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## 2023 WRAP-UP



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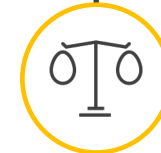
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# FOREWORD



The year 2023 was an eventful one in the Nigerian dispute resolution space as there were notable judicial pronouncements on matters of significant national and economic importance; also, a number of important legislations were either amended or repealed. The general elections in Nigeria were concluded in 2023 and this equally presented superior courts of record in Nigeria with the opportunity of making pronouncements on some novel issues.

We also witnessed a 5th alteration to the 1999 Constitution of the Federal Republic of Nigeria (the Constitution), where a number of notable changes were made to the Constitution. The arbitration space was not left out, as we saw the enactment of the Arbitration and Mediation Act 2023 (AMA) which repealed the Arbitration and Conciliation Act 1990 (ACA). In addition, the Evidence Act 2011 was amended to introduce some new provisions which seek to bring the Evidence Act 2011 up to speed with the digital realities of the 21st century.

In this Wrap-Up, we delve into all these groundbreaking laws that redefined our jurisprudence in 2023 and also provide an outlook of anticipated developments that could shape the Nigerian dispute resolution space in 2024. We envisage that 2024 will be eventful considering the enactment of the AMA and expect that its provisions will be tested in Court. We also envisage that due to the roll out of new policies and laws by the new government, corporates and individuals who would have

their business interests impacted by these legal reforms would seek legal redress to challenge the reforms and policies in Court.

Further, with the growing trend of divestment of assets by the IOCs, we envisage that there will be an increase in oil pollution disputes. We also foresee that due to the revenue generation drive of the new government and emphasis on taxes and compliance with tax laws, there would be an increase in tax disputes by persons dissatisfied with tax assessments. This Wrap-up and Outlook highlights the notable events in 2023 and the projections that are expected in the dispute resolution space in 2024.

Thank you.



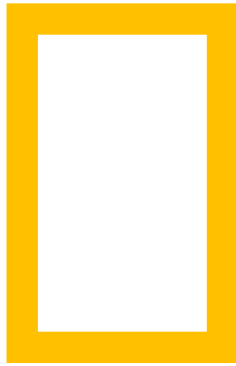
*Olabisi Makanjuola*

Partner, Olaniwun Ajayi LP



WRAP UP

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# ELECTORAL MATTERS

FCT DOES NOT HAVE ANY SPECIAL STATUS

**PETITION NO:**  
**CA/PEPC/03/2023 –**  
Mr. Peter Gregory  
Obi & Anor v  
Independent  
National Electoral  
Commission & Ors.



## Brief Facts

The 1st Appellant was a presidential aspirant who participated in the presidential election conducted by the Independent National Electoral Commission (INEC) on 25.02.2023. Upon conclusion of the election, the 2nd Respondent was returned as winner of the election, and the Appellants displeased with the outcome of the election commenced Petition No. CA/PEPC/03/2023 challenging the proceedings and the outcome of the presidential election at the Presidential Election Petition Tribunal/Court (the PEPC). In the main, the 1st Appellant's contention was that: (x) the 2nd Respondent was not qualified to contest the election as the 3rd Respondent had been earlier nominated as the senatorial candidate for Borno Central Constituency and also, that the 2nd Respondent had been fined for an offence involving dishonesty contrary to section 137(1)(e) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) (the CFRN); (y) the election was marred by electoral malpractices which violates the Electoral Act, 2022, particularly that there was overvoting in some polling units and that the Bimodal Voters Accreditation System was not properly utilised during the election; and (z) the 2nd Respondent was not duly elected by the lawful votes cast at the election as he did not obtain one quarter of the votes cast in the Federal Capital Territory in purported non-compliance with section 134(2)(b) of the CFRN.

The PEPC dismissed the Petition, and the Appellants appealed the decision of the Tribunal to the Supreme Court.

## Decision of the Court

The Supreme Court, in dismissing the petition, held inter alia that the Appellants had failed to demonstrate with sufficient evidence the irregularities at the election. It posited that the Appellants failed to plead specific details of electoral irregularities contrary to paragraph 4 (1) of the Electoral Act 2022. Further, the Supreme Court held that section 134(2) of the CFRN does not mandate a candidate to secure 25% of the total votes cast in the Federal Capital Territory, Abuja (FCT) as the FCT does not hold a special status and priority over other States in Nigeria and should be treated as one of the States in Nigeria.

The Supreme Court also upheld the decision of the PEPC striking out the witness statement on oath of the 1st Appellant's subpoenaed witnesses. This was in line with paragraph 4(5) of the 1st Schedule to the Electoral Act that the petition shall be accompanied by a list of witnesses and their witnesses' statements on oaths, and the Appellants failed to file the statements on oath within the prescribed timeline in the Electoral Act. The Supreme Court enunciated that the provisions of the Electoral Act are strict and should be complied with.

On the whole, the Supreme Court dismissed the Appellants' appeal and affirmed the return of Bola Ahmed Tinubu as president.

**PETITION NO:**  
**CA/PEPC/05/2023 –**  
Abubakar Atiku &  
Anor v  
Independent  
National Electoral  
Commission & Ors.



**Brief Facts**

The 1st Appellant was a presidential aspirant who participated in the presidential election conducted by the Independent National Electoral Commission (INEC) on 25.02.2023. Upon conclusion of the election, the 2nd Respondent was returned as winner of the election and the Appellants commenced Petition No. CA/PEPC/05/2023 challenging the proceedings and the outcome of the presidential election at the Presidential Election Petition Court (the PEPC). The 1st Appellant alleged that: (x) there were electoral irregularities during the election, including alleged manipulation of the Bimodal Voters Accreditation System (BVAS); (y) the 2nd Respondent did not have the majority of the lawful votes cast at the election as the 2nd Respondent failed to secure 25% of the votes in the Federal Capital Territory in purported non-compliance with section 134(2)(b) of the CFRN; and (z) the 2nd Respondent was not qualified to contest during the election on grounds of forged academic certificates contrary to section 137 of the CFRN. The PEPC dismissed the petition as the Appellants were unable to substantiate their case with relevant evidence. Dissatisfied with the outcome of the PEPC, the Appellants lodged an appeal against the decision of the PEPC to the Supreme Court.

**Issues**

The Supreme Court considered, inter alia, this issue of whether the 2nd Respondent had been duly elected by the majority of votes cast at the election. The Appellant also filed a motion on notice seeking to file fresh evidence, notably the Chicago State University (CSU) records of President Tinubu; and this raised the issue of whether the Appellants could file this application after the prescribed timeframe for tendering of evidence had lapsed.

**Decision**

The Supreme Court, in dismissing the 1st Appellant's application to submit fresh evidence, held that section 285 (6) of the CFRN provides that election petitions shall be heard and determined within 180 days of filing the election petition. This provision of the CFRN is "immutable and cannot be extended". As such, the Court held that it lacked jurisdiction to grant the application and the

Court was unable to invoke section 22 of the Supreme Court Act as the PEPC had lost jurisdiction to entertain the application for fresh evidence. The Supreme Court went further to state that there was no paragraph of the petition which made a case of forgery, therefore, the Appellants' application to introduce fresh evidence could not succeed.

On the substance of the appeal, the Supreme Court held that section 134(2)(b) of the CFRN does not require a candidate to secure 25% of the total votes cast in the FCT and a distinct 25% of the votes cast at the election in at least two thirds of the States of the Federation as the FCT does not have any special status over and above the other States in Nigeria; in fact, for purposes of the presidential elections, it should be treated as one of the several States.

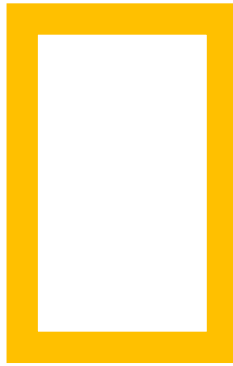
On the whole, the Supreme Court dismissed the Appellants' appeal and affirmed INEC's return of Bola Ahmed Tinubu as president.

**Brief Comment**

The Supreme Court in both presidential election petitions laid to rest the issue of whether section 134(2)(b) of the CFRN gives the FCT special status to the effect that a presidential candidate must have at least 25 % of votes cast in the FCT in addition to 25% of two-third of the States of the Federation in order to be returned as winner of the presidential elections.

As seen in the Supreme Court's decision, the FCT is only to be treated as one of the states of the Federation in accordance with section 299 of the CFRN. In essence, in order for a candidate to be returned as winner of the Presidential elections in Nigeria, it is not mandatory that he obtains at least 25% of the votes in the FCT. Rather, the FCT is construed like any other state in the Federal Republic of Nigeria and the requirement of at least 25% of two-third of states should be read as at least 25% of two-third in the 37 states of Nigeria.

**“** it is not mandatory that he obtains at least **25%** of the votes in the FCT. **”**



## *PARTIES MUST COMMENCE THEIR ACTIONS BY PROPER MODE IRRESPECTIVE OF PROVISIONS OF COURT RULES*

### **SUPREME COURT'S DECISION IN APC V. SHERIFF & ORS [2023] LPELR-59953 (SC)**



#### **Brief Facts**

The case presented by the 1st Respondent was that he won the primary election of the Appellant held on 28.05.2022 for the nomination of its candidate for Yobe North Senatorial District. He alleges that the primary election was conducted by the by the National Working Committee (NWC) of the Appellant and that without cancelling same, the Appellant purported to conduct another primary election on 09.06.2022, in which the 2nd Respondent was declared winner of the said primary election and his name submitted to INEC. The 1st Respondent commenced an action by way of Originating summons at the Federal High Court, Damaturu Judicial Division (trial Court) on 22.02.2022 where he sought, inter alia, a declaration that it was unlawful for the Appellant to recognize the name of the 2nd Respondent or any candidate other than the 1st Respondent as its candidate for the Yobe North Senatorial District for 2023 Elections.

The Appellant, 2nd and 3rd Respondents all filed notices of preliminary objections challenging the jurisdiction of the Court on various grounds including that the 1st Respondent did not have locus standi to institute the action, that the suit was statute barred and that the suit disclosed no reasonable cause of action. The preliminary objections and the substantive matter were heard together, and the trial Court held inter alia, that the 1st Respondent's action is a pre-election matter which falls squarely within its jurisdiction and proceeded to grant all the reliefs sought by the 1st Respondent.

Dissatisfied with the decision of the trial court, the Appellant appealed to the Court of Appeal which affirmed the decision of the trial Court. The Appellant further appealed to the Supreme Court.

#### **Decision of the Supreme Court**

The recondite issue before the Supreme Court was whether in the circumstances of the appeal, especially with the allegation of fraud in the midst of other irreconcilable conflicts in the numerous affidavits and further affidavits filed by the parties in support of their various conflicting positions, the Court of Appeal was correct to hold that the trial Court was right to have determined the case by way of originating summons.

In determining the sole issue, the Supreme Court started by reiterating the principle of law that originating summons is a procedure used when the evidence to be adduced is mainly by way of documents and there is no serious dispute on facts between the parties. The Court compared this with a writ of summons which is used when there are facts in dispute.

The Supreme Court noted that it is not every seeming conflict arising from affidavit evidence that would necessitate the calling of or resort to oral evidence for its resolution. However, the Supreme Court stated that from the affidavit and further affidavit of the 1st Respondent, there were copious allegations of fraudulent practices made. The Supreme Court relied on the provisions of Order 3, Rule 2(b) of the Federal High Court (Civil Procedure) Rules, 2019, to state that an originating summons procedure is not apposite for any suit which is based on an allegation of fraud. Further, the Supreme Court held that allegations of fraud were central to the case and that the allegations require that the particulars of fraud be set out to confer any modicum of seriousness on such allegations and that the matter should proceed to trial.

Hence, when there are allegations of fraud in the affidavit evidence before the trial court, there is the need to call oral evidence to prove same in accordance with the standard required and prescribed by law beyond reasonable doubt. It is on this premise that the Supreme Court held that the judgements of the trial court and the Court of Appeal were perverse and occasioned miscarriage of justice.

It is noteworthy to mention that while the above decision was the majority judgment of three justices of the Supreme Court and there were dissenting judgements. In one of the dissenting judgments, it was noted that Originating summons is a special method or process prescribed for the commencement of pre-election suits by Rule 4(1) of the Federal High Court of Nigeria (Pre-Election) Practice Directions 2022 and as such the commencement of the suit in compliance with the procedure laid down by law is valid and competent.

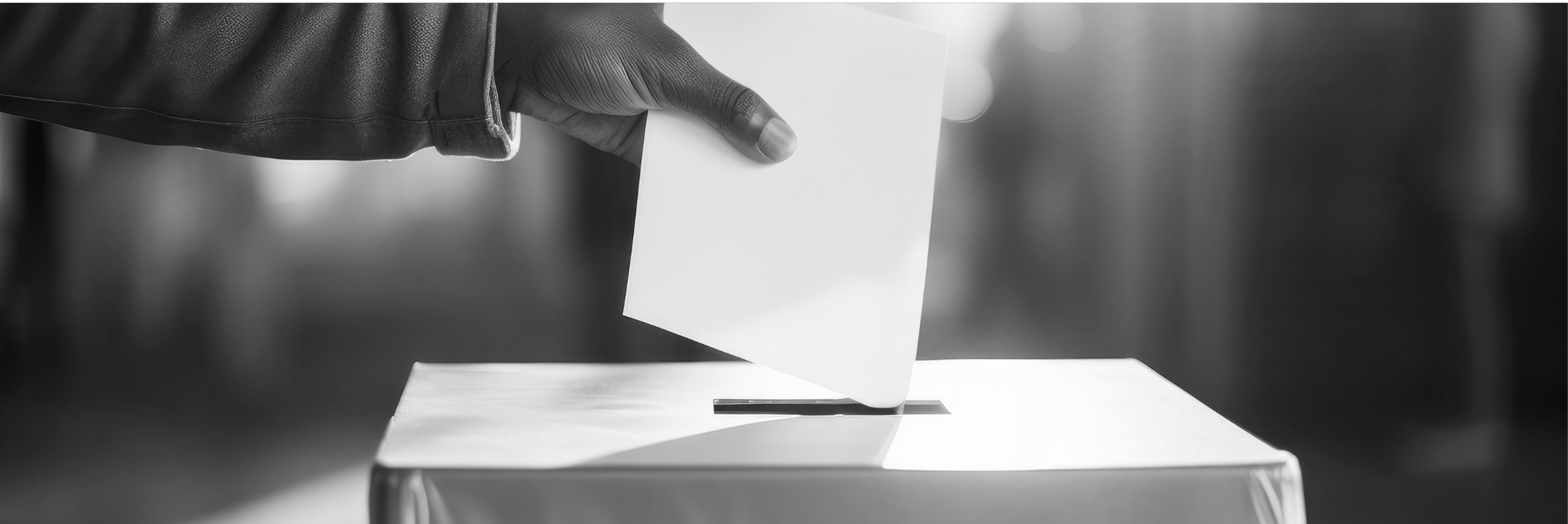
Further, in the minority judgement, it was held that the facts are not irreconcilable as the Appellant refused to controvert material averments. Hence, a party cannot refuse to controvert material averments in an affidavit and also claim that facts are in dispute as they are two mutually exclusive possibilities.

#### **Brief Comment**

This decision is one that has garnered widespread reaction, and it is important that lawyers and litigants give regard to this decision of the Supreme Court and bring it to bear when initiating Court actions or ventilating their grievances in Court.

Although, it might appear that the 1st Respondent suffered unduly and for no fault of his, as he initiated the Suit at the trial Court by way of originating summons in compliance with the provisions of the Federal High Court of Nigeria (Pre-Election) Practice Directions 2022, the decision of the Supreme Court draws strength from the long line of cases on the non-suitability of originating summons for commencing contentious matters or matters which contain disputed or peculiar facts which require the calling of evidence.

Further, since the Supreme Court is a final Court and its decisions form binding precedent on all lower Courts, lawyers and litigants must be guided by this decision and ensure that when initiating fresh action, whether pre-election or otherwise, keen attention is given to whether the facts are likely to be contentious or would require the calling of evidence in order to guide the mode of commencement of the action. Also, for matters that are time bound and particularly for election or pre-election matters, lawyers must exercise extreme caution in ensuring that their actions are not defeated, or the interests of litigants extinguished on the basis of technicalities.





# ARBITRATION MATTERS

REVIEW OF SALIENT PROVISIONS OF THE ARBITRATION AND MEDIATION ACT 2023

Another notable development in the dispute resolution space in 2023 is the enactment of the Arbitration and Mediation Act, 2023 (AMA); and it is only fitting to highlight some of the noteworthy provisions of the new law.

## ENFORCEMENT OF ARBITRATION AGREEMENT

Prior to the enactment of the AMA, the old Arbitration and Conciliation Act Cap 18, LFN 1990, (ACA or old law) gave Courts wide discretion to determine whether to enforce or disregard an arbitration agreement. The old provisions allowed a party to revoke an arbitration agreement by "leave of the Court or judge", and a Court could refuse to stay proceedings despite a valid arbitration agreement if it found "**sufficient reason why the matter should not be referred to arbitration in accordance with the arbitration**", or if the Defendant had not shown that it was "**ready and willing to do all things necessary to the proper conduct of the arbitration**".

However, the new regime under the AMA has dispensed with this latitude as it requires a Court to enforce an arbitration agreement by staying proceedings and referring parties to arbitration unless the Court finds that the agreement is "**void, inoperative or incapable of being performed.**"

## REQUIREMENT FOR WRITING

Whilst like the ACA, the AMA requires that an arbitration agreement should be in writing, the new law further recognises that an arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct or by other means. The requirement for writing is met if the information is contained in electronic communication which is accessible as to be useable for subsequent reference. Electronic communication in this instance means communication that the parties make by means of data messages. Data messages are defined as information generated, sent, received or stored by electronic, magnetic, optical or similar means including electronic data interchange, electronic mail, telegram, telex or telecopy.

## SOLE ARBITRATOR IS THE NEW DEFAULT

Under the AMA, a sole arbitrator is the new default, and unless the parties agree otherwise, an arbitral tribunal will consist of a sole arbitrator, down from three arbitrators under the repealed law. Relatedly, under the old law, if parties in international arbitration did not specify the procedure for appointing or failed to agree on the choice of an arbitrator, the appointment will be made by the appointing authority, although this usually proved difficult where the parties did not designate an appointing authority. Meanwhile under the AMA, if parties do not specify the procedure for appointing the arbitrator or designate an appointing authority, the appointment will be made by the Director of the Regional Centre for International Commercial Arbitration, Lagos.

## EMERGENCY ARBITRATOR

Under the AMA, a party may now request the appointment of an emergency arbitrator for the purpose of obtaining emergency relief. The party may, concurrent with or following the filing of a request for a dispute to be referred to arbitration but prior to the constitution of the arbitral tribunal, submit an application for the appointment of an emergency arbitrator to the designated arbitral institution or to the Court. There is also flexibility in the proceedings of the emergency arbitrator as such proceedings can be conducted through a meeting in person at any location the emergency arbitrator considers appropriate or by video conferencing, telephone and other similar means of communication.

## THIRD PARTY FUNDING

On the novel provisions on third party funding, until now, the historical common law doctrine of maintenance and champerty made it hazardous to finance litigation or arbitration in exchange for a share of any monetary award made in favour of the funded party. This changes with the AMA, which provides that the common law torts of champerty and maintenance do not apply to third-party funding arrangements in connection with arbitration seated in Nigeria or arbitration-related proceedings before a Nigerian Court. Costs of obtaining third-party funding will be accounted as one of the costs of arbitration that the tribunal is obliged to allocate in its final award.

## LIMITATION PERIOD FOR AWARD ENFORCEMENT

On application of limitation law to arbitration and mediation proceedings, the AMA settles a storm of debate about whether statutory limitation periods may be invoked in arbitration regarding the limitation period for enforcing an arbitral award. Certain state limitation laws, including the Limitation Law of Lagos State, contain provisions which the Supreme Court has interpreted to mean that the six-year limitation period for enforcing arbitral awards must be reckoned from the date on which the dispute arose, rather than the date on which the award was rendered. The AMA overrides this position as it provides that statutory limitation periods can be invoked in arbitration and clarifies that the limitation period for enforcing arbitral awards begins to run from the date on which the party received the award. Additionally, where a Court sets aside or annuls an arbitral award, the limitation period applicable to the dispute excludes the period between the commencement of the arbitration and the order annulling the award. Relatedly, the limitation period is suspended when parties resort to mediation and resumes on the day that the mediation ends without a settlement.

## TRIBUNAL'S POWER TO AWARD INTEREST

Under the old regime, the power of an arbitral tribunal to award a pre-award interest was hotly contested until the very recent case of **Units Environmental Services Limited v Revenue Mobilization Allocation & Fiscal Commission**<sup>1</sup> where the Supreme Court held that an arbitral tribunal could award a pre-award interest. However, in line with the AMA, there is an express provision empowering an arbitral tribunal to award not just a pre-award interest but also to simple and compound interest either as a pre-award or post-award interest.

## EXPEDITED PROCEEDINGS

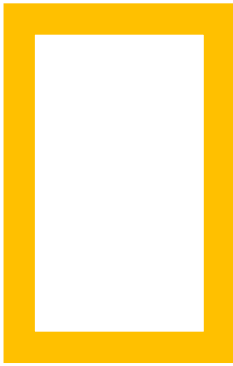
The AMA makes special rules aimed at expediting proceedings when an arbitration claim or appeal comes before Nigerian Courts. The rules modify the ordinary litigation procedures to dispense with red tape and abridge the time for taking steps in arbitration claims and appeals which will significantly reduce the time that it takes the Courts of first instance and the appellate Courts to decide arbitration matters.

## MEDIATION

Another salient change brought by the AMA is that Mediation replaces conciliation as the statute-backed Alternative Dispute Resolution (“ADR”) option.

Overall, the AMA, by design, overrides a fair amount of anachronistic arbitration case law; and in critical areas, it replaces judicial uncertainty with concrete prescriptions in the statute which reinforce the stability, speed and efficiency that have made arbitration the preferred dispute resolution mechanism in international commerce. The AMA keeps Nigeria firmly in step with global trends in international arbitration and reaffirms its status as a prime destination for cross border dispute settlement in Africa.

1. [2022] 10 NWLR Pt 1837 at 133 P 162 Paras F-H



## REVIEW OF AND LESSONS FROM THE P & ID DECISION OF THE ENGLISH COURT



*"... found that Nigeria committed a repudiatory breach which P&ID had accepted thus terminating the contract and held Nigeria liable to pay P&ID damages in the sum of **\$6.6 billion at 7% interest rate.**"*

### Brief Facts of the case

A Gas Supply and Processing Agreement for Accelerated Gas Development (GASPA) was signed by the Federal Government of Nigeria (FGN) and Process & Industrial Developments Limited (P&ID) on 11.01.2010. The contract was intended to last for 20 years; however, P&ID did not construct any Gas Processing Facilities (GPFs) and Nigeria did not provide any wet gas to GPFs.

P&ID declared a dispute and in accordance with the GASPA, same was referred to arbitration which was commenced by P&ID on 22.08.2012.

The Arbitral Tribunal by a split decision delivered on 17.07.2015, and a supplementary award of 31.01.2017 (together the Awards) found that Nigeria committed a repudiatory breach which P&ID had accepted thus terminating the contract and held Nigeria liable to pay P&ID damages in the sum of \$6.6 billion at 7% interest rate.

On 16.03.2018, P&ID applied for an Order from the English Commercial Court to enforce the Final Award and on 16.08.2019, Butcher J found that the seat of arbitration was England. On 26.09.2019, Butcher J made an order on the enforcement application allowing P&ID to enforce the Final Award but granted Nigeria permission to appeal on certain grounds. He ordered a stay of enforcement until the

determination of the appeal.

On 05.12.2019, Nigeria applied for an order from the English Commercial Court (the Court) to set aside the Award on the grounds that: (x) they were procured by fraud and other conduct that is contrary to public policy; and (y) the Tribunal lacked jurisdiction. The application was heard by Hon. Mr Justice Robin Knowles CBE.

The Judge delivered his judgment on 23.10.2023.

### Recondite issues considered by the Court

- The Court considered what would amount to substantial injustice which would enable a party to succeed in its challenge against an arbitral award on grounds of serious irregularity pursuant to section 68 of the Arbitration Act 1996.
- The Court also considered whether a party may raise objections which were not already raised during arbitration considering section 73 of the 1996 Act and what would amount to reasonable diligence?

### Decision of the English Court

Nigeria premised its application to set aside the award on Section 68 of the Arbitration Act 1996 (the Act). The Court reproduced the full term of Section 68 of the Act as follows:

*“Challenging the award: serious irregularity. (1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award. A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3).*

*(2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant—... (g) the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy.”*

In contriving irregularity against P&ID, the Court held that corrupt payments were made to one Mrs. Grace Taiga, who was Legal Director at Ministry of Petroleum Resources so that she would favour P&ID in its dealings with Nigeria as it relates to the GSPA.

The Court also held that at the arbitration proceedings, P&ID provided and relied on materials to the Tribunal which it knew to be false, and that P&ID continued to bribe Grace Taiga during the arbitration period to suppress from the Tribunal and Nigeria the fact that she had been bribed when the GSPA came about.

Further, the Court held that P&ID retained Nigeria’s internal documents it received during the arbitration instead of returning them unread and it did this to monitor Nigeria whether it had become aware of the deception.

On the seriousness of this irregularity and whether substantial injustice had been done to Nigeria to warrant Nigeria to succeed under Section 68 of the Act, the Court held that when Section 68 of the Act refers to seriousness, its focus is on the consequences, and specifically the consequences for justice. The Court further held that there will be substantial injustice where it is established that, had the irregularity not occurred, the outcome of the arbitration might well have been different.

The Court held that the arbitration would have been completely different, and in ways strongly favourable to Nigeria, had the fact of bribery of Grace Taiga been made known to the arbitral tribunal. This would have brought in the issue of whether the GSPA was procured by fraud, and as a result voidable. In essence, discovery of the concealment of the bribery of Grace Taiga would have completely altered the Tribunal’s approach to the evidence of P & ID which would have altered the outcome of the arbitration. In this instance, the Court held that it had no hesitation in concluding that Nigeria suffered substantial injustice within the meaning of the section.

On the issue of whether considering the provisions of Section 73 of the Act, a party may raise objections which were not already raised during arbitration when he took part in the arbitration, the Court reproduced the provisions of Section 73 of the Act as follows:

*“(1) If a party to arbitral proceedings takes part, or continues to take part, in the proceedings without making, either forthwith or within such time as is allowed by the arbitration agreement or the tribunal or by any provision of*

*this Part, any objection ... (a) that the tribunal lacks substantive jurisdiction ... or (d) that there has been any other irregularity affecting the tribunal or proceedings ... he may not raise that objection later, before the tribunal or the court, unless he shows, 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.”*

The Court held that the test under section 73 is that in order for a party not to lose its right to object, it must show that at the time it took part or continued to take part in the arbitration, it did not know or could not with reasonable diligence have discovered the grounds for the objection at the arbitration stage.

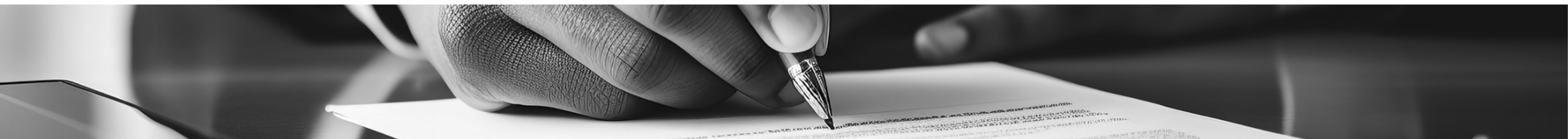
In holding that Nigeria could not have known the grounds for objection at the arbitration stage, the Court stated that Nigeria first began to acquire knowledge of the bribery of Mrs. Grace Taiga when she was interviewed by and gave a statement to EFCC in September 2019 and that reasonable diligence did not require an interview capable of extending to bribery or corrupt payments at any earlier point. The Court also held that an interview with Mrs. Taiga before 2019 would not have revealed then what was revealed by her statement in 2019 and that even her statement of 2019 did not reveal the first bribe at the time of the GSPA; as Nigeria had to go to the New York Court to obtain that.

The Court further held that Nigeria first began to acquire knowledge that P&ID had Nigeria’s Internal Legal Documents on 29 October 2021 when that was disclosed to it by Kobre & Kim, and that reasonable diligence required nothing from Nigeria in this wise. Accordingly, the Court held that Nigeria did not lose its “right to object” under section 68(2)(g), that the Awards were obtained by fraud and the way in which they were procured was contrary to public policy.

#### **Brief Comment on Decision**

This case exposes the vulnerability of arbitration to fraud; and the Court noted that this starts even at the point of drafting contracts where there is imbalance of power and where one party has the money to instruct better lawyers or has compromised the other party to skew the Contract to its favour. This was present in the instant case where the GSPA required more details, but evidence showed that P&ID has some level of control over the drafting process.

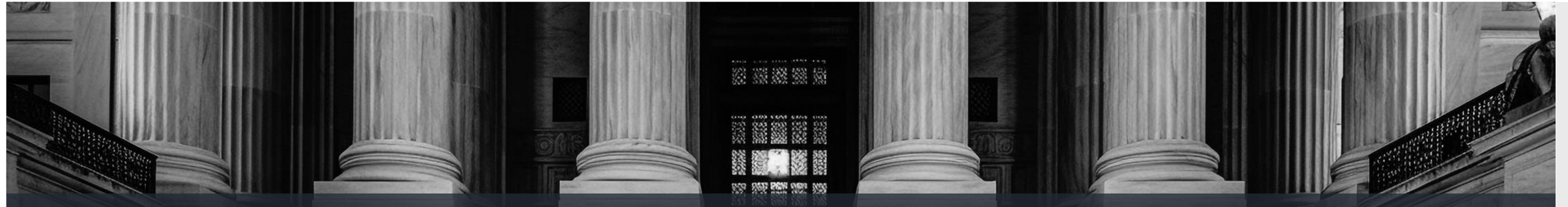
Further, the Court noted that arbitration requires greater scrutiny, or it might become less reliable, and more vulnerable to fraud especially when it involves a significantly large value, or when one of the parties involved is a state. A reason for this need for greater scrutiny arises from the fact that unlike judicial proceedings that are public and subject to much supervision and commentary, arbitrations are private proceedings which, except subject to limited supervision by the courts, enjoy confidentiality and do not have as much publicity or scrutiny. The Court noted that Nigeria was not up to par at the arbitration proceedings and that perhaps if there was more scrutiny like in Court proceedings, Nigeria might have dealt better at the proceedings.





# CONSTITUTIONAL MATTERS

REVIEW OF THE 5TH ALTERATION ACT TO THE CONSTITUTION OF THE FEDERAL REPUBLIC OF NIGERIA, 1999



*In a bid to promote true federalism in Nigeria, President Muhammad Buhari signed sixteen (16) bills which altered salient provisions of the 1999 Constitution of the Federal Republic of Nigeria (As Amended) (“the Constitution”). Here are some of the notable provisions of the 5th Alteration.*

## FINANCIAL AUTONOMY OF HOUSE OF ASSEMBLY

Act No.6 amends Section 121 of the Constitution to provide for the financial autonomy of the House of Assembly of each state. Specifically, the amendment provides that any amount standing to the credit of a State House of Assembly in the Consolidated Revenue Fund of the State is to be paid directly into the account of the State’s House of Assembly. In addition, Act No. 6 further strengthens the financial autonomy of the House of Assembly and the Judiciary of each state by establishing for each state, a Disbursement Committee.

## PRE-ELECTION MATTERS AND ELECTION PETITIONS

As it relates to pre-election matters and election petitions, Act No.10 amends Section 285 of the Constitution by inserting a new subsection 13A which provides that the period where a natural disaster, war or any State or National emergency prevents the filing of a pre-election matter or election petition matter will not be reckoned with in the computation of time for filing of an election petition, delivery of judgment in election petition, etc.

## ACTS NO. 15, 16 AND 17

These devolve powers to make laws with respect to prison, railway, and power generation, transmission, and distribution to the state legislature by moving the power to legislate on the items from the Exclusive Legislative List to the Concurrent Legislative List. The implication of this is that the state government can henceforth make laws in relation to these items.

## RIGHT TO FOOD AND FOOD SECURITY

In recognition of the critical nature of food security to the survival of the nation, Act No. 34 altered Section 16 of the Constitution in subsection 2(d), by substituting the words “suitable and adequate food, with the words “right to food and food security”. Thus, a state shall direct its policy towards ensuring amongst others, the right to food and food security.



# DIGITALISATION OF COURT PROCEEDINGS IN NIGERIA



## Review of the 2023 Amendments to the Evidence Act

The Nigerian legal landscape is undergoing a transformative shift towards digitization, with recent legislative amendment reflecting the imperative to adapt to technological advancements. The Evidence (Amendment) Act 2023 (Amendment Act) in Nigeria highlights key amendments that align the Evidence Act with contemporary digital realities. We will now proceed to mention some of these key amendments.

## Amendments to the Evidence Act 2011

The Amendment Act introduced notable modifications to Section 84 of the Principal Act, addressing the admissibility of computer-generated documents. The term "documents" is expanded to include "electronic records" in acknowledgment of the prevalence of electronic evidence. Consequential amendments in Sections 84A to 84D facilitate the acceptance of electronic forms, ensuring compliance with legal requirements and emphasizing the reliability of digital signatures.

Further, Section 93 of the Evidence Act 2011 (the Principal Act) underwent significant change to explicitly include "digital signature" alongside "electronic signature." This adjustment recognizes the nuanced difference between the two and underscores the legal validity of digital signatures, which involve more complex authentication requirements. The move is aligned with the broader goal of embracing digitization in evidence.

Sections 108, 109, and 110 of the Principal Act are amended to accommodate electronic deposition of affidavits. This reflects a pragmatic response to the challenges posed by traditional deposition methods, allowing for virtual depositions through audio-visual means. The amendments recognize the evolving nature of legal practices and promote accessibility in legal proceedings.

Section 255 of the Principal Act now includes provisions for an Electronic Gazette. This innovation signals a shift towards electronic publishing of government laws, regulations, and notices, marking a departure from traditional paper-based gazettes. This forward-looking approach aligns with the broader trend of digital information dissemination.

Section 258 of the Principal Act is amended to include definitions of key terms related to the amendments. Notably, the introduction of definitions of "digital signature" and "electronic signature" aims to provide clarity in understanding these terms within the context of the Act. However, an oversight regarding the absence of the Second Schedule specifying electronic techniques for electronic signatures requires correction. On the whole, considering the important stature of the Evidence Act in our jurisprudence and in Court proceedings in Nigeria, these amendments signify Nigeria's conscious effort in keeping with the global trend of digitalization.



# NOTABLE FOREIGN CASES REPORTED IN 2023

**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) initiated legal proceedings against Achter Land & Cattle Ltd (ALC) in the King's Bench for Saskatchewan. SWT claimed that they had entered into a deferred delivery purchase contract with ALC, wherein SWT agreed to purchase and ALC agreed to deliver 87 Metric Tonnes of flax at a specified rate. The contractual arrangement originated from a text message sent by SWT's representative, Kent Mickleborough, to ALC's representatives, Bob and Chris Achter. Following negotiations over the phone, Kent sent a draft contract specifying the terms, which ALC was expected to confirm.

Crucially, ALC's confirmation came in the form of a "thumbs-up" emoji ("👍") in response to Kent's text message confirming the flax contract. However, despite this confirmation, ALC failed to deliver the agreed-upon flax, leading SWT to file an action against ALC for breach of contract. SWT sought summary judgment for \$82,200.21, citing ALC's failure to fulfill the contractual obligation.

## Decision of the Court

In its decision, the court analyzed the formation of a contract between South-West Terminal Ltd (SWT) and Achter Land & Cattle Ltd (ALC). The court emphasized the importance of the three essential elements of a contract: offer, acceptance and the intention to create a legal relationship. Kent, representing SWT, provided evidence of previous contracts initiated with ALC, where the parties communicated and confirmed terms over the phone, and subsequent contracts were executed without issues. The court held that ALC's previous responses, such as "Looks good," "Ok," and "Yup," indicated a clear intention to create contracts,

supporting the validity of the flax contract. Additionally, the court deemed the "thumbs-up" emoji used by ALC in response to the flax contract as a valid expression of acceptance in electronic form, qualifying under the Electronic Information and Documents Act.

Furthermore, the court rejected ALC's argument that the contract was void due to uncertainty, emphasizing that the absence of a photo of the "General Terms and Conditions" or the use of "Nov" for November did not render the contract void. The court reasoned that ALC could reasonably expect the terms to be similar to previous contracts, and all essential terms were contained in the first page sent to Chris. Addressing the enforceability of the contract under the Sale of Goods Act, the court cited the Electronic Information and Documents Act, noting that a "thumbs-up" emoji constituted a non-traditional but valid electronic signature. The court also highlighted the ability to determine the identity of the signer through their unique cell phone number. Ultimately, the court ruled in favor of SWT, recognizing the validity of the contract and ALC's breach.

## Brief Comment

We hold the view that this decision is progressive and aligns with the realities of the digital age; the Court was persuaded by substance rather than the strictness of form. We believe that the Nigerian Courts can be persuaded by this decision when faced with similar scenario.

*Kindly see pages 19-22 of our Dispute Resolution 3rd Quarter Newsletter, 2023 for detailed analysis on the case.*

**Time Theft in a Remote Work Arrangement is a Just Cause for Termination of Employment– Canadian Civil Resolution Tribunal in Besse v. Reach CPA Inc., 2023 BCCRT 27**



**Brief Facts**

On 29.03.2022, Reach CPA Inc (Reach) terminated the employment of Besse due to an allegation of time theft. Besse was employed by Reach as an accountant on 20.09.2021 and her employment agreement provided for remote work arrangement. Besse contended before the Civil Resolution Tribunal (“CRT”) that her employment was terminated without any just cause and claimed \$1,371.60 as unpaid wages and \$4,166.67 as one month’s severance pay in lieu of notice, the total claim amounting to \$5,538.27. However, she limited her claim to \$5,000, being the CRT small claims monetary limit.

Reach’s position is that on 21.02.2022, he installed a time-tracking software application called TimeCamp on Besse’s work laptop and that after discovering some irregularities in Besse’s timesheet entries, her TimeCamp data between 22.02.2022 and 25.03.2022 was analysed and discovered 50.76 unaccounted hours that Besse had reported on her timesheets but did not appear to have spent on work-related tasks. Hence, according to Reach, Besse’s employment was terminated because she engaged in time theft.

Reach thereafter filed a counterclaim against Besse for the sum of \$1,506.34 for the wages Reach already paid Besse for the 50.76 hours she did not work.

**Decision of the Tribunal**

The issues for determination before CRT were: (i) was Besse wrongfully dismissed and is she entitled to \$4,166.67 for 1 month’s severance pay in lieu of notice, or did Reach have just cause for terminating her employment; (ii) does Miss Besse owe Reach \$1,506.34 for time theft; (iii) is Miss Besse entitled to \$1,371.60 for unpaid wages; and (iv) does Miss Besse owe Reach \$1,096.73 for the unforgiven part of the advance it made to her.

The CRT analysed the facts of the case and the video evidence presented before the Court by Reach which Besse did not dispute

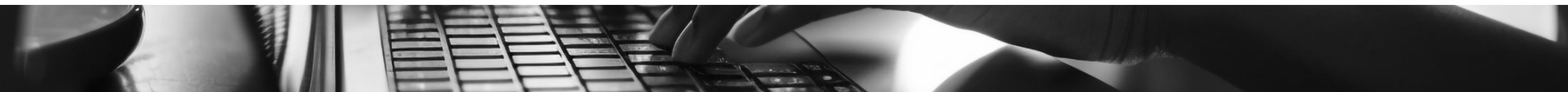
and concluded that TimeCamp accurately recorded Besse’s work activities and that there were 50.76 unaccounted hours which Besse unjustifiably recorded on her timesheets. Hence, the CRT found Reach to have successfully proven time theft between 22.02.2022 and 25.03.2022 against Besse.

In answering the question of whether Besse was wrongfully dismissed, the CRT held that the test for just cause is whether an employee’s misconduct amounts to an irreparable breakdown in the employment relationship. Thus, the CRT then stated that: “given that trust and honesty are essential to an employment relationship, particularly in a remote work environment where direct supervision is absent, I find Miss Besse’s misconduct led to an irreparable breakdown in her employment relationship with Reach and that dismissal was proportionate in the circumstances. So, I find Reach had just cause to terminate Ms. Besse’s employment.”

The CRT dismissed the entirety of Besse’s case and further held that Reach was entitled to the wages paid to Besse in respect of the unaccounted hours of 50.76 which Besse had recorded in her timesheet but did not work for. The CRT granted the counterclaim accordingly.

While there is no similar decision in Nigeria as it relates to remote work arrangements, Nigerian Courts have held in decided cases that absence from work is a valid ground to terminate an employer’s employment. Considering the change in work culture and the general shift to remote-working, it is arguable that absence of work in the traditional work setting is same or almost same with time theft as in both instances, the employer cannot account for the employee’s time and the employee abdicated duty without the authorization of the employer. Hence, it is arguable that under the Nigerian Law, time theft will also constitute a valid ground to terminate an employee’s employment.

*Kindly see pages 22-24 of our Dispute Resolution 2nd Quarter Newsletter, 2023 for detailed analysis on the case.*



**A one-off event or an isolated escape cannot give rise to a continuing nuisance: the UK Supreme Court in Jalla and another (Appellants) v Shell International Trading and Shipping Co Ltd and Another (Respondents) [2023] UKSC 16**



**Brief Facts**

This case is an appeal which concerns the tort of private nuisance in the context of a major oil spill. The principal question considered by the Court was whether there is a continuing private nuisance such that there is a continuing cause of action to the effect that the limitation period runs afresh from day to day.

The claim was in respect of alleged oil pollution of land, including waterways, caused by an oil spill which occurred off the coast of Nigeria on 20 December 2011 (“the Bonga Spill”). The leak which gave rise to the Bonga Spill occurred during a cargo operation at an offshore installation in the Bonga oil field. The cargo operation and the leaking were stopped after about six hours after the leak commenced, although the Appellants allege the oil has not been removed or cleaned up.

**Issue before the Court**

Whether a one-off event or an isolated escape can give rise to a continuing nuisance.

**Decision of the Tribunal**

The Appellants argued that there is a continuing nuisance in this case because, the oil is still present on the Appellants’ land and has not been removed or cleaned up.

The Supreme Court reasoned that if this submission were correct, it would mean that if the other ingredients of the tort of nuisance were made out, and a Claimant’s land were to be flooded by an isolated escape on day 1, there would be a continuing nuisance and a fresh cause of action accruing day by day so long as the land remained flooded on day 1000. It can therefore be seen that the effect of accepting the submission would be to extend the running of the limitation period indefinitely until the land is restored.

It would also impliedly mean that the tort of private nuisance would be converted into a failure by the defendant to restore the

claimant’s land. It might also produce difficulties for the assessment of damages, which are, in general, to be assessed once and for all. Where land is flooded on day 1, all the losses, past and prospective for that accrued cause of action can be assessed on day 1 (including the cost of restoration). It is unclear how there can be a different assessment of damages, for a different cause of action, on day 2.

The Court found expressly that there was no continuing nuisance in this case (and there would be no continuing nuisance in the example of the one-off flood) because, “outside the Appellants’ land, there was no repeated activity by the defendants or an ongoing state of affairs for which the Defendants were responsible that was causing continuing undue interference with the use and enjoyment of the Claimants’ land. The leak was a one-off event or an isolated escape.” Thus, the cause of action accrued and was complete once the Appellants’ land had been affected by the oil.

**Brief Comment on the Decision**

The decision provides support to the principle that a one-off event or an isolated escape cannot give rise to a continuing nuisance. The Supreme Court drew a distinction between a continuing nuisance and the continuing effect of an act of nuisance, such that the effects of the oil spillage could not be taken to be a continuing act that serves to refresh the cause of action on a *de die in diem* basis.

This position is consistent with the position of the Nigerian Courts that have also established that there is a difference between a continuing tortious act and permanent damage arising from a single tortious action, such that only the former can give rise to a cause of action that is renewed from time to time per the continuance of the act of nuisance.

*Kindly see pages 15-16 of our Dispute Resolution 2nd Quarter Newsletter, 2023 for detailed analysis on the case.*



# 2024 OUTLOOK

# TESTING THE NEW WATERS IN ARBITRATION

Arbitration has garnered increased popularity globally as the preferred means of resolving commercial disputes<sup>2</sup>. This is due to the advantages that arbitration offers, some of which include the appointment of competent experts as arbitrators and speedy resolution of disputes as compared to traditional court litigation, amongst other benefits. On 26.05.2023, the Arbitration and Mediation Act 2023 (AMA) became the extant arbitration law in Nigeria. The AMA provided the much-needed clarity with concrete prescriptions on specific procedure of arbitral proceedings and has overridden a fair amount of anachronistic arbitration case law. Given the laudable and innovative provisions in the AMA, we envisage that more entities will opt for the resolution of their disputes via arbitration in the year 2024.

Further to the enactment of the AMA, we anticipate that there will be an increase in the number of both institutional and ad hoc arbitral proceedings within Nigeria given that the AMA, by some of its provisions, has sought to reinforce the stability and efficiency that has made arbitration the preferred dispute resolution mechanism in commerce. Worthy of note are the provisions of the AMA on third party funding of arbitration<sup>3</sup>. Until the enactment of the AMA, the historical common law doctrines of maintenance and champerty had made it hazardous to finance litigation or arbitration in exchange for a share of any monetary award made in favour of the funded party. Arbitration, being cost intensive, has thus experienced reduced usage for the

resolution of dispute by parties who are unable to personally bear the cost of arbitration. Given that the costs of obtaining third-party funding will be accounted as one of the costs of arbitration that the tribunal is obliged to allocate in its final award,<sup>4</sup> parties who obtain fundings from third parties are thus reassured of recouping the cost of arbitration, which invariably increases the employment of arbitration as the preferred means of resolving commercial disputes.

Also, considering the AMA's clarification that the limitation period for enforcing arbitral awards begins to run from the date on which the party received the award,<sup>5</sup> the apprehension that commencing arbitral proceedings may negatively hamper or foreclose the statutory period for instituting an action before the Court or enforcing the arbitral award has been adequately laid to rest.

Lastly, we anticipate that the novel provisions of the AMA are likely to be put to test by the Nigerian Courts. Notable among those provisions are the conditions to be considered by the court in the grant of an application for stay of proceedings pending arbitration, the appointment of emergency arbitrators by the Court, the grant and enforcement of interim reliefs by court pending arbitration, etc. We thus envisage an increase in court actions testing the waters of these new provisions of the AMA.

2. Gary Born and Wendy Miles 'Global Trends in international arbitration' accessible at [https://www.wilmerhale.com/-/media/files/wilmerhale\\_shared\\_content/files/editorial/publication/globaltrends\\_internationalarbitration.pdf](https://www.wilmerhale.com/-/media/files/wilmerhale_shared_content/files/editorial/publication/globaltrends_internationalarbitration.pdf) last accessed on 27.11.2023.

3. Section 61 and Section 50(1)(g) of the AMA.

4. Section 50(1)(g) of the AMA.

5. Section 34 (4) of the AMA.

# DISPUTES FROM THE REVOCATION, SUSPENSION & AWARD OF GOVERNMENT PROJECTS AND CHANGE IN GOVERNMENT POLICIES



In some climes, the government runs as a continuous entity where the activities and policies of a previous administration are continued and completed by the new administration. However, as is routine in some developing nations, the emergence of a new government occasions a reassessment of policies and decisions made by the previous administration, including the awards of contracts where the new government will abandon the awarded projects, refuse to honour the agreement with contractors and even rescind or revoke some of these awards.

In Kano State of Nigeria for example, upon the swearing in of the new governor, Governor Abba Yusuf, he immediately instructed security agencies to take over state properties that were sold by the last administration<sup>6</sup> and there were widespread reports of the demolition of most of the properties. This is among other reversals in government policies happening around the country such as Benue State, Abia State, Zamfara State as well as other parts of the country.

We envisage that as election petitions are being concluded and the Supreme Court gives its final verdict on who the governors of the various states are, more of these decisions to reverse the policies of the previous governments will be taken which will

ultimately lead to the suspension of projects and revocation of awards, and contracts will be awarded to different vendors, consultants and contractors. We anticipate that individuals and businesses aggrieved by the new policies would challenge some of the actions and policies of the government across various state governments and against the federal government. Also, the new government will do all that it can, whether through the Courts or by other policies, to ensure it stamps its own policies and interventions firmly into its administration.

Ultimately, while we are not ruling out the possibilities of political solutions in resolving the disputes that might arise because of the actions of the new government, we envisage that there would arise quite a number of disputes from this situation. Furthermore, we also envisage that there will be a lot of public interest disputes from individuals, pressure groups and international entities, such as foreign governments or organizations as the Nigerian polity has been witnessing a lot of changes in socio-economic policies at the state and federal levels. We consider that organizations and individuals, in a bid to ensure correctness with procedure and compliance with relevant laws, would contest any policy which they believe is improper.

6. Vanguard, 'Gov. Abba orders security to take over sold public properties, assets by Ganduje govt' (29 May 2023), available at [Gov. Abba orders security to take over sold public properties, assets by Ganduje govt - Vanguard News \(vanguardngr.com\)](https://www.vanguardngr.com/2023/05/gov-abba-orders-security-to-take-over-sold-public-properties-assets-by-ganduje-govt/), accessed 21 November 2023.

# POTENTIAL DISPUTES BETWEEN THE STATE AND FEDERAL GOVERNMENT ON POWERS TO LEGISLATE ON PUBLIC INFRASTRUCTURE

On 17th March 2023, President Muhammadu Buhari assented to sixteen (16) bills amending certain provisions of the Constitution of the Federal Republic of Nigeria 1999 (as amended) (“**1999 Constitution**”). Of particular significance is the endowment on the State Houses of Assembly, the powers to legislate on key public infrastructure such as railway operation, generation, transmission and distribution of electricity, and establishment and management of correctional services within the states.

Prior to the assent of Alteration Acts No. 15, No 16, and No 17 relating to correctional services, railways and electricity respectively (“**the Amendments**”), the Federal Government was imbued with the exclusive powers to legislate over railways, prisons and areas covered by the national grid.<sup>7</sup> However, with the advent of the Amendments, the items are now captured under the Concurrent Legislative List thereby empowering both the federal and state governments to concurrently legislate on the matters therein. Bearing in mind the effect of the Amendments on the legislative process across both levels of government, it is anticipated that the federal and state Governments may be at odds if their legislative arms enact laws in respect of the same infrastructure, for example, the Electricity Act 2023 (“**the Act**”) was passed by the Federal Government into law on 09.06.2023 and various states have also commenced the process of passing their own Electricity Laws. We highlight below the possible areas of conflict that may arise in the exercise of powers conferred by the Amendments.



## POWERS TO LEGISLATE ON ELECTRICITY

One of the notable provisions of the Amendments is that it expanded the scope of state legislative powers to include generation, transmission and distribution of electricity in areas covered by the national grid system. Prior to the Amendments, states were only permitted to make laws for the generation, transmission and distribution of electricity in areas not covered by the national grid.

The concurrent power to legislate over matters relating to electricity connotes that the states are also empowered to set up State Electricity Regulatory Commissions to issue licenses and regulate the generation, transmission and distribution of electricity within their state borders. We envisage that conflict might arise between the Federal Government through Nigerian Electricity Regulatory Commission (NERC) and the State Governments through their respective electricity agencies in respect of the license applicable to participants in the electricity sector. Although it can be argued that the Act has created a regime to take care of the transition from NERC to States electricity regulatory authority and the possibility of dispute in this transition. Section 230(2)b of the Act provides that a State may at any time establish a State electricity regulatory authority and deliver a formal notification of the establishment of the State electricity regulatory authority to NERC. Further, by the provisions of Section 230(6) of the Act, upon the completion of the transition, NERC loses any further regulatory responsibility for electricity market activities carried out within such State. Also, Section 230(9) of the Act provides that NERC and all State electricity regulatory agencies have the obligation to foster and maintain a beneficial inter-institutional relationship amongst themselves and shall establish an inter-governmental body to promote and foster this inter-institutional relationship. Hence, strong arguments can be made for the view that the provisions of the Act go to great lengths to ensure that there is no dispute between the Federal Government and States. Nonetheless, we still do not rule out the possibility of conflict or dispute in the process of giving effect to the provisions of the Act and Act. No. 17 of the Amendments.

7. Prior to the Amendments, the state government by virtue of paragraph 14(b), Part II of the 2nd Schedule to the 199 Constitution, could make law in respect of the generation, transmission and distribution of electricity to areas not covered by the national grid within a state.



#### POWER TO LEGISLATE ON RAILWAY OPERATIONS

Prior to the Amendments, the Federal Government had the exclusive power to regulate and develop railway infrastructure in Nigeria and enacted the National Railway Corporation Act (“the NRC Act”) to regulate the railway transport sector through the National Railway Corporation.<sup>8</sup> However, State Houses of Assembly now have the power to make laws for States relating to the establishment, operation and maintenance of a state railway carrier within the state including the construction and maintenance of railway tracks and infrastructures within the State.

The NRC Act confers the power to construct and operate railways – both inter-state and intra-state in the NRC. However, by virtue of the Amendments, the State Government is now empowered to make state laws relating to railway transport intrastate. We are of the view that the provisions of Act No. 16 of the Amendments are quite clear on the powers of the Federal Government on railway operations. As such, it is unlikely that the provisions of the NRC Act as it relates to the construction and maintenance of railway tracks and infrastructure within a State will stand for long considering its inconsistency with the Constitution. We also anticipate that the question of this inconsistency will be submitted to and determined by the Court.



#### POWER TO LEGISLATE ON MANAGEMENT OF CORRECTIONAL FACILITIES

Further to the Amendments, States are imbued with the power to make laws in respect of establishment and management of correctional facilities within states. Prior to the Amendments, the Federal Government through the National Correctional Service<sup>9</sup> and the National Correctional Service Act 2004 regulated the correctional facilities in Nigeria. However, with the addition of establishment and management of correctional facilities to the Concurrent Legislative List, a conflict which would require judicial determination may arise where subsequent legislation enacted by a State Government in relation to correctional facilities is inconsistent with Federal laws.



8. The Federal Government agency of Nigeria which regulates the National Railway.

9. Federal Government agency of Nigeria which operates prisons.

# DIVESTMENT OF OIL ASSETS: INCREASE IN OIL POLLUTION DISPUTES

The Nigerian economy is heavily reliant on oil and gas, with the country being a prominent oil producer boasting reserves of 37 billion barrels; this has led to a heavy presence of large international oil corporations (IOC) in Nigeria over the years. At the moment, five international oil companies, namely Shell, Chevron, Total Energies, ExxonMobil, and Eni, continue their operations in the country. However, a noteworthy trend in the Niger Basin area of Nigeria reveals that these IOCs have divested about 26 oil mining licenses over the past decade.<sup>11</sup> With the surge in the divestment of oil assets in Nigeria, particularly by large IOC due to environmental crises and many other factors – like unfavourable regulations and security concerns among others, the increase in disputes surrounding various divestment issues is inevitable.

This trend of divestment among IOCs have seen the IOC offer to sell their oil and gas assets valued at billions of dollars. Notably, Eni disclosed an agreement with Oando PLC in September 2023, involving the sale of interests in six onshore blocks and the Okpai gas power plant located in Delta State.<sup>12</sup> Also within the last decade, Shell had divested its shares in OMLs 4, 38, and 41 to Seplat, OML 29 to Aiteo Eastern Exploration and Production Company Limited (AITEO), OML 42 to Neconde, OML 18 to SPV Eroton, and OML 17 to Trans-Niger Oil and Gas (TNOG). While these IOCs continue to divest their assets due to reasons ranging from insecurity, repatriation of profit, regulatory uncertainties in Nigeria to investment in more energy friendly sources, it is expected that incidents will occur that may lead to legal disputes. We will briefly examine some of the situations with potential legal disputes.

## POTENTIAL LEGAL DISPUTES

### INCREASE IN OIL POLLUTION DISPUTES

Upon divestment of assets by the IOCs, we envisage that host communities and individuals, being aware that the IOCs are divesting their assets, would hastily proceed to the Courts to institute claims for oil spills, pollution and injury purportedly caused by the activities of the IOCs which occurred in the past in order to get what they can from the IOCs before they divest their major assets, transfer ownership and liability and leave the shores of Nigeria. Hence, we envisage a flurry of such actions by host communities and individuals. Also, as these IOCs continue to divest their interests, if these assets are not properly managed by the acquiring companies, we envisage an increase in oil pollution claims by the host communities where these assets are located.

### DISPUTES RELATING TO DECOMMISSIONING

Another issue that is foreseen to take the front burner is that of decommissioning of equipment and the attendant dispute that is likely to ensue therefrom. Decommissioning is the process of returning an oil facility, whether onshore or offshore, to its pre-operation state. It is the process of safely and permanently closing down and abandoning oil and gas facilities that are no longer productive or economically viable.

Issues that are likely to arise as it relates to decommissioning include failure to decommission or properly decommission a facility thus exposing the site and facility to continual degradation and environmental damage during decommissioning - such as soil and water contamination, habitat disruption, and the release of hazardous substances and chemicals, posing risks to ecosystems and third parties amongst others. All of these are likely to spiral into claims in Court.

### DISPUTES AS TO INTEGRITY OF ASSETS

Closely connected to the above, is the fact that these local oil companies acquiring divested assets often acquire weak infrastructure, and infrastructure requiring extensive maintenance, upgrades, and even decommissioning. Moreover, physical inspection of all these infrastructures, particularly pipelines, may not be totally feasible during the process of acquisition/divestment. Thus, issues as to integrity of these infrastructures, some of which these IOCs have been using for decades, will certainly occur. Interestingly, Aiteo is said to be currently embroiled in an ongoing court case against Shell regarding the ownership and integrity of the acquired assets in OPL 29 which was acquired in 2014.

In view of the foregoing analysis, it is projected that 2024 may herald an increase in the number of disputes arising from the oil and gas sector particularly as it relates to oil pollution and decommissioning of oil and gas machineries.

10. Nigeria's oil reserves now stand at 37billion – NUPRC (25 April 2023) – <https://businessday.ng/energy/article/nigerias-oil-reserves-now-stand-at-37billion-nuprc/> accessed on 24.11.2023

11. Nigerian Energy News < <https://www.nogenergyweek.com/media-centre/news-centre/2020/december/iocs-divestments-threat-to-nigeria-s-oil-sector-fgmittances/#:~:text=A%20report%20in%20the%20Africa,more%20set%20to%20be%20sold.>> accessed on 28.11.2023

12. Eni signs agreement to sell Nigerian subsidiary NAOC Ltd to Oando PLC - <https://www.eni.com/en-IT/media/press-release/2023/09/eni-signs-agreement-sell-naoc.html> accessed on 23.11.2023

# TAXATION AND THE NIGERIAN ECONOMY: TAX ASSESSMENTS, APPEALS AND IMPACT ON REVENUE GENERATION



Nigeria is presently saddled with several economic woes ranging from budget deficit, to lack of sufficient revenue generation avenues and economic hardship. Certainly, these are not the best of economic times. Aside from oil revenue which has and continues to rapidly lose its allure, there is no gainsaying that Nigeria needs another source of revenue to shore up its budget deficit and generate revenue to build infrastructure, sustain governance and finance policies. Since the Strategic Revenue Growth Initiative (SRGI), the government has communicated its willingness to maximize tax as a means of revenue generation and so far, the FIRS has impressively boosted tax revenue.

Past administrations have looked more closely into revenue generation through taxes; there has been increased awareness of tax obligations. The state and federal tax agencies have continued to issue demand notices and tax assessments on individuals and corporates respectively. In 2024, we do not expect this to change, especially considering the ongoing nationwide VAT and WHT

monitoring exercise which commenced in 2023. We envisage that the new government will be more interested in tax reforms, plugging tax leaks and ensuring that it gets the best and most from its tax laws. The President has already instituted the Presidential Fiscal Policy Reform Committee, which is aimed at holistically reviewing amongst others, the tax administrative system to ensure compliance, reduce leakages and promote tax efficiency. It is expected that the result of the reform will improve Nigeria's tax base, and possibly reduce the multiplicity of taxes on both individuals and corporates.

The necessary implication of this is that irrespective of the positives of the policy reforms, we expect that there would be increase in tax contests, tax disputes and tax appeals. It is also envisaged that the government's bid to get the most from its tax policies could lead to incorrect or bloated tax assessments; and individuals and corporates are likely to contest the assessments and applicability of some taxes levied against them.

<b>ACA</b>	Arbitration and Conciliation Act Cap 18, LFN 1990
<b>ADR</b>	Alternative Dispute Resolution
<b>AITEO</b>	AITEO Eastern Exploration and Production Company Limited
<b>AMA</b>	Arbitration and Mediation Act 2023
<b>Amendment Act</b>	The evidence (amendment) Act 2023
<b>BVAS</b>	Bimodal Voters Accreditation System
<b>CFRN</b>	Constitution of the Federal Republic of Nigeria as amended
<b>CRT</b>	Civil Resolution Tribunal
<b>FCT</b>	Federal Capital Territory, Abuja
<b>FGN</b>	Federal Government of Nigeria
<b>FIRS</b>	Federal Inland Revenue Service
<b>GPFs</b>	Gas Processing Facilities
<b>GASPA</b>	Gas Supply and Processing Agreement for Accelerated Gas Development
<b>INEC</b>	Independent National Electoral Commission
<b>IOC</b>	International Oil Corporations
<b>NERC</b>	Nigerian Electricity Regulatory Commission
<b>NRC Act</b>	Nigerian Railway Corporation Act
<b>NWC</b>	National Working Committee
<b>PRINCIPAL ACT</b>	Evidence Act 2011
<b>PEPC</b>	Presidential Election Petition Tribunal/Court
<b>P&amp;ID</b>	Process & Industrial Developments Limited
<b>REACH</b>	Reach CPA Inc
<b>STRGI</b>	Strategic Revenue Growth Initiative
<b>TNOG</b>	Trans-Niger Oil and Gas

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