of Facts

This is an appeal against the decision of the Federal High Court, Lagos. The Federal Inland Revenue Service (FIRS or the Respondent) issued tax assessments on the Appellant where it alleged that the Appellant had failed to file its tax returns for a number of years.

The Appellant disputed this assessment, and the Respondent filed a tax appeal at the Lagos Division of the Tax Appeal Tribunal (TAT). The TAT agreed with the Respondent and ordered that the Appellant pays the assessed taxes with the penalties, and ordered that the Appellant pay various amounts, including withholding tax, outstanding VAT, penalties for late filing of certain returns, and additional VAT and penalties, totalling N21,105,875.31.

Dissatisfied with this decision, the Appellant appealed to the Federal High Court, Lagos Division, but the appeal was dismissed for lacking merit. Still dissatisfied, the Appellant further appealed to the Court of Appeal.

Issues for determination

One major issue that was considered by the Court and which we would examine here was whether a taxable person would be liable for the non-payment of VAT where it issued invoices for the payment of VAT and its customers refused to pay same despite being informed that same is due for payment to the FIRS.

Decision of the Court

The Appellant argued that having issued invoices on behalf and for the benefit of the FIRS, it ought to have been absolved of liability for the payment of the said VAT. It argued that from a read of Sections 2 and 46 of the VAT Act 2004, there are two separate processes in the course of payment of VAT to wit; the computation of VAT with the issuance of invoice on the one part and the collection/deduction of the VAT so invoiced. The Appellant argued that where no VAT is collected, no VAT could be remitted. It stated that it discharged its statutory duty by issuing the invoices and that it could not be held liable for the action or inaction of the defaulting third parties.

The Respondent on the other hand submitted that by virtue of the provisions of Section 8 of the Act, the Appellant is a taxable person who has the statutory duty of collecting and remitting VAT for goods and services rendered to customers. In essence, the duty of a taxable person does not stop at issuing invoices but goes further to collecting the taxes due. The Respondent also stated that they had written to the Appellant on several occasions demanding and reminding them of the VAT indebtedness to no avail. They also submitted that contrary to the assertion of the Appellant, the Appellant ought not to have operated a separate account and billing system for customers to pay VAT and the creation of a separate system and invoice for VAT was deliberate to ensure that same was not paid.

In resolving the issue, the Court held that by Section 8 of the Act, the Appellant upon its registration under the Act became a taxable person for the purposes of collecting remittances from third parties and remitting same to the Respondent. The Court further held that mere issuance of invoice to clients does not satisfy the statutory duty of collection and remittance of VAT on behalf of the FIRS. The Court noted that the Appellant only issued invoices to its client and 'factually went to sleep' despite that the clients were in continuous default of the law and that this amounts to a dereliction of duty that the Appellant must be made to pay for.

The Court thus dismissed the appeal of the Appellants and held it liable to pay the VAT as assessed.

The Respondent also stated that they had written to the Appellant on several occasions demanding and reminding them of the VAT indebtedness to no avail.

Brief comment on the decision

It is commonplace for companies and taxable persons to separate the invoice for VAT from the invoice for the purchase of goods and services and as the Court put it, 'go to sleep' once the VAT invoice has been issued. This is the case because these taxable persons operate under the assumption that the statutory duty has been discharged once the invoice for VAT has been issued and served. This decision, however, introduced a new dispensation into the regime of liability for VAT remittance as the Court in interpreting the provisions of the VAT Act held that not only does a taxable person have the responsibility of issuing VAT invoices, but they should also ensure that same is remitted to the FIRS.

Considering that the Court held that the Appellant ought not to have issued separate invoices to its customers and to have gone to sleep for 5 years without taking active steps to recover the VAT, we hold the view that it is possible that the Court will not have held the Appellant liable for the unremitted VAT if it issued a single invoice and sent reminders and demand letters to its customers, demanding for the VAT payable to the FIRS.

Notwithstanding the above and until there is a contrary decision by either the Court of Appeal or the Supreme Court, it is prudent that taxable persons in issuing invoices for taxable goods and services include the chargeable VAT and where VAT is not paid, make efforts (preferably by issuance of demand letters) to ensure that same is duly paid. They should also inform the FIRS promptly of their customers who have refused to pay VAT in order not to liable for the remittance of the VAT.

A PARTY WAIVES THE RIGHT TO CHALLENGE AN ARBITRAL AWARD ON THE BASIS OF AN ALLEGED IRREGULARITY OR IMPARTIALITY OF AN ARBITRATOR WHEN THE PARTY CONTINUES WITH AN ARBITRATION PROCEEDING WITHOUT OBJECTING TO THE ALLEGED IRREGULARITY. – **ENGLISH COMMERCIAL COURT IN RADISSON HOTELS APS DENMARK V HAYAT OTEL IŞLETMECILIĞI TURIZM YATIRIM VE TICARET ANONIM ŞIRKETI [2023] EWHC 892 (COMM)**

Brief Facts

The case arose out of an International Chamber of Commerce (ICC) arbitration brought by Hayat Otel Işletmeciliği against Radisson Hotels APS Denmark in respect of a claim arising out of the management of a hotel in Turkey. The arbitral tribunal comprised of the ICC-appointed presiding arbitrator (Mr. Collins KC), the Radisson nominated co-arbitrator (Ms. O'Sullivan KC), and the Hayat nominated co-arbitrator (Ms. Timer). It was common knowledge to the parties in the arbitration that at some earlier point, Radisson had meetings with Mr. Önkal and Dr Durman, both of whom had been previously engaged by Hayat as an expert consultant and lawyer respectively. During those meetings, Radisson was made aware of ex parte communications between Mr Önkal and Ms. Timer. On 13.01.2022, Radisson and its legal counsel identified documents on a USB drive provided by Mr Önkal, reproducing the text of emails between Ms. Timer and the rest of the arbitral tribunal. The USB drive contained evidence of two internal Tribunal emails chains being forwarded by Ms. Timer to Mr. Önkal in March 2019, one of which contained Ms. O'Sullivan's initial impressions of the parties' cases. The native copies of these emails were obtained by 25.01.2022. In parallel, Radisson filed its Rejoinder on Quantum on 14.01.2022. On 23.03.2021, the Tribunal issued the partial award on liability and causation (**the Partial Award**).

On 27.01.2022, Radisson applied to the English Commercial Court (**the Court**) to set aside the partial award pursuant to sections 68(a), (c) and (g) of the Arbitration Act 1996 (the Arbitration Act) on the grounds of serious irregularity (**the Application**). Following the Application, on 4.03.2022, Hayat disclosed further emails from April and May 2019 which showed that Mr. Önkal had stated to a board member of Hayat's affiliate company that Ms. Timer had returned from London and that they "have a lot to talk about" as well as showing that Ms. Timer sent Mr. Önkal an email attaching inter parties' correspondence from Radisson to the Tribunal.

Issues for Determination

Whether the arbitral award can be set aside on grounds of serious irregularity.

Decision of the Court of Appeal

The Court dismissed Raddison's Application on the basis that Radisson had waived its right to challenge the award pursuant to section 73(1) of the Arbitration Act by allowing the proceedings to continue without alerting the Tribunal and the other party to the serious irregularity.

Section 73(1) of the Arbitration Act provides that "If a party to arbitral proceedings takes part, or continues to take part, in the proceedings without making any objection that the proceedings have been improperly conducted, he may not raise that objection later unless he shows that, at the time he took part or continued to take part in the proceedings, he did not know and could not with reasonable diligence have discovered the grounds for the objection."

Radisson had argued that section 73 of the Arbitration Act did not apply in relation to a challenge to a partial award that had already been issued. However, the Court rejected this submission on the basis that the proceedings continued until all aspects of the arbitration had been resolved. Otherwise, a party could carry on with the next phase of the arbitration and then strategically deploy an objection to derail the arbitration at its own convenience. Citing the decision of **Rustal Trading Ltd v. Gill & Duffus SA** [2000] C.L.C. 231, the Court emphasized that section 73 of the Arbitration Act imposed the obligation on Radisson to raise the objection promptly and as soon as it believed that it had the grounds for objecting. The Court emphasized that "Section 73 is designed to ensure that a party who believes he has grounds for objecting on the basis of serious irregularity should raise that objection as soon as he is aware of it".

The Court held that Radisson knew it had grounds for objection when the emails showing the ex parte contact between Ms. Timer and Mr. Önkal were first provided to Radisson on 13.01.2022 by Mr. Önkal himself, a credible source. Radisson did not need the native versions of those emails (which were received by 25.01.2022) to have had belief that it had grounds for objecting and challenging the impartiality of the arbitrator. The Court emphasised that "the question is not when [the applicant] had the "cogent evidence" necessary to bring its s.68 challenge by that dat,e but when it believed it had grounds for objecting whereupon it was obliged to raise the objection promptly…"

The emails showing the ex parte contact between Ms. Timer and Mr. Önkal were obtained by Radisson on 13.01.2022 and rather than raising the matter immediately, it had submitted its Rejoinder on Quantum to the Tribunal. On 21.01.2022, Radisson's legal counsel also wrote to the ICC Secretariat about the appointment of a new president and the timing of the next hearing. The Court therefore held that Radisson had continued participating for nearly two weeks despite having the belief that it had grounds for objection. On the whole, the Court dismissed Raddison's Application to set aside the partial award.

Brief comment on the decision

This case is instructive for parties engaged in London-seated arbitration and where the arbitration agreement of parties is regulated by English law. Parties must bear in mind the need to raise their objections promptly and immediately they become aware of a ground to object to the arbitral proceedings, to prevent waiving the right to challenge the award.

Relatedly, section 9 of Nigeria's Arbitration and Mediation Act 2023 (AMA) provides that a party who intends to challenge an arbitral proceeding due to the circumstance of the arbitrator's lack of impartiality or independence shall within fourteen days of becoming aware of the said circumstance send the arbitral tribunal a written statement of the reason of the challenge. There appears to be some similarity between Section 9 of the AMA and Section 73 (1) of the Arbitration Act in the sense that both legislations emphasize that objections must be raised timely. It remains to be seen whether the Nigerian Courts will be persuaded by this decision and begin to lean towards demanding strict adherence with the AMA as it relates to timeous objections to the impartiality of an arbitrator.

THUMBS-UP 👍 QUALIFIES AS AN INDICATION OF INTENTION TO CREATE LEGAL RELATIONSHIP – **SOUTH WEST TERMINAL LTD V. ACHTER LAND & CATTLE LTD 2023 SKKB 116**

Brief Facts

South-West Terminal Ltd (SWT) filed an action at the King's Bench for Saskatchewan (the Court) against Achter Land & Cattle Ltd (ALC).

SWT claimed that it entered a deferred delivery purchase contract with ALC on 26.03.2021 where SWT agreed to buy and ALC agreed to deliver 87 Metric Tonnes of flax to SWT at the rate of $669.26 per tonne (the Contract). The background to SWT's claim was that Mr. Kent Michleborough (Kent) acting as grain buyer for SWT sent a text to Bob Achter (Bob) and Chris Achter (Chris) of ALC.

The text message reads "All Divisions - Kent Mickleborough – Flax Prices: Flax I Can (max 6% dockage) $22.50/bu Apr. $17.00 Oct/Nov/Dec del." After the text message, Kent spoke with both Bob and Chris over the phone and afterwards sent a draft contract for ALC to sell 86 Metric Tonnes of flax to SWT at $17.00 per bushel, amounting to $669.26 per Tonne with "Nov" indicated as the delivery period. Kent then signed contract, took a photo of it, and sent to Chris with the text message "Please confirm flax contract". Chris texted back with a "thumbs-up" emoji "👍" and the delivery was to be done between 01.11.2021 and 30.11.2021.

SWT brought the action due to ALC's failure to supply the flax. SWT also filed an application for summary judgment, claiming $82,200.21 with interest and cost, for the alleged breach of the contract by ALC. In response to the action, ALC denied accepting SWT's offer and entering the Contract with SWT. ALC also maintained in the alternative that based on section 6(1) of the Sale of Goods Act, RSS 1978, C S-1 (the Act), the Contract was unenforceable because there was no note or memorandum of the contract made or signed by the parties.

Issue before the Court

The crux of this matter which was considered by the Court was whether a valid contract could be said to exist between SWT and ALC and whether the thumbs-up emoji suffices as acceptance of terms to birth a contract.

Decision of the Court

In resolving the issue of whether a contract was formed and exists, the Court restated the three ingredients of a contract – offer, acceptance, and intention to create a legal relationship.

The Court noted that Kent stated in his affidavit that from 2015 he had initiated contracts between 15 to 20 times with ALC, and typically he would call Chris over the phone, and they will negotiate the quantity and price of the grain SWT wanted to buy. Chris would then ask him (Kent) to draw up the contract and send to him (Chris). Kent deposed to examples of 14.07.2020 when after their typical negotiation call over the phone, he prepared the contract for 185 metric tonnes of durum wheat, signed it, and took a photo of the contract signed by him and sent to Chris with the message "Please confirm terms of durum contract" and Chris texted back "Looks good." This contract was performed without any issues or denial. On 11.09.2020, another contract for 131 metric tonnes of durum wheat was prepared after their negotiation call over the phone and sent to Chris after Kent had signed with the message "Please confirm terms of durum contract" and Chris texted back "Ok". This contract was also performed without any issues. On 21.10.2020, after the usual negotiation call over the phone, Kent prepared and signed a contract for 395 metric tonnes of durum wheat and sent to Chirs with the message "Please confirm terms of durum contract" and Chris texted back "Yup" and this contract was also performed without any hitch.

The Court in resolving the issue held that "Looks good", "Ok", and "Yup" by Chris to those previous contracts are clear indication to create contracts and not just acknowledgment of receipt of the contracts. Further to this, the Court refused to accept ALC's arguments that the thumbs-up emoji was only a confirmation that Chris received the contract and not an indication of agreeing to the terms, and that Chris was still expecting the full terms and conditions of the flax contract to be sent to him by fax or email for him to review and sign.

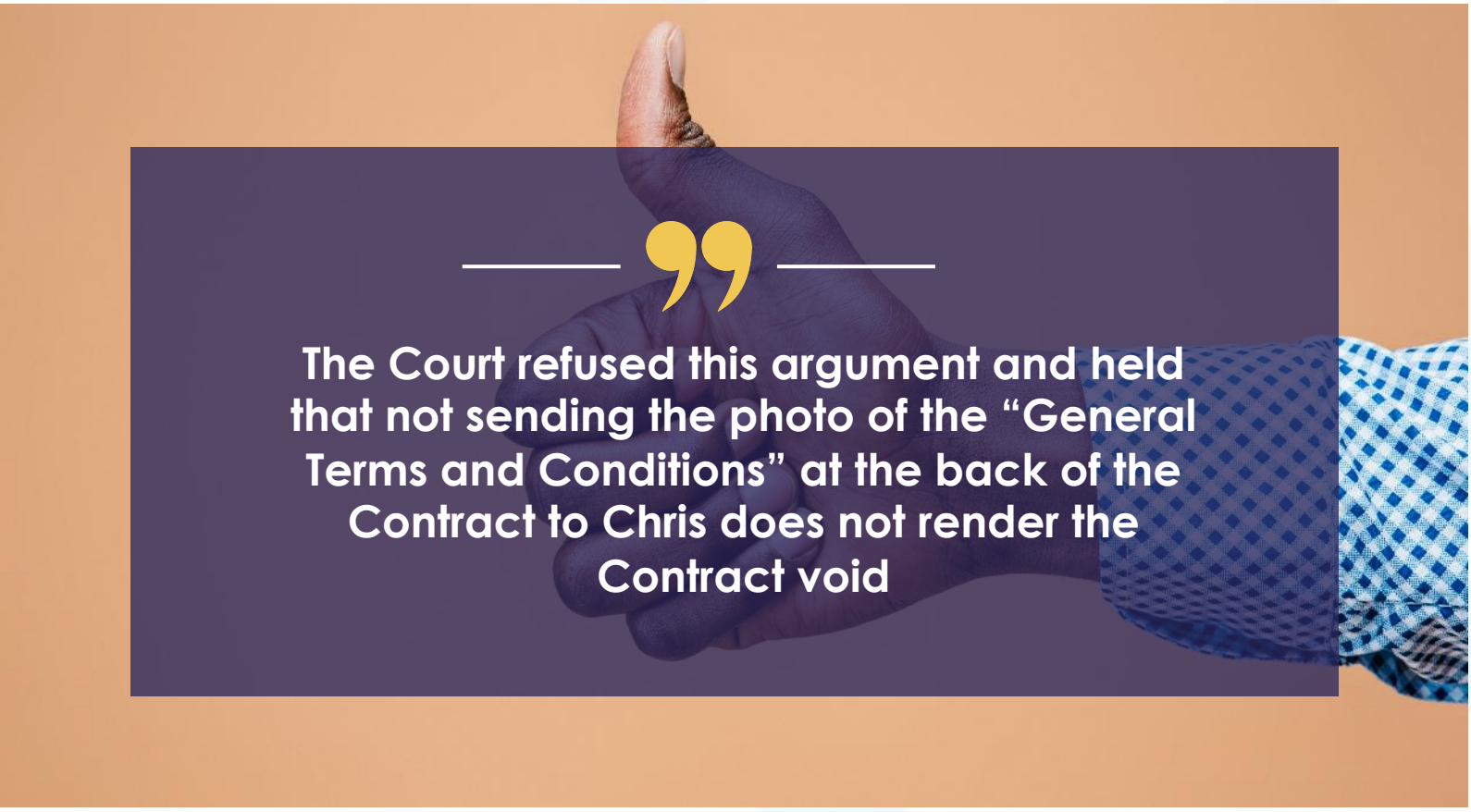
The Court held that it was satisfied on the balance of probabilities that Chris okayed or approved the contract just like he had done before except this time he used an 👍 emoji and that upon a consideration all of the circumstances, the thumbs-up emoji meant approval of the flax contract and not simply that Chris had received the contract and was going to think about it. The Court also mentioned that a reasonable bystander knowing all of the background would come to the objective understanding that the parties had reached consensus ad idem – a meeting of the minds – just like they had done on numerous other occasions.

The Court mentioned that the use of 👍 qualified as "an action in electronic form" capable of being used to express acceptance of an offer as contemplated under section 18 of the Electronic Information and Documents Act, 2000, SS 2000, c E-7.22 (EIDA).

In resolving ALC's argument that the Contract was also void for being uncertain because Kent did not text a photo of the "General Terms and Conditions" contained at the back of the Contract to Chris, and the delivery period stated as "Nov" was vague, the Court refused this arguments and held that not sending the photo of the "General Terms and Conditions" at the back of the Contract to Chris does not render the Contract void and uncertain as Chris ought to have known that the General Terms and Conditions at the back of the Contract will be similar to the contracts they had performed in the past. The Court also held that all the essential terms of the Contract were all contained in the first page that was sent to Chris.

On the delivery period of "Nov" being vague, the Court held that this was a red herring as based on their previous dealing and the context the Contract was discussed, "Nov" meant November 2021.

On ALC's argument that by the provisions of the Act, the Contract will be unenforceable unless some note or memorandum in writing of the contract is made and signed by the party to be charged, the Court stated that by the provisions of section 14(1) of the EIDA which provides that a requirement of signature pursuant to the law is satisfied by an electronic signature, a 👍 emoji is a non-traditional way of signing a document and also noted that the identity of the person signing could be determined by his/her unique cell phone number.



> **The Court refused this argument and held that not sending the photo of the "General Terms and Conditions" at the back of the Contract to Chris does not render the Contract void**

Brief comment on the decision

This case introduces an interesting perspective on the principle of acceptance of an offer to birth a contract and is a deviation from the traditional modes of what the Court would construe as accepting the terms of an offer or signing a contract. In this case, the Court found that the thumbs up emoji suffices as proof of acceptance of a contract.

Although there is no similar decision or precedent in our jurisprudence, we consider that assuming a similar matter is brought before the Nigerian Courts, it is not unlikely that the Nigerian Court will follow the precedent of the Canadian Court. This is more so as both parties had contracted in similar manner on previous contracts and have expressed an intention to be bound in that manner over a period. In **Spiess v. Oni** [2016] 14 NWLR (Pt. 1532) 236 at 262, paras G-H, the Supreme Court described intention as a state of the mind, which can be inferred from facts which have been proved. A Nigerian Court in similar situation can therefore draw the inference that ALC intends to be bound by the manner ALC indicated to be bound by prior contracts which are similar to the instant scenario.

On the electronic signature point, the Evidence Act 2011 (2011 Act) provides for electronic signature as satisfying the evidential requirement of a signature, but the 2011 Act does not define electronic signature. The Evidence (Amendment) Act, 2023 (2023 Act) defines electronic signature to "mean authentication of any electronic record by a subscriber by means of the electronic technique specified in the Second Schedule and includes digital signature." However, the 2023 Act does not have a second schedule, so it is not certain as of now what the 2023 Act regards as electronic technique and whether an emoji would qualify as signature in the formation of a Contract.

We however hold the view that to the extent that the offeree did not communicate a disagreement to the terms of the offer and did not present a counteroffer, if the Evidence Act 2023 accommodates a thumb up as an electronic signature, there is good basis to hold the view that the Nigerian Courts would follow the precedent laid by the Canadian Court.

US SUPREME COURT CLARIFIES THE STANDARDS FOR THE TRANSFORMATIVE USE OF COPYRIGHTED WORKS–IN **ANDY WARHOL FOUNDATION FOR THE VISUAL ARTS, INC. V. GOLDSMITH 598 US _ (2023)**

Brief Facts

Lynn Goldsmith, a world-renowned photographer in 1981, took several photographs of Prince Rogers Nelson for Newsweek magazine which was used in a publication about the musician. In 1984, Vanity Fair sought to license one of Goldsmith's Prince photographs for use as an "artist reference" to help illustrate an article about Prince. Goldsmith agreed to license the work to Vanity Fair, but only on the conditions that the use of her photograph was for "one time" only; she was credited for the "source photograph" and paid the sum $400 (Four Hundred United States Dollars). Vanity Fair then hired Andy Warhol to use the Goldsmith image as the basis for an illustration in Warhol's signature style. As requested, Warhol made a silkscreen using Goldsmith's photo, and Vanity Fair published the resulting image alongside an article about Prince.

Warhol, however created fifteen additional (and unlicensed) works based on Goldsmith's 1981 Prince photograph. In 2016 — more than three decades after Vanity Fair's license from Goldsmith — the Andy Warhol Foundation licensed one of Warhol's sixteen "Prince" works to Condé Nast, received $10,000 for the license to publish the image. Goldsmith received nothing.

Upon becoming aware of Warhol's "Orange Prince" on the cover of Condé Nast's special edition magazine, Goldsmith notified the Andy Warhol Foundation (AWF) of her belief that it had infringed her copyright. The Andy Warhol Foundation then sued Goldsmith and her agency for a declaratory judgment of noninfringement or, in the alternative, fair use. Goldsmith counterclaimed for infringement. In resolving the dispute, the District Court granted summary judgment for AWF, finding a fair use because Andy Warhol's sixteen silk-screen Prince works were "transformative" in that they "have a different character, give Goldsmith's photograph a new expression and employ new aesthetics with creative and communicative results distinct from Goldsmith's." Goldsmith appealed the decision and the Court of Appeal for the Second Circuit reversed, holding that all four fair use factors favored Goldsmith. AWF then appealed to the United States Supreme Court.

The sole issue before the US Supreme Court was whether AWF can defend a claim of copyright infringement because it made "fair use" of Goldsmith's photograph.

Decision of the Court

In resolving the narrow question of whether the first fair-use factor (that is, "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes") supported a finding that the AWF commercial licensing to Condé Nast was a fair use of Goldsmith's 1981 photograph, the Supreme Court first expounded on the nature of fair use. The Court relying on the case of **Campbell v. Acuff-Rose Music, Inc.,** 510 U. S. 569, 579 (1994). held that the fair use factor focuses on whether an allegedly infringing use has a further purpose or different character, which is a matter of degree, and the degree of difference must be weighed against other considerations, like commercialism. The Court further held that although the giving of new expression to a creative work may be relevant to whether a copying use has a sufficiently distinct purpose or character than the original work, such new expression is not, without more, dispositive of the fair use factor.

On the degree of transformation required to make 'transformative' use of an original piece," the Supreme Court stressed that the transformation "must go beyond that required to qualify as a derivative." In other words, the new expression must, in the context of the challenged use, materially alter not just the meaning or message of the underlying work, but also the specific purpose for which the original work was used. However, the Court found that the use of Goldsmith's photographs of Prince and AWF's copying use of it share substantially the same purpose and does not meet the requirement for transformative use of a creative work.

Consequently, the Supreme Court found that the fair-use factor favours Goldsmith, not the Andy Warhol Foundation.

Brief Comment on the Decision of the Court

As a way of background, in the 1994 case of Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994), the Supreme Court of the United States held that 2 Live Crew's unlicensed incorporation of significant portions of Roy Orbison's copyrighted song, "Oh, Pretty Woman," into 2 Live Crew's "Pretty Woman" song could be a fair use under the Copyright Act, even though 2 Live Crew sold its song for profit. In this case, the Supreme Court applied the four factors set forth in the Copyright Act for a fair-use analysis: (1) the purpose and character of the use, (2) the nature of the copyrighted work, (3) the amount or substantiality of the portion used, and (4) the effect of the use on the potential market for or value of the work.

In applying these four factors, the Supreme Court stated that "the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works" and "the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use." Concluding that listeners could understand the 2 Live Crew song as a parody, and that creating the parody required substantial borrowing from Orbison's original, the Supreme Court held that 2 Live Crew's song could be fair use under the Copyright Act.

Since Campbell, Federal Courts have increasingly relied on the "transformative" nature of an allegedly infringing work to rule that the fair-use defense applies. The pre-Campbell notion that any "commercial" use of a copyrighted work was "presumptively unfair" soon gave way to a post-Campbell notion that "transformative" works were "presumptively fair"—regardless of whether the works were commercial in nature or not.

The addition of "new expression" alone is not sufficient to constitute a "transformative use", even when the accused work's "new expression" creates a new aesthetic, a new meaning or a new message.

The Warhol case now makes two things clear. First, the addition of "new expression" alone is not sufficient to constitute a "transformative use", even when the accused work's "new expression" creates a new aesthetic, a new meaning or a new message. Rather, the specific complaint of use of the secondary work must be for a sufficiently dissimilar purpose than that of the original work. Second, the commercial nature of a secondary use looms large when the purpose of the secondary use is similar to the purpose of the original work. While perhaps not as significant as the "commercial-use" presumption that dominated the fair-use analysis prior to the 1994 2 Live Crew decision, the Warhol decision moves the focus back in that direction. Accordingly, when considering copyright fair use going forward, creators and advocates will need to determine "the main or essential nature/purpose of the specific use of the secondary work" and distinguish it from the underlying work.

INTERNET SERVICE PROVIDERS MAY BE IMMUNE FROM LIABILITY UNDER SECTION 2333 OF THE ANTI-TERRORISM ACT WHERE THERE IS FAILURE TO PROVE INTENTIONAL PROVISION OF SUBSTANTIAL AID TO TERRORIST

US SUPREME COURT IN TWITTER INC V TAAMNEH ET ALL NO. 21-1496

Brief Facts

Owing to the provisions of section 2333(a) of the Antiterrorism Act (ATA) as amended by the Justice Against Sponsors of Terrorism Act (JASTA), which permits United States' (US) nationals who have been injured by reason of an act of international terrorism to file a civil suit for damages, the family of Nawras Alassaf claimed reliefs under section 2333(d)(2) of the ATA against Facebook Inc., Twitter Inc. (the Petitioner) and Google Inc. (altogether the Defendants). The case of the Plaintiff arises from a 2017 terrorist attack carried out by Abdulkadir Masharipov on behalf of the Islamic State of Iraq and Syria (ISIS). The attack which occurred at the Reina nightclub in Istanbul claimed the lives of 39 people including Nawras Alassaf, leaving 69 others injured. The family members of Nawras Alassaf thereafter sued Facebook, Google and Twitter for aiding and abetting ISIS claiming that they did so by permitting ISIS to upload content on their platform, taking insufficient steps in removing that content and allowing their algorithms to recommend that content to third parties.

Specific to Google is the allegation that Google had reviewed and approved some of the ISIS videos given Google's system which allows it to share revenue gained from certain advertisements with users of YouTube.
At the United States District Court, sitting at California, the Plaintiff's complaint was dismissed for failure to state a claim. However, this decision was reversed by the United States Court of Appeal for the Ninth Circuit (Ninth Circuit). The Ninth Circuit found that the Defendants could be held secondarily liable for the Reina nightclub attack, for aiding and abetting ISIS within the meaning of section 2333(d)(2).

Issue under Consideration

The question posed for determination was, "whether the Defendants' conduct constituted aiding and abetting by knowingly providing substantial assistance such that they can be held liable for the Reina attack".

Decision of the Court

In rendering its decision, the Supreme Court examined the provisions of section 2333 of the ATA which provides that those injured by an act of international terrorism can (a) sue the relevant terrorists directly under section 2333(a), or (b) sue anyone who aids and abets, by knowingly providing substantial assistance, or who conspires with the person who committed such an act of international terrorism under section 2333(d)(2).

The Court found that it was not in dispute that the Reina nightclub attack was an act of international terrorism, or that the attack was committed by ISIS which in itself is designated as a foreign terrorist organisation as of the date of the attack. What was in dispute however, was, whether the Defendants' conduct constituted aiding and abetting by knowingly providing substantial assistance such that they can be held liable for the Reina attack.

In construing the phrase "aids and abets, by knowingly providing substantial assistance," the Court considered the case of **Halberstam v Welch** 705 F.2d 472 (D.C. Cir. 1983) wherein the three-element and six-factor test were articulated for the purpose of determining whether a defendant's assistance can be said to be substantial. The six factors are (a) the nature of the act assisted, (b) the amount of assistance provided, (c) the presence of the defendant at the time of committing the tort, (d) the defendant's relation to the tortious actor, (e) the defendant's state of mind and (f) the duration of the assistance given.

The Court held that the Plaintiffs allegations fell short of proving knowing and substantial assistance on the part of the Defendants. To aid and abet refers to a conscious, voluntary and culpable participation in another's wrongdoing. However, the only affirmative "conduct" the Defendants allegedly undertook was creating their platforms and setting up their algorithms to display content relevant to user inputs and user history. The Plaintiffs never alleged that after the Defendants established their platforms, they gave ISIS any special treatment or words of encouragement nor is there reason to believe that the Defendants selected or took any action at all with respect to ISIS' content (except, perhaps, blocking some of it upon being made aware). It therefore follows that the mere creation of those platforms, or the use of the Defendants' recommendation algorithms does not convert the Defendants' passive assistance to active abetting. The Court found the relationship between the Defendants and the Reina attack to be highly attenuated. The Defendants' relationship with ISIS and its supporters was viewed as being the same as their relationship with their billion-plus other users: arm's length, passive and largely indifferent.

The Court went further to state that the Plaintiffs' reliance on the Defendants' failure to act was at best a claim that the Defendants owed the Plaintiffs an independent duty (which they failed to establish) to remove ISIS' content. It was held that even where such duty exists, it would not transform the Defendants' inaction into 'knowing and substantial assistance'. The Court found that to hold otherwise would be to hold communication providers (cell phone, email or internet services) liable for any sort of wrongdoing merely for knowing that the wrongdoers were using its services and failing to stop them.

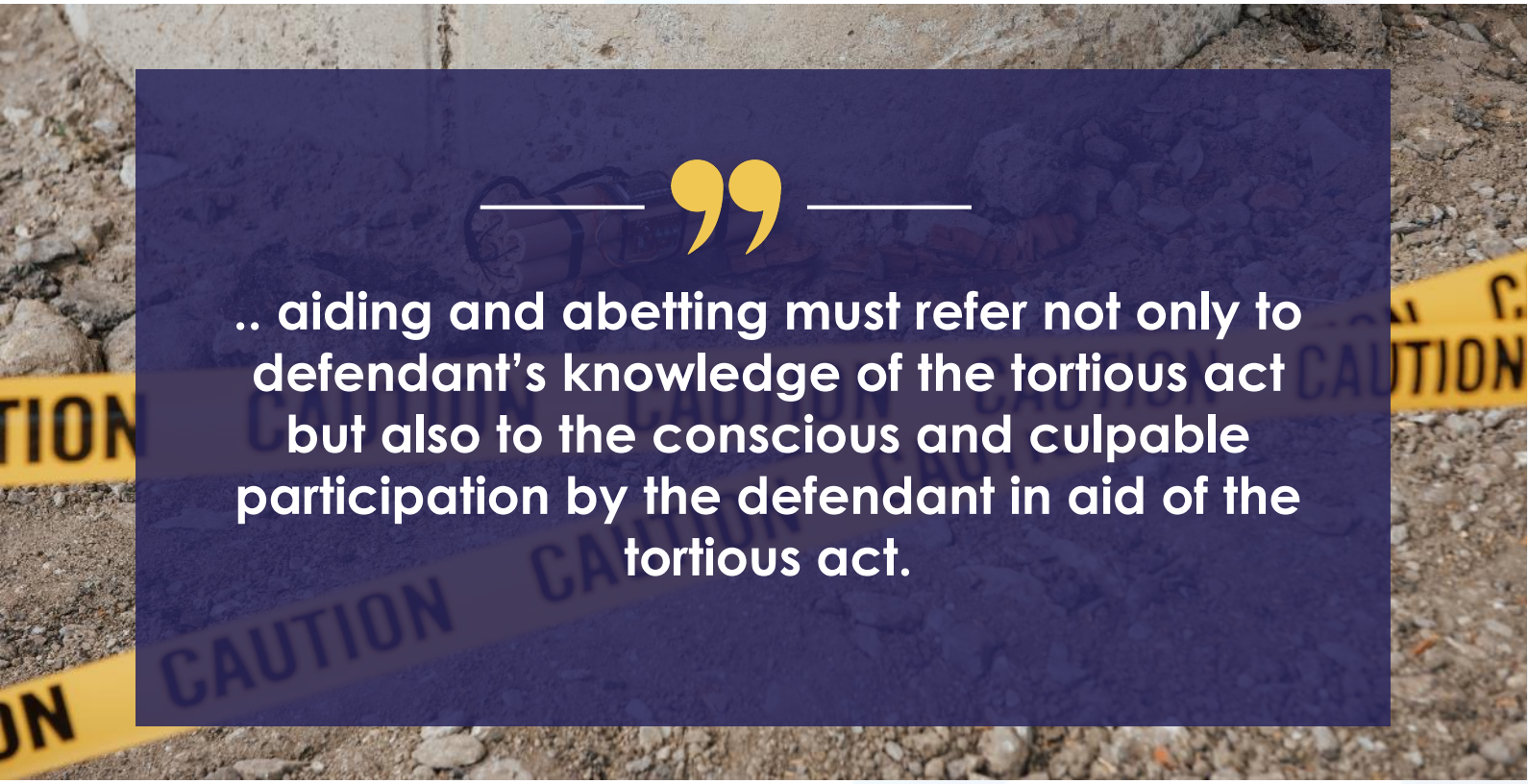
On the specific allegations against Google, the Supreme Court held that the Plaintiffs had failed to show how Google knowingly provided substantial assistance to the Reina attack as no evidence shows the amount supposedly shared with ISIS by Google, the number of videos or the number of accounts approved by Google for revenue sharing.
Having found that the Plaintiffs failed to prove that Defendants intentionally provided any substantial aid to the Reina attack or otherwise consciously participated in it or that the Defendants so pervasively and systemically assisted ISIS, the Supreme Court reversed the judgement of the Ninth Circuit.

Brief comment on the decision

Given the international underpinnings of terrorism, this case sets the tone for linking liability for acts of terrorism with the use of social media platforms. Also, the attendant allusion to the case of Halberstam v Welch, clarifies the scope of aiding and abetting under the ATA to the effect that aiding and abetting must refer not only to defendant's knowledge of the tortious act but also to the conscious and culpable participation by the defendant in aid of the tortious act.

This decision is laudable and forward-looking given its recognition of the complexities of social media platforms and the approach taken by the courts to ensure that owners of social media platforms are not held liable solely for being aware of the use of their platforms by others. Although unintended, this decision may pose difficulties to individuals (who seek to rely on section 2333 of the ATA as amended by the JASTA to claim damages) as the threshold for proving knowing and substantial assistance can be particularly complex in cases against owners of digital platforms.

In Nigeria, this case appears be in tandem with the position of Nigerian courts in the case of **Nicholas Okoye v Laidun & Ors** [2022] No. LD/170/2012 [Unreported] where it was held that internet-service providers will not be held liable for content uploaded by bloggers given that it would be humanly impossible for them to enforce policies which would require human or manual screening of all contents uploaded online.



> .. aiding and abetting must refer not only to defendant's knowledge of the tortious act but also to the conscious and culpable participation by the defendant in aid of the tortious act.

LITIGATION FUNDING AGREEMENTS IN WHICH THE FUNDER'S REMUNERATION IS CALCULATED BY REFERENCE TO A SHARE OF THE DAMAGES ULTIMATELY RECEIVED WILL NOW BE UNENFORCEABLE IN ENGLAND & WALES UNLESS IT IS IN COMPLIANCE WITH CERTAIN CONDITIONS – **UK SUPREME COURT IN R (ON THE APPLICATION OF PACCAR INC AND OTHERS) V COMPETITION APPEAL TRIBUNAL AND OTHERS [2023] UKSC 28**

Brief Facts of The Case

The European Commission (Commission) in 2016 imposed a fine of about Three Billion Euros having found that the five major European truck manufacturing groups, including PACCAR Inc and DAF Trucks (the Appellants), infringed on competition law by inflating the prices paid for trucks by consumers. Based on the decision of the Commission, the 2nd and 3rd Respondents, Road Haulage Association (RHA) and UK Trucks Claim Limited (UKTC) as Claimants, applied to the Competition Appeal Tribunal (CAT) for an order to bring a follow-on collective proceeding under Section 47B of the Competition Act 1998 (the CA 1998) against the Appellants to be able to claim compensation for the infringement established by the Commission. While RHA made an application for "opt-in" collective proceedings, (whereby additional individuals who want to take part in any award would have to choose to join the class that the RHA is representing), the UKTC submitted "opt-out" application (where it gets a mandate to represent a certain class of people who may opt out if they did not want to be represented), and also made an "Opt-in" application in the alternative.

For the CAT to make a Collective Proceedings Order (CPO), both RHA and UKTC must demonstrate that they have adequate funding arrangements in place to cover costs relating to the proceedings. Hence, both RHA and UKTC relied on the Litigation Funding Agreements (LFAs) between themselves and Therium Ltd and Yarcombe Ltd, who were the litigation funders. In the LFAs, both Therium Ltd and Yarcombe Ltd committed to fund the litigation, while their maximum remuneration would be calculated by reference to a share of the damages that would be received by the Claimants in the litigation. The character of the LFAs was in issue in the application for the CPO.

The CAT disagreed with the Appellants' contention and held that the LFAs were not under the purview of Section 58AA of CLSA and as a result they were not DBAs and could not be rendered unenforceable. The Appellants appealed to the Court of Appeal and filed an application for judicial review in anticipation of the Court of Appeal holding that it does not have jurisdiction. The Court of Appeal held that it had no jurisdiction to hear the appeal but sat as a Divisional Court and proceeded to determine the issue by way of judicial review. In essence, both the CAT and the Court of Appeal sitting as a Divisional Court, disagreed with the Appellants' argument and found that for a service to come within the definition of claims management services, such service must have been provided within the context of the management of the claim and that the funders did not normally manage a claim, they only fund the claim. The Divisional Court, therefore, dismissed the application. Consequently, the Appellants then appealed directly to the Supreme Court.

Issues For Determination by the Supreme Court

The main issue for determination by the Supreme Court was whether Litigation Funding Agreements (LFAs) pursuant to which the funder is entitled to recover a percentage of any damages recovered constitute "Damages-Based Agreements" (DBAs) within the meaning of the relevant statutory scheme of regulation (the DBA issue).

Decision of the Court

The Supreme Court focused on the definition of "claims management services" in section 4 of the CA and the definition of DBA in section 58AA(3) of CLSA in coming to its conclusion on whether the Respondents' LFAs could be characterised as DBAs, which would then make them unenforceable for not complying with the statutory requirements stipulated for DBAs. The Supreme Court accorded literary interpretation to the relevant provisions of law under consideration and stated that the wordings are so wide as to accommodate LFAs.

For context, section 58AA (3) of CLSA defines a DBA as:

"a. an agreement between a person providing advocacy services, claims management services and the recipient of those services which provides that –

(i) the recipient is to make a payment to the person providing the services if the recipient obtains a specified financial benefit in connection with the matter in relation to which the services are provided, and (ii) the amount of that payment is to be determined by reference to the amount of the financial benefit obtained."

On the other hand, section 4(2) Compensation Act, 2006 defines 'claims management services' as "advice or other services in relation to the making of a claim". It was the contention of both UKTC and RHA that funders who provide funds via the LFAs neither advise on the claim nor render any service in relation to making of the claim. In interpreting what amounts to management of a claim, the Supreme Court drew a distinction between "advice" and "other services" and held that the language of the main part of the definition of "claims management services" in section 4(2)(b) of CA is wide and not tied to any concept of active management of a claim. Additionally, the Supreme Court was of the view that despite the fact that the meaning of a term mentioned in a statutory definition may be determined by its legal or common definition, claims management services did not have a widely accepted meaning that would change or influence the precise language of the definition provided in the statute. This would be a contrary interpretation to the CA's purpose and objective.

The Supreme Court stated that while the word "advice" in the provision may not qualify to accommodate LFAs, the subsequent wordings, that is, "other services" are wide and express and go beyond the management of a claim and could encompass LFAs. The Supreme Court, therefore, opined that: "this provision therefore constitutes a further specific indication that the definition of "claims management services" in section 4(2)(b) is indeed intended to be very wide, in line with its own express language and that of section 4(3)(a), and that it is not limited to services involving the management of a claim."

The Supreme Court also disagreed with the position of the Divisional Court per Henderson LJ that they saw no reason why Parliament would have wished to regulate non-champertous third-party funding in return for a reasonable share of the sum recovered which would then make the arrangement to qualify as a DBA. The view of the Supreme Court was that ordinarily, the Secretary of State could not have sought to regulate services which would not jeopardize consumer's interests, however, that evidence might emerge of third party funders extracting more than a reasonable share of the recovery, or have tendency to be exploitative, in which case regulation would plainly be fairly and squarely within the purpose of the power in section 4 of the CLSA, in order to protect consumers of such services. This reasoning, therefore, will make LFAs classified as DBAs to be regulated by legislation.

The Supreme Court was of the view that section 4 of the CA allows for regulation of the provision of financial services or assistance to be integrated, if appropriate, into a coherent package of regulation covering other forms of service provision with which they may be associated. The Supreme Court, therefore, held that the LFAs by both UKTC and RHA constitute DBAs and are unenforceable for failure to comply with the mandatory requirements to be satisfied by DBAs, which include inter alia that the agreement should not provide for a payment above a prescribed amount or for a payment above an amount calculated in a prescribed manner.

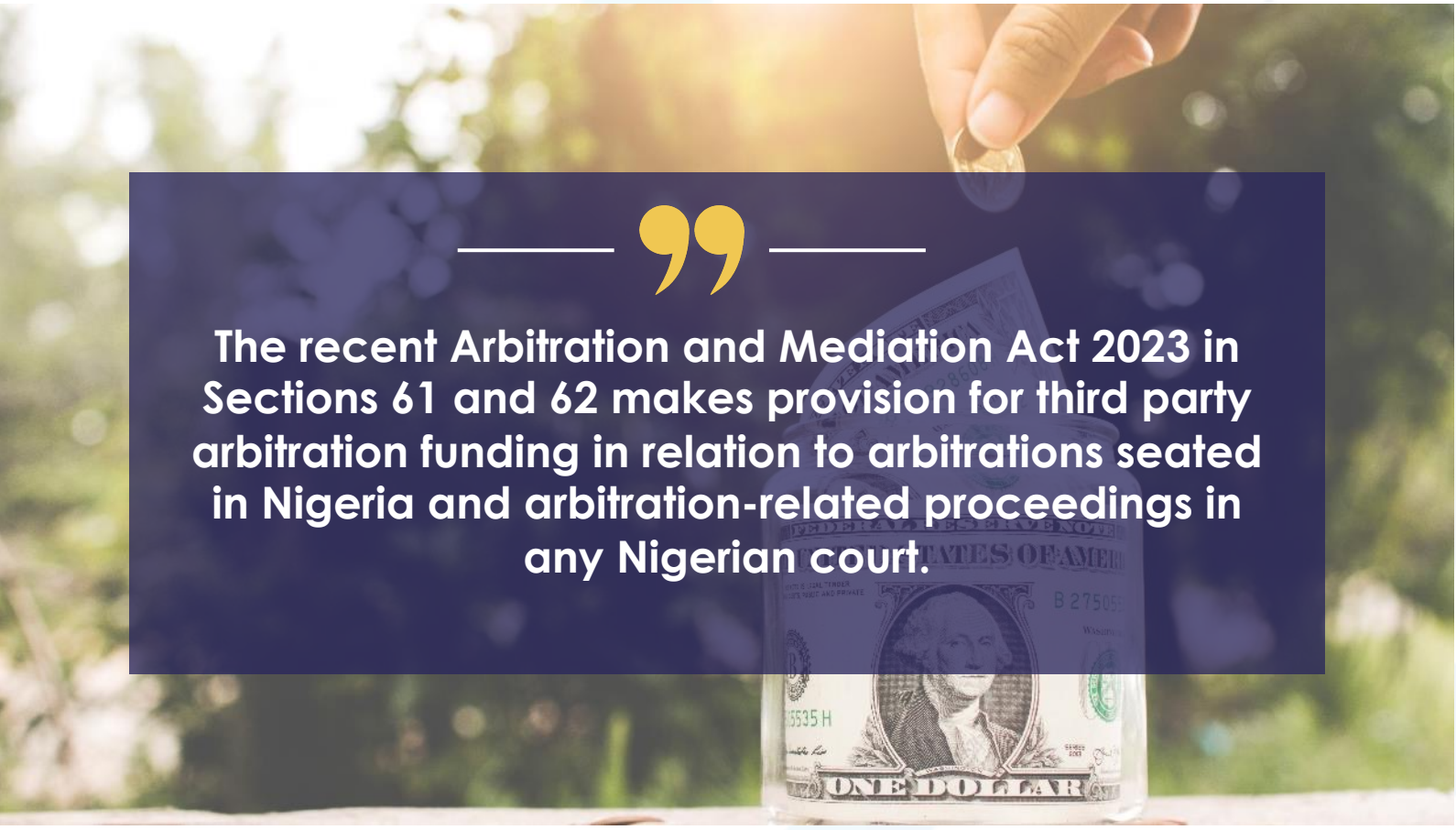
Brief Comment on The Decision

Historically, third-party litigation funding agreements were frowned upon by common law. Such agreements were typically seen as being unenforceable since they were against public policy, in accordance with the doctrines of champerty and maintenance. However, this position changed overtime. The Criminal Law Act 167 appears to be a regulatory change that first classified maintenance (involves third parties funding a legal case) and champerty (maintenance for a profit), as neither torts nor crimes in Great Britain.

Following the radical shift brought about by the new laws governing litigation funding, a number of significant companies, including Burford Capital (2009), Therium Capital Management (2009), Vannin Capital (2010) and Woodsford Litigation Funding (2010) emerged to benefit from the more favourable funding environment. The topic of whether the United Kingdom government should control third-party fundraising groups or allow them to self-regulate was brought up by the new and quickly expanding business. With the understanding that if self-regulation failed, the government would have to intervene and regulate, self-regulation prevailed.

Thus, this judgment of the Supreme Court has obviously set a new regime for third-party litigation funding agreements in the United Kingdom and has now rendered all existing LFAs which may have failed to comply with the statutory requirement of DBAs, to be unenforceable in view of the new classification. We expect that the litigation funders will, going forward, ensure that the LFAs they enter into are in strict compliance with the requirements of DBAs as stipulated in Section 58AA(4) CLSA, that is, the agreement must; (i) be in writing; (ii) not relate to proceedings which by virtue of Section 58A(1) and (2) cannot be the subject of an enforceable conditional fee agreement or to proceedings of a description prescribed by the Lord Chancellor; (iii) not provide for a payment above a prescribed amount or for a payment above an amount calculated in a prescribed manner; and (iv) comply with such other requirements as to its terms and conditions as are prescribed.

In Nigeria, generally the common law doctrine of champerty still holds sway and any third-party litigation funding agreement will be rendered invalid and unenforceable. However, the common law champerty has been eliminated when it comes to arbitration proceedings in Nigeria. The recent Arbitration and Mediation Act 2023 in Sections 61 and 62 makes provision for third party arbitration funding in relation to arbitrations seated in Nigeria and arbitration-related proceedings in any Nigerian court. The implication of this is that the doctrine of champerty is no longer applicable to arbitration proceedings in Nigeria, however, it is applicable in all other circumstances.



The recent Arbitration and Mediation Act 2023 in Sections 61 and 62 makes provision for third party arbitration funding in relation to arbitrations seated in Nigeria and arbitration-related proceedings in any Nigerian court.

PART B – RECENT ENACTMENTS AND LEGISLATION

ENFORCEMENT OF DATA SUBJECTS' RIGHTS UNDER THE NIGERIA DATA PROTECTION ACT 2023

INTRODUCTION

The Nigeria Data Protection Act 2023 (the **"NDPA"** or the **"Act**") was signed into law by President Bola Ahmed Tinubu on 12.06.2023 in a bid to bring Nigeria into the growing fold of nations with a well-defined legal framework for the protection of personal information. At the centre of this new legal regime is the Nigeria Data Protection Commission charged with functions, including regulation of deployment of technological and organizational measures to enhance personal data protection. The Nigeria Data Protection Regulation 2019 (the **NDPR**) was before the Act, the most comprehensive and encompassing framework data protection in Nigeria.

The Act contains new provisions which we assume were intended to improve the NDPR and make for a global standard legal framework for data protection in Nigeria. One of such new provisions is the creation of the Nigeria Data Protection Commission (the **Commission**) to administer the NDPA like the National Information Technology Development Agency (**NITDA**) administered the NDPR.

Lodging a Complaint with the Commission

It is important that data subjects are familiar with the enforcement procedure under the Act in case any of the rights available and guaranteed to them under the Act is breached. Section 46(1) of the Act provides that **"A data subject, who is aggrieved by the decision, action, or inaction of a data controller or data processor in violation of this Act, or subsidiary legislation made under this Act may lodge a compliant with the Commission."** The Commission may investigate the complaint made to it if it appears to the Commission that the complaint is not frivolous or vexatious[1] and where the Commission is satisfied that a data controller or processor has violated or likely to violate any requirement under the Act or any regulation made under the Act, the Commission may make compliance order against the data controller or processor[2]. The compliance order is to be in writing and shall specify some things, including the right of the data subject to apply to a court for judicial review under section 50 of the Act[3].

The above excerpted provision of the Act seems clear on lodging a complaint with the Commission. However, it may agitate the mind of a data subject whether it is mandatory to first refer a complaint against a data controller or processor to the Commission and can only approach a court for judicial review after the decision of the Commission, or he can elect to approach a court directly without first going to the Commission. Immediately, we must admit that section 46(1) is capable of two interpretations. It is possible to argue that using the word "may" with reference to lodging a complaint with the Commission, the provision intends for lodging a complaint with the Commission to be elective. Decisions such as **Edewor v. Uwegba & Ors** [1987] LPELR-1009(SC), 45-46, paras B-B may be cited to support this position. It is also possible to argue that the use of the word "may" does not make lodging a complaint with the Commission elective, but rather relates to the freedom of a data subject who feels aggrieved by a decision, action, or inaction of a data controller or processor to ventilate that grievance at all or to forgo. Support for this position may be that the Act does not provide for any other means of enforcing data subjects rights under the Act, which could be elected against the lodging of complaint with the Commission under section 46(1). It is important to consider the regime under the NDPR and if that will help to support any of the views.

1. *Section 46(2) and (3) of the Act.*
2. *Section 47(1) of the Act.*
3. *Section 47(3)(d) of the Act. Section 50 of the Act provides that "A person who is not satisfied with an order of the Commission, may apply to the court for judicial review within 30 days after the order was made."*

Administrative Redress under the NDPR

Article 4.2 of the NDPR provides that *"Without prejudice to the right of a Data Subject to seek redress in a court of competent jurisdiction, the Agency shall set up an Administrative Redress Panel under the following terms of reference…"* One should think that the NDPR is clear on not making reference of any dispute to the Administrative Redress Panel (**ARP**) mandatory or a condition precedent to instituting an action in court for a breach of the provisions of the NDPR, because the NDPR makes it clear that the provisions of Article 4.2 of the NDPR is without prejudice to the right of a data subject to seek redress in court. However, in **Incorporated Trustees of Digital Rights Lawyers Initiative v. Unity Bank Plc (ITDRLI v. Union Bank Plc)[4],** the Federal High Court held that failure of the Plaintiff in the case to refer the dispute first to the ARP, divested the Court of jurisdiction to adjudge the matter, and on this basis upheld the Defendant's preliminary objection and dismissed the case.

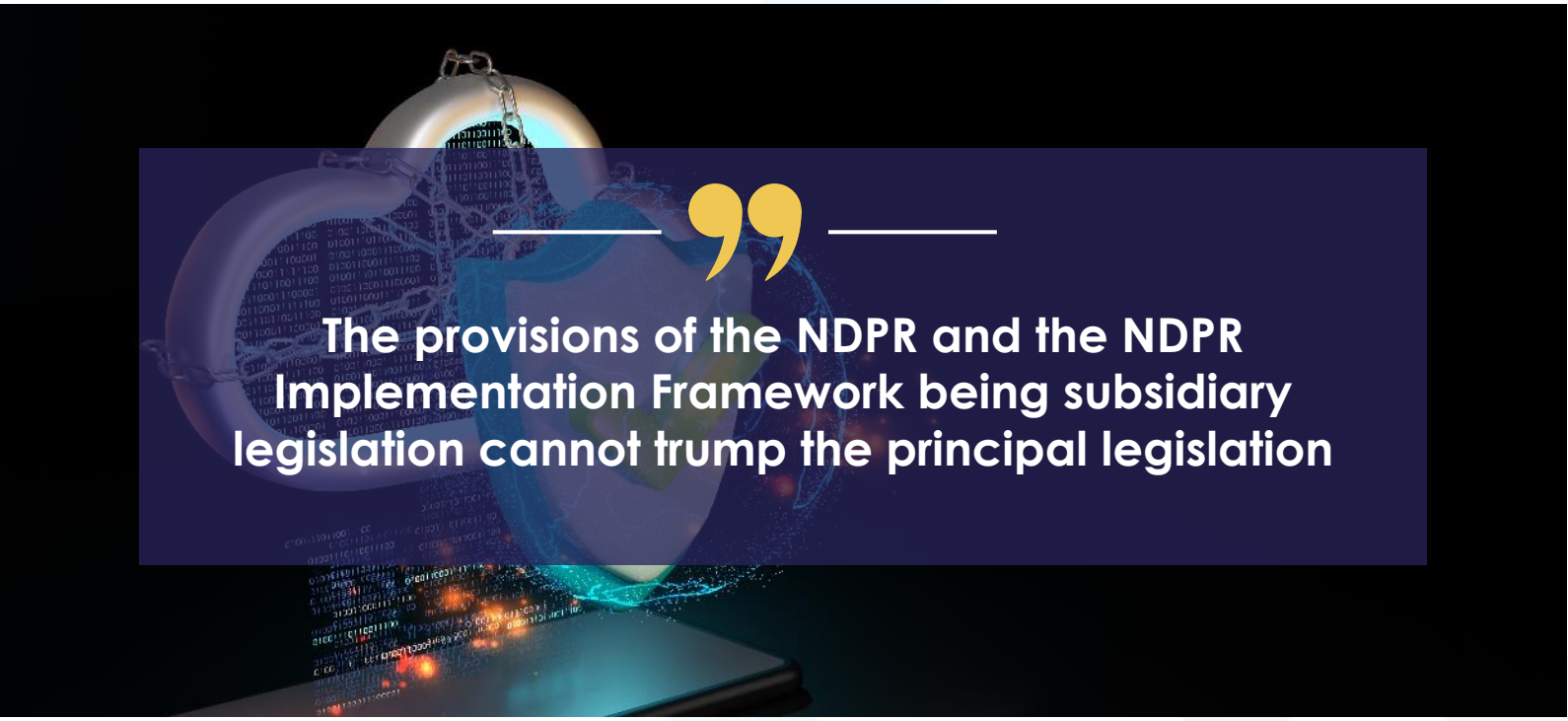
ITDRLI v. Union Bank Plc seems to be a standalone decision as there are hardly any other decisions that support same. Authors have also disagreed with the decision in ITDRLI v. Union Bank Plc. Felix[5] argued that the decision (i) is not supported by the clear provision of Article 4.2 of the NDPR which makes the provision subject to the right of a data subject to seek redress in court; (ii) is contrary to the clear provision of the NDPR Implementation Framework which provides in paragraph 11.2 that "Decisions of the ARP shall not be a condition precedent for entertaining data breach related issues in the court of law, except otherwise directed by a competent court of law"; and (iii) enforced reference to a non-existent panel as the ARP was yet to be set up (and has till now not been set up as the Commission is now the body to perform the functions assigned to the ARP under the NDPR). The author also pointed out the similarity of Article 4.2 of the NDPR with Article 77(1) of the European General Data Protection Regulation (**GDPR**) which makes the right of a data subject to lodge a complaint with a supervisory authority (the Information Commissioner's Office) *"without prejudice to any other administrative or judicial remedy…"*

What we deduce from the regime under the NDPR is that a data subject's right to lodge a complaint with the ARP (which was never set up) was without prejudice to the right of the data subject to seek redress in a court of competent jurisdiction. The NDPR Implementation Framework further makes it abundantly clear that the decision of the ARP is not a condition precedent to approaching a court of law under the NDPR. This is the position that the NDPA seems to deviate from.

4. *Unreported decision of the Federal High Court, Abeokuta Judicial Division, per Hon. Justice Ibrahim Watila, delivered on 09.12.2020 in Suit No. FHC/AB/CS/85/2020.*
5. *Felix Emmanuel, 'A Review of Digital Rights Lawyers Initiative v. Unity Bank Plc on Approaching the Administrative Redress Panel as a Condition Precedent to Enforcement of Data Subjects' Rights Under the Nigeria Data Protection Regulation' (2022) Gravitas Vol. 13 No. 4, Pp. 66-72.*

The NDPA and the NDPR Compared

Noticeably, the NDPA does not make the lodging of complaint with the Commission subject to the rights of a data subjects to approach a court. It can be argued that this deviation from the provision of the NDPR and the NDPR Implementation Framework is deliberate. It could also be argued that the provision of the NDPA does not exclude the right of a data subject to approach a court without first lodging a complaint with the Commission. The relevant principle of law in this respect is that a condition precedent to the institution of an action in court, either in a statute or contract, must be express. This is understandably so because the right of access to court is a constitutional right, and any statute which seeks to suspend that right until a condition is met, should do so in clear terms. Clearly, the NDPA does not clearly make the right of a data subject to approach the court under the NDPA subject to first lodging a complaint with the Commission and obtaining the Commission's decision.



We have considered the right of a data subject to apply to court for judicial review of the decision of the Commission under section 47(3)(d) and although we accept that this gives some basis to argue that the Act intended a data subject to approach a court only after the Commission has given a decision, an argument can be made that section 47(3)(d) of the Act is only to show the appealability of the decisions of the Commission while noting that where the decision of the Commission is not appealable or not subject to judicial review, same will be liable to be set aside for unconstitutionality pursuant to section 36(2)(b) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) which requires non-finality of decisions of administrative bodies. Thus, it can be argued that the right to apply for judicial review of the decision of the Commission is a right that is further to the election to approach the Commission.

Interestingly, by section 64(2)(f) of the NDPA, all orders, rules, regulations, decisions, directions, licences, authorisations, certificates, consents, approvals, declarations, permits, registrations, rates, or other documents issued by NITDA are to continue in effect as if they were made or issued by the Commission until they expire or are repealed, replaced, reassembled, or altered. The NDPR and the NDPR Implementation Framework are therefore still in effect.

Although the NDPA does not have inconsistent provision to address any case of inconsistency of the provisions of the rules and regulations issued by NITDA with the provisions of the NDPA, we hold the view that the provisions of the NDPA will supersede the provisions of the NDPR and NDPR Implementation Framework because (i) at best, what section 64(2)(f) of the NDPA has done is to promote the NDPR and NDPR Implementation Framework to the position of regulation and framework issued under the NDPA; and (ii) with the relationship between the NDPA, NDPR and NDPR Implementation Framework being that of principal statute and subsidiary legislations respectively, the provisions of the NDPR and the NDPR Implementation Framework being subsidiary legislation cannot trump the principal legislation. See **Osadebay v. AG Bendel State** [1991] LPELR-2781(SC), 40, paras. D-E.

Thus, the question whether a data subject should approach the ARP instead of the Commission does not arise because the ARP which NITDA was to create was never created, and even if it was created, the establishment of the Commission would have overtaken the ARP because the ARP would have been a creation of a subsidiary legislation as compared to the Commission which is created under the principal Act.

Conclusion

It is arguable that the NDPA requires a data subject to first refer every dispute under the NDPA to the Commission and approach a Court only for judicial review of the decision of the Commission. It could also be argued that this interpretation is not well set out in the NDPA and that a data subject could either elect to seek redress in Court or approach the Commission. We are hopeful that the Courts will consider these provisions of the NDPA and put finality to this issue.

REVIEW OF THE EVIDENCE (AMENDMENT) ACT 2023

The law of evidence is of paramount importance in our jurisprudence, as it governs the relevance and admissibility or otherwise of testimonies and documents presented by parties to establish the truth or otherwise of any matter in issue between parties to a dispute. Hence, it is significant that a law as relevant as the Evidence Act be reviewed periodically in order to bring it up to speed with the changing realities of a developing society, especially because of the fast-paced manner in which technology is changing the way we exchange information and documents which become evidence in court in cases of disputes arising from our interactions.

True to the dictates of technology, on 12 June 2023, the Evidence 2011 (Principal Act) which had governed the law of evidence in Nigeria for 12 years was amended by the Evidence (Amendment) Act 2023 (Amendment Act). The amendments introduced by the Amendment Act are majorly to align the Principal Act with technological advancements and the reality of present times.

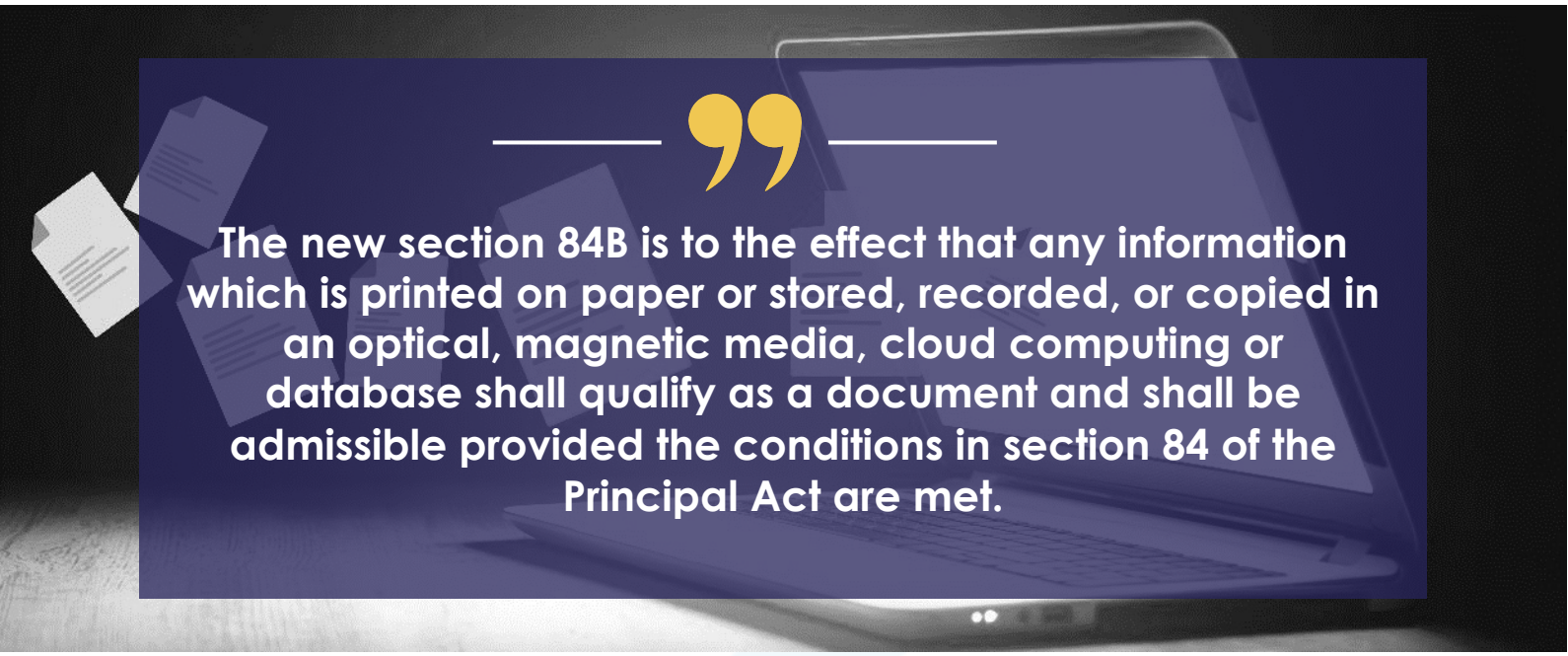
In this section of the Newsletter, we consider the amendments introduced by the Amendment Act, the impact of the amendments and made general comments on the amendments.

Amendments Introduced by the Amendment Act

01 *Section 84 of The Principal Act on Admissibility of Computer-generated Documents is Amended to Include Electronic Record*

Section 84 of the Principal Act provides for the admissibility of statements contained in a document which is generated from the computer, subject to some conditions. The said section 84 of the Principal Act refers only to computer-generated “documents” and does not make provision for other forms of evidence which may be generated by a computer.

The Amendment Act in section 2 makes provisions to the effect that everywhere the word “documents” is stated in section 84 of the Principal Act, it shall be followed by the phrase "or electronic records”. Consequentially, subsection 2(b) of section 84 of the Principal Act which provides for one of the conditions for the admissibility of computer-generated evidence, was substituted for a new subsection 2(b) by the Amendment Act. By way of further consequential amendments to give effect to the amendment to section 84 of the Principal Act, the Amendment Act introduces new Sections 84A to 84D. The new section 84A provides that if any law requires information or a matter to be in writing, typewritten or printed, notwithstanding anything in that law, the requirement will be deemed to have been met if that information or matter is in an electronic form or usable for subsequent references.



The new section 84B is to the effect that any information which is printed on paper or stored, recorded, or copied in an optical, magnetic media, cloud computing or database shall qualify as a document and shall be admissible provided the conditions in section 84 of the Principal Act are met.

The new section 84A is to the effect that if any law requires information or a matter to be in writing, typewritten or printed, notwithstanding anything in that law, the requirement will be deemed to have been met if that information or matter is in an electronic form or usable for subsequent references.

The new section 84B provides that any information which is printed on paper or stored, recorded, or copied in an optical, magnetic media, cloud computing or database shall qualify as a document and shall be admissible provided the conditions in section 84 of the Principal Act are met. The new section 84C provides that a person may now be able to authenticate an electronic record by affixing his electronic/digital signature on it provided it is reliable. The reliability of such appendage would be dependent on if (i) signature creation or authentication data are linked to the signatory or authenticator; (ii) any alteration to the signature or authentication would be traceable; and (iii) it fulfils any other conditions which may be prescribed. The new section 84D provides that except when deemed secured, the fact that a person's digital signature which is on an electronic record belongs to the signatory must be proved. It would however be deemed secured if the person has exclusive control and custody of the digital signature.

02 *Amendment of Section 93 of The Principal Act to Include Digital Signature*

Section 93(2) of the Principal Act provides to the effect that where a rule of evidence requires a signature, an electronic signature fulfils that requirement of the rule of evidence. The amendment introduced by the Amendment Act is for the words "or digital signature" to be added after anywhere "electronic signature" appears in section 93 of the Principal Act.

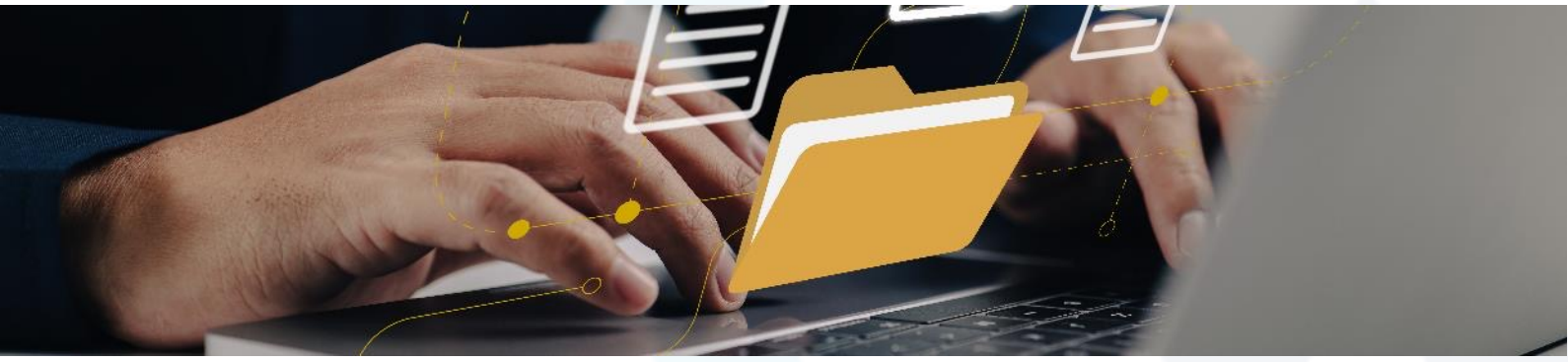
This addition is important, given the difference between electronic signature and digital signature. The former is an electronic version of a person's signature while the latter is an encrypted identity mark backed by a digital certificate, with more complex authentication requirements. This is also in advancement of the goal of digitisation of evidence to meet up with the realities of now.

03 *Substitution for Section 108 of the Principal Act to Accommodate Deposing to Affidavit Electronically*

Section 108 of the Principal Act provides that before an affidavit is used in court for any purpose, the original shall be filed in court and the original alone shall be recognised for any purpose in court. This section now provides for electronic deposition which requires a copy thereof to be filed in the court's registry and consequentially, sections 109 and 110 of the Principal Act are also amended to accommodate electronic deposition of affidavits.

Section 109 of the Principal Act provides for the use in court of "any affidavit sworn before any judge, officer or other person duly authorised to take affidavits in Nigeria." This section has been amended to include the words "whether in person or through audio-visual means" to permit for a person to depose to an affidavit virtually. Similarly, section 110 of the Principal Act which provides for the use of an affidavit deposed in other country other than Nigeria before a judge or magistrate or the duly authorised officer in the Nigerian embassy, the High Commission, or the Consulate in that country, has been amended to also include the words "whether in person or through audio-visual means" to allow for foreign-sworn affidavit to be done virtually.

This amendment is commendable. It makes it easy to depose to an affidavit whether in Nigeria or abroad as the deponent does not need to appear physically before the person authorised to take oath.



04 *Amendment of Section 119 of the Principal Act on Jurats*

Section 119 of the Principal Act to provides for a jurat to be included to an affidavit that is deposed to by a blind or illiterate person. Amongst other things, the jurat is to include the date and place of the swearing of the affidavit. The Amendment Act introduces a new subsection (2)(a) to the effect that where an affidavit is deposed through an audio-visual means, then the electronic record shall state the audio-visual method that was used and the date it was used. This is to meet the requirement of date and place in the jurat of an affidavit deposed physically before a person authorised to take oath.

This provision is necessary to give effect to the new provision on virtual or audio-visual deposition to affidavit, otherwise, the requirement of a date and physical place of swearing to an affidavit in a jurat will defeat an affidavit deposed by a blind or illiterate person virtually.

05 *Substitution for Section 255 of the Principal Act to provide for Electronic Gazette*

This new section 255, in subsection (2), makes provision for an Electronic Gazette. This is a great innovation towards the e-publishing of government laws, regulations, notices, etc. We envisage that this would soon be replicated in many other laws and will soon become the prevalent practice.

06 *Amendment of Section 258 of the Principal Act to include interpretation of words used in the Amendment Act*

The definitions of the following are inserted into section 258 of the Principal Act which is the interpretation section in alphabetical order viz: “audio-visual communication”, “cloud computing”, “computer”, “digital signature”, “Electronic Gazette”, “electronic record”, “electronic signature”, “magnetic media”, “optical media”. These insertions are necessitated by the need to clarify new words and concepts introduced to the Act.

Notably the Amendment Act defines “digital signature” as an electronically generated signature which is attached to an electronically transmitted document to verify its contents and the sender’s identity. Additionally, the Amendment Act defined “electronic signature” to mean authentication of any electronic record by a subscriber by means of the electronic technique specified in the Second Schedule and includes digital signature.

However, we observe that the definition of electronic signature above refers to the Second Schedule, a schedule which does not exist. The effect therefore is that we do not have visibility of the electronic technique that should constitute an electronic signature. We propose that this error is amended and corrected by an inclusion of a Second Schedule which should state what constitutes electronic technique. Overall, we hold the view that the amendments to the Evidence Act are laudable as they bring Nigeria’s evidence law in line with the changing times and digital realities that now exist and we can only hope that as the society develops, our laws do not only play catch-up but are robust enough to accommodate present and future developments.

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