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Introduction

This is the maiden edition of the TEMPLARS Dispute Resolution Digest (the **Digest**), a quarterly publication focused on the evolving litigation landscapes of Nigeria and Ghana. The Digest offers a curated selection of landmark judgments, legislative updates, and pivotal developments in dispute resolution from the last quarter of 2023 to date.

The Digest is designed to bridge the gap between theory and practice and provide valuable insights into the contemporary issues shaping dispute resolution in both jurisdictions for legal professionals, researchers, and relevant stakeholders.

In this edition, we explore key Nigerian Court decisions such as *NNPC v. Fung Tai Co. Ltd (2023) 15 NWLR (Pt. 1906) 117,* which clarified the applicability of pre-action notice requirements to government agencies in arbitration proceedings; alongside significant decisions from the Ghanaian Courts such as *Republic v High Court (General Jurisdiction 11) Ex parte: Anas Aremeyaw Anas,* which provided insightful perspectives on the power of the Chief Justice to transfer cases at the request of one party without prior notice to the other party.

Additionally, we highlight legislative reforms including the introduction of digital notarisation in Nigeria by the new Notaries Public Act, 2023.

We also shed light on Practice Directions and Administrative Guidelines issued by the Chief Justice of Ghana to ensure efficiency, expeditious disposal of cases and to enhance access to justice.

The Digest promises to be an insightful read for all interested in the Nigerian and Ghanian litigation eco-systems.

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Nigeria

Pre-Action Notice Requirement Does Not Apply to Arbitral Proceedings:

RE: NNPC v. Fung Tai Co. Ltd (2023) LPELR-59745 (SC)

The Supreme Court, in this landmark case, resolved the vexed issue of whether a pre-action notice must be served on NNPC before commencing arbitration proceedings.

In an action to enforce the arbitral award that was made in favour of Fung Tai Engineering Company Limited ("**Fung Tai**") against the Nigerian National Petroleum Corporation ("**NNPC**"), NNPC sought to set aside the arbitral award on the grounds that the Federal High Court lacks the jurisdiction to determine the application for the enforcement of the arbitral award because Fung Tai failed to comply with the then applicable provisions of Sections 12(1) and (2) of the Nigerian National Petroleum Corporation Act 1977, which has been repealed. For context, Sections 12(1) and (2) of the Act provides that suits against NNPC must be commenced within twelve months of the occurrence of the cause of action, and that a one-month pre-action notice must have been issued to the NNPC before such suit is commenced.

The Supreme Court held that the limitation period and the requirement of pre-action notice do not apply to arbitration because arbitral proceedings are not court proceedings, and an arbitral tribunal is not a court. The Supreme Court also found that the jurisdiction of the Federal High Court to enforce or set aside an arbitral award derives from the provisions of the Arbitration and Conciliation Act 1998 (now repealed) and not the Constitution of the Federal Republic of Nigeria.

The foregoing findings are in alignment with the new Arbitration and Mediation Act, 2023 in that they not only enhance the efficiency and reliability of arbitration as a method of resolving disputes but also reinforce the judiciary's role in ensuring the enforceability of arbitral awards, without resort to mere technical and unnecessary procedural glitches.

Libel Cases are Not Arbitrable:

RE: UBA Plc. v. Triedent Consulting Limited (2023) LPELR-60643 (SC)

In Nigeria, certain types of disputes cannot be settled through arbitration. Such disputes are typically reserved for resolution by national courts due to public policy considerations. Indeed, disputes involving or relating to crime, declaration of title to land, matters which cannot be referred to arbitration, as provided by their enabling law(s), and matters which cannot be settled by accord and satisfaction, have all been held to be incapable of being settled by arbitration by the Nigerian courts. Recently, the Nigerian apex court found, as illustrated in the case of **UBA Plc. v. Triedent Consulting Limited (2023) LPELR-60643 (SC)**, that libel cases are also not arbitrable.

In that case, Triedent Consulting Limited brought an action on 4 February 2009 at the High Court of Lagos State against UBA Plc to recover outstanding payments and damages for libel. UBA Plc sought to stay the proceedings pending arbitration under the old Arbitration and Conciliation Act 1988 but failed to provide evidence of its willingness to arbitrate. Both the High Court of Lagos State and the Court of Appeal dismissed UBA's application. On further appeal, the Supreme Court also upheld the dismissal of UBA's application, emphasizing that libel cases are not arbitrable because libel is a claim at common law, it remains a question of law and can only be effectively determined by a court of law. Further, the Court held that an arbitrator is not imbued with the power to answer legal questions and cannot grant relief for damages arising from the determination of the legal question of whether there has been defamation.

Prior to this case, we are not aware of any case law on the arbitrability of defamation. Therefore, the Supreme Court's ruling that legal issues, such as libel, are better suited for litigation than arbitration, even if the

arbitration agreement states that the arbitration covers '*disputes arising from or connected to the contract, including torts*', holds significant relevance by clarifying issues that are arbitrable and issues that are not, in a commercial contract. This is especially true, considering the Arbitration and Mediation Act 2023, which allows a party to seek court intervention to set aside an arbitral award in cases where the subject matter of the dispute is not arbitrable.

The Jurisdiction of the Investment and Securities Tribunal:

RE: Ajayi v. S.E.C (2023) LPELR-59729 (SC)

The Nigerian Supreme Court, in this case, settled the controversy surrounding the exclusive jurisdiction of the Investment and Securities Tribunal to hear appeals against the decisions of the Securities and Exchange Commission (**SEC**).

In this case, Mr. Ajayi, who was the Finance and Accounts Manager of African Petroleum Plc. (**African Petroleum**), purportedly authorized the issuance of a prospectus dated 30 March 2000. The prospectus relates to an offer of sale of 86,400,000 (Eighty-six Million, Four Hundred Thousand) ordinary shares of 50k (fifty kobo) each at N28.50 (Twenty-eight Naira, fifty kobo) *per* share. The prospectus, however, contained an inaccurate statement that the total indebtedness of African Petroleum as of 30 June 1999 was ₦10,200,000 (Ten Million, Two Hundred Thousand Naira) whereas subsequent revelations indicated that African Petroleum's indebtedness was over ₦22,000,000 (Twenty-two Million Naira).

This act was reported to SEC by Sadiq Petroleum Limited, a core investor that subscribed to 30% of the shares of African Petroleum. Mr. Ajayi was served with hearing notice to appear before the Administrative Proceedings Committee (**APC**) of the SEC, but he failed to appear. He was found liable and accordingly penalized. Mr. Ajayi, however, approached the Federal High Court (**FHC**) for a judicial review, but the FHC declined jurisdiction and held that the proper adjudicatory panel to determine the matter is the Investment and Securities Tribunal.

Upon further appeal, the Court of Appeal held that Section 284(1) of the Investment and Securities Act confers jurisdiction on the Investment and Securities Tribunal to the exclusion of any other court or tribunal or body, to hear and determine any question of law or dispute involving a decision or determination of the SEC in the operation and application of the Investment and Securities Act. By implication, the Federal High Court has no jurisdiction to determine a dispute within Section 284 of the Investment and Securities Act.

This judgment is a welcomed development as it provides clarity on the hitherto controversial question of the exclusive jurisdiction of the Investment and Securities Tribunal, as exemplified by the earlier conflicting decisions of the Court of Appeal in *SEC v Kasunmu* (2008) LPELR-4936 (CA), *Okeke v SEC* (2018) LPELR-44461 (SC), *Ajayi v SEC* (2007) LPELR-CA 2000; and *Nospecto Oil & Gas v Olorunnimbe* (2021) LPELR-55630 (SC).

Enforceability of Collective Agreements:

RE: National Union of Hotel and Personnel Service Workers v. Outsourcing Services Limited (2023) LPELR-60683 (CA)

This case borders on the enforceability of collective agreements between an employer and its employees under Nigerian law. The National Union of Hotel and Personnel Service Workers (**NUHPSW**), a trade union, brought an action at the National Industrial Court on behalf of its members to enforce the provisions of a "collective agreement" executed by NUHPSW and Outsourcing Service Limited (**OSL**). In defense, OSL contended that the collective agreement was unenforceable and non-justiciable having not been incorporated into its employees' contract of employment. The National Industrial Court of Nigeria agreed with this position.

On appeal, the Court of Appeal acknowledged that OSL's contention that the collective agreement was unenforceable and non-justiciable because it was not incorporated into the employees' contract of employment mirrors the erstwhile position of the law that collective agreements were unenforceable until they were incorporated into employees' contract of employment. However, the Court of Appeal held that the collective agreement is enforceable and justiciable, notwithstanding that it was not incorporated into employees' contract of employment with OSL. This position was based on the provisions of Section 254(C)(1) (b & f) of the Third Alteration Act of the Constitution of the Federal Republic of Nigeria, 1999 (as amended), which empowers the National Industrial Court of Nigeria to take cognizance of international best practice.

Introduction of Digital Notarization and Recognition of Electronic Seals and Signatures on Notarized Documents

Until recently, notarization of documents was governed by the Notaries Public Act, Cap. N141 Laws of the Federation of Nigeria 2004 (**Old Act**). Most of its provisions dated back to 1 October 1936 when it was enacted and were disconnected from current realities, especially advancements in technology. Its amendment was therefore overdue. Thankfully, on 12 June 2023, the new Notaries Public Act 2023 was enacted.

As part of its innovations, the new Notaries Public Act 2023 introduces digital notarization which enables Notaries Public to discharge their duties via electronic means provided that the requisite registration with the Chief Registrar is complied with. As a corollary, Notaries Public can now perform their notarial acts via audio-visual communication for persons both within and outside Nigeria provided that the proper functioning of the electronic medium to be utilized for such digital notarization is guaranteed.

The new Notaries Public Act 2023 also recognises digital seals and signatures of Notaries Public on electronically notarized documents to be as valid as documents notarized in-person and serve as prima facie evidence in any court of the notarization of such a document. Documents which may be notarized as listed in the new Notaries Public Act 2023 include Affidavits, Police Clearance Certificates and Marriage Certificates.

These innovations are aligned with the spirit and soul of the new Evidence (Amendment) Act, 2023 which provides that an affidavit deposed to electronically before any person duly authorized is recognizable for any purpose in the court and reflect a progressive approach to integrating technology into the legal system, enhancing efficiency, and promoting access to justice.

Ghana

The Supreme Court of Ghana Confirms the Power of The Chief Justice to Transfer a Case on a Petition by One Party but Without Prior Notice to Other Parties:

RE: Republic v. High Court (General Jurisdiction 11) Ex parte: Anas Aremeyaw Anas (Civil Motion: J5/72/2023) (delivered on 28 February 2024)

In this recent case, the Supreme Court of Ghana held that the power of the Chief Justice under section 104 of the Courts Act, 1993 (Act 459) (as amended) can be exercised on the Chief Justice's own motion or based on a petition. But, in either case, the Chief Justice is not required to consult with parties prior to making the decision whether to transfer a case or assign a case to a judge.

In this case, Anas Aremeyaw Anas (**Anas**) filed a defamation suit against Kennedy Ohene Agyapong (the Interested Party) in the High Court. Justice Eric Baah J.A. (a Justice of the Court of Appeal) sat as an additional High Court Judge over the case because the substantive judge in the High Court had been transferred. When a new substantive judge was appointed in the High Court, the Interested Party petitioned the Chief Justice for Justice Eric Baah J.A. to continue with the trial of the case, which he had already begun hearing. The petition was sent to the Chief Justice without notice to Anas. The Chief Justice granted the petition and ordered Justice Eric Baah J.A. to continue hearing the case.

Thus, Justice Eric Baah J.A. informed the parties of the Chief Justice's order for him to conclude the trial. At this stage, Anas did not challenge the transfer order. However, after a full trial, the High Court dismissed Anas's case against the Interested Party. Then, Anas filed a judicial review application for an order of certiorari to quash the judgment of the High Court on the grounds that the High Court lacked jurisdiction because Anas was not notified of the petition for a transfer of the case from the new substantive judge to Justice Eric Baah J.A.

The Supreme Court in a unanimous decision held that:

1. The Chief Justice's power to transfer cases under section 104 of Act 459 could be exercised either with or without an application from any of the parties to the proceedings. There was no requirement for Anas to have been notified of the Interested Party's petition to the Chief Justice. The Court however indicated that it would foster transparency in judicial proceedings if the petitioning party notified the other parties to the dispute of their pending petition for the transfer of a case.
2. Anas did not object to the selection of the trial Judge to continue with the trial of the case. Having failed to do so and having participated in the proceedings, Anas is precluded from objecting to it.

The Supreme Court of Ghana Confirms that an Arbitral Tribunal – not the Court – has the Jurisdiction to Determine Questions of Forgery or Fraud Related to the Existence of an Arbitration Agreement and/or a Container Agreement.

RE: Unichem (Ghana) Limited and Another v. Metropolis Healthcare (Mauritius) Limited and Another (Civil Appeal No. J4/43/2023) (delivered on 21 February 2024)

In this case, the Supreme Court dismissed an appeal where Unichem (Ghana) Limited (**Unichem**) and Suresh Kirpalani (**Suresh**) argued that there could be no reference to arbitration because their signatures were forged on the container agreement which contains the arbitration agreement. The Supreme Court held that considering that the argument of Unichem and Suresh was essentially that the container agreement did not exist, this was a question for the arbitral tribunal (not the court) to determine based on the principles of separability and kompetenz-kompetenz recognized in sections 3 and 24 of the Alternative Dispute Resolution Act, 2010 (Act 798).

In this case, Unichem and Suresh sued Metropolis Healthcare (Mauritius) Limited and Metropolis Healthcare (Ghana) Limited (together, "**Metropolis**") in the High Court for an order to cancel a Shareholder's Agreement on the ground that it was procured by fraud. Particularly, Unichem and Suresh claimed that their signatures were forged. However, considering that the Shareholder Agreement had an arbitration clause, Metropolis applied to the High Court for the dispute to be referred to arbitration.

The High court dismissed the request for the dispute to be referred to arbitration. The High Court made a preliminary finding that the signatures of Unichem and Suresh were forged. Based on that finding, the Judge concluded that the arbitration agreement did not exist.

The Court of Appeal overturned the decision of the High Court by a majority decision. The majority of the Court of Appeal took the view that the question of whether the container agreement was the arbitration agreement was a question which under section 24 of the Alternative Dispute Resolution Act, 2010 (Act 798) could be determined by the arbitral tribunal itself. The dissenting view relied on the decision of the US Supreme Court in the case of Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 18 L. Ed. 2d 1270, 87 S. Ct. 1801 (1967) ("**Prima Paint Case**"). The dissenting Judge held that where there is an allegation of fraud related to the existence of an arbitration agreement, that question ought to be determined first by the Court.

On Wednesday, 21 February 2024, the Supreme Court (in a unanimous decision) upheld the decision of the majority of the Court of Appeal. The Supreme Court therefore referred the parties to arbitration as provided under the terms of the arbitration agreement. This decision therefore confirms that an arbitral tribunal is competent to determine its own jurisdiction even where one of the parties alleges that either the container contracts or the arbitration agreements are non-existent because they were procured by fraud. The Supreme Court took the view that the US Prima Paint Case though generally persuasive was inapplicable because it directly conflicts with the express statutory provisions of Act 798.

Practice Directions and Administrative Guidelines, 2024

On 8 April 2024, the Chief Justice of Ghana issued several Practice Directions and Administrative Guidelines. Generally, the directions and guidelines highlight and re-emphasize existing procedures. They also provide innovative and grounded procedures which are ultimately aimed to achieve a greater level of uniformity and certainty.

These Guidelines will come into effect on 1 May 2024.

Guidelines to using the Supreme Court Registry

These Guidelines clarify the practice and procedure for the various modes of invoking the jurisdiction of the Supreme Court. The Guidelines provide Standard Templates and Checklists to ensure that all requirements have been complied with. The Guidelines also recommend steps and actions that practitioners should adopt to ensure the efficient operation of the Supreme Court Registry.

Guidelines on Courtroom Proceedings

These Guidelines provide a more structured approach towards manual and electronic conduct of Court proceedings. They re-emphasize the principles of courtroom decorum by parties and lawyers. The Guidelines prohibit parties from recording any activity in the Court room and directs judges to use only officially certified recording equipment. The Guidelines provide timelines for delivering court processes.

Guidelines for Commercial Pre-trial Settlement

The Guidelines provide directions for Commercial Pre-trial Settlement and are issued in furtherance of the High Court (Civil Procedure Amendment) Rules, 2020 (C.I. 133) which apply to the High Court and Circuit Courts. They provide standard Forms to be filled out by parties, their lawyers and/or witnesses during each stage of the pre-trial settlement process.

The Guidelines also introduce a novel position in directing that no case involving Government of Ghana Ministries, Departments or Agencies shall be referred to external mediation.

Directions on Adjournments and Adoption of Proceedings in Part-Heard Trials

Case law has always directed practitioners on matters of adjournments and adoption of Court proceedings. The Directions introduce new rules stipulating that an application for an adjournment ought to be made to the Court through the Registrar and it must set out in detail, the reasons for the adjournment and supported by documents in proof of the stated reasons. Additionally, the application is to be made not less than 3 clear days prior to the date fixed for the hearing of the case.

Directions on Prerogative Writs involving Chiefs/Chieftaincy Issues

These directions lay emphasis on the procedural provisions found under Order 55 of the High Court (Civil Procedure) Rules, 2004 (C.I. 47). Additionally, they require an applicant to serve notices of an originating motion on all parties directly affected by it. Any interested party who then wishes to respond is required to file an Affidavit in Opposition within 7 days of service of the application on him. The directions seek to provide for effective and efficient disposal of chieftaincy matters at the High Court.

Directions on Plea Bargaining

The Directions do not differ substantially from the plea-bargaining provisions under the Criminal and other Offences (Procedure) (Amendment) Act, 2022 (Act 1079). It sets out uniform standards for the negotiation and execution of plea-bargaining agreements and consequential matters. The Directions further provide guidance in respect of juveniles in line with the policy objective of ensuring that juveniles are diverted from the criminal justice system.

Directions to aid Expeditious Disposal of trial by Jury.

The Directions provide guidelines for jury selection for indictable offences. These guidelines are introduced to bring in certainty and clarity in jury trials. Thus, the guidelines provide timelines for the settlement of jury lists and directions for case management conference and trial in absentia.

Directions on Award of Costs

The Directions emphasize the factors to be considered by courts in the award of costs. Judges are enjoined to perform a detailed assessment of legal costs by considering multiple factors including the actual time charged for the preparation of legal documents, routine letters and emails sent out, and the cost of making copies of documents exceeding 100 pages. Significantly, the Directions have introduced the requirement to file a Notice of Bill of Cost which is to be served on all parties in a summary format.

Directions for Determining Applications for Injunction to restrain Burial of a Deceased

This practice direction is issued because of the influx of injunction applications to restrain the burial of deceased persons. Thus, courts are encouraged to consider the need for finality and dignity in burial proceedings, recognizing the cultural and societal importance of burials. Significantly, the Directions stipulate that the Court will not hear an injunction application if the application is filed later than two weeks prior to the date scheduled for the burial unless there is a compelling reason for the Court to grant the application.

There are also Practice Directions and Guidelines on Generation of Suit Numbers, Procedure for Online Publication of Judgements and Rulings. These Directions are focused on the internal administration and management of the Judicial Service.

Conclusion

2023 was indeed a remarkable year in the Nigerian and Ghanaian dispute resolution space. Apart from settling the vexed issue of the exclusivity of the jurisdiction of the Investments and Securities Tribunal, the extent of court interference with arbitrations both in Nigeria and Ghana has also been clarified in the notable decisions highlighted in this digest. The introduction of digital notarization and the recognition of digital seals and signatures of Notaries Public under the new Notaries Public Act, 2023 are a laudable improvement from the position tenable under the old Notaries Public Act of 1 October 1936. We are hopeful that these decisions and instrument will continue to shape dispute settlements in 2024 and beyond.