NIGERIAN BAR ASSOCIATION

SECTION ON LEGAL PRACTICE NEWSLETTER

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FROM THE CHAIRPERSON

It seems Nigeria in the last few months can be viewed in terms of "pre-election" and post-elections". February has gone, March is here, and Nigeria can heave a huge semi-sigh of relief. We can get back to the business of law and crank up our revenue/ income as Legal Practitioners. Social media friends who turned enemies, in the run up to the elections, can go back to being friends. Other events that occurred in February 2019 which have not been mentioned remain sub-judice and will not be mentioned. Whatever they may be…

Dear colleague, as you know, and as we had said in the past, Seni Adio, SAN (Chair of Section on Business Law) and I had hoped the Sections could have a joint event, which would have enabled us network and share ideas. Due to the change in the election timetable, we were unable to achieve that, but we have not given up and that event is still very much on our radar.

By now I am sure our readers will agree that our past conferences have always been events not to be missed. In particular, our one-day conference which held in December in Port Harcourt on election matters and was organized by the Committee on Democratic Process and Electoral Litigation (Chaired by Chief Ferdinand Orbih, SAN) was exceedingly enlightening and extremely well attended. Thank you, my Chair, Chief Orbih, SAN.

We are warming up for our Annual Conference in Akure, Ondo State. As we informed delegates who attended our one-day conference in Port Harcourt, His Excellency, Arakunrin Oluwarotimi Akeredolu, SAN kindly offered to host us and with Ayodele Akintunde, SAN (CPC Chair) and Folashade Alli (Alternate Chair) I am confident we will have a wonderful time. I am looking forward to the serenity of the Idanre Hills (Oke Idanre) which I am sure, will make for excellent hiking and legal contemplation. After all, how many hills can boast of having a poem written about it by a Nobel laureate - 667 steps to the peak, located on a 500-million-year batholith that is listed as a UNESCO World heritage Tentative site. Who is joining me? Seni???

The theme of this year's conference is "Value-Added Legal Practice" and if you visit our website www.nba-slp.org you will get more details on the conference. We also urge you to take advantage of the early bird conference fees.

As usual our fees are minimal so members can get maximum benefits. Delegates will also get their CLE points. We know that as part of ensuring the standards of our legal practice improve, the administration of Mr. President, Paul Usoro, SAN, is poised to take steps towards ensuring due compliance with the CLE requirements which, by Rule 11 of the Rules of Professional Conduct 2007, are mandatory. All lawyers (private, corporate, law officers etc.) need to achieve between 12 - 24 hours, depending on one's year of call. Register at http://www.nba-slp.org/nbaslp2019-annual-conference/. We will be reaching out for sponsorship from our members and friends. Some of my dear friends have already told me not to call them, but they know I will...

This edition has excellent articles from the very erudite Hon. Justice B. Kanyip, PhD, of the National Industrial Court, who graciously made out time from his very busy schedule to prepare an article for this newsletter, my sister Silk, Funke Adekoya, my brother George Etomi (yes, George and yes this is SLP not SBL), Ike Oguine and Pacer Guobadia.

Justice Kanyip, PhD. considers Human Capital v Robotic Capital and ponders if our existing laws can tackle the changes in the labour industry while Mrs. Adekoya, SAN tackles the Role of Diversity in International Arbitration.

George Etomi, with his passion for business law considers the African Continental Free Trade Area and its impact on cross border legal services. I asked George if we have anything to fear, he said I should read the article… George! I have. Ike and Pacer analyse decisions on the rights of regulatory authorities to impose fines and suffice for me to say that I can put in a few bills with the information in Ike and Pacer's article. They all make excellent reading. Enjoy.

In other news, the African Arbitrators Association (AfAA) has its 1st Annual International Conference coming up in Kigali, Rwanda from the 3rd to the 4th of April 2019. The Commonwealth Lawyers Conference, which is a biennial event, will hold in Livingstone Zambia between the 8th and 12th of April.

Lastly, I have been asked by colleagues how to go about reporting any breach of the Rules of Professional Conduct for Legal Practitioners 2007 (RPC) by Legal Practitioners and I have set out in brief, my findings based on information available to me. The Section's attention was also drawn to information in the social media on the inappropriate use of the wig and gown by certain persons. We need to remember that the use of the wig and gown outside the occasions set out in the RPC may be considered conduct incompatible with the status of a legal practitioner and may render one liable to disciplinary measures.

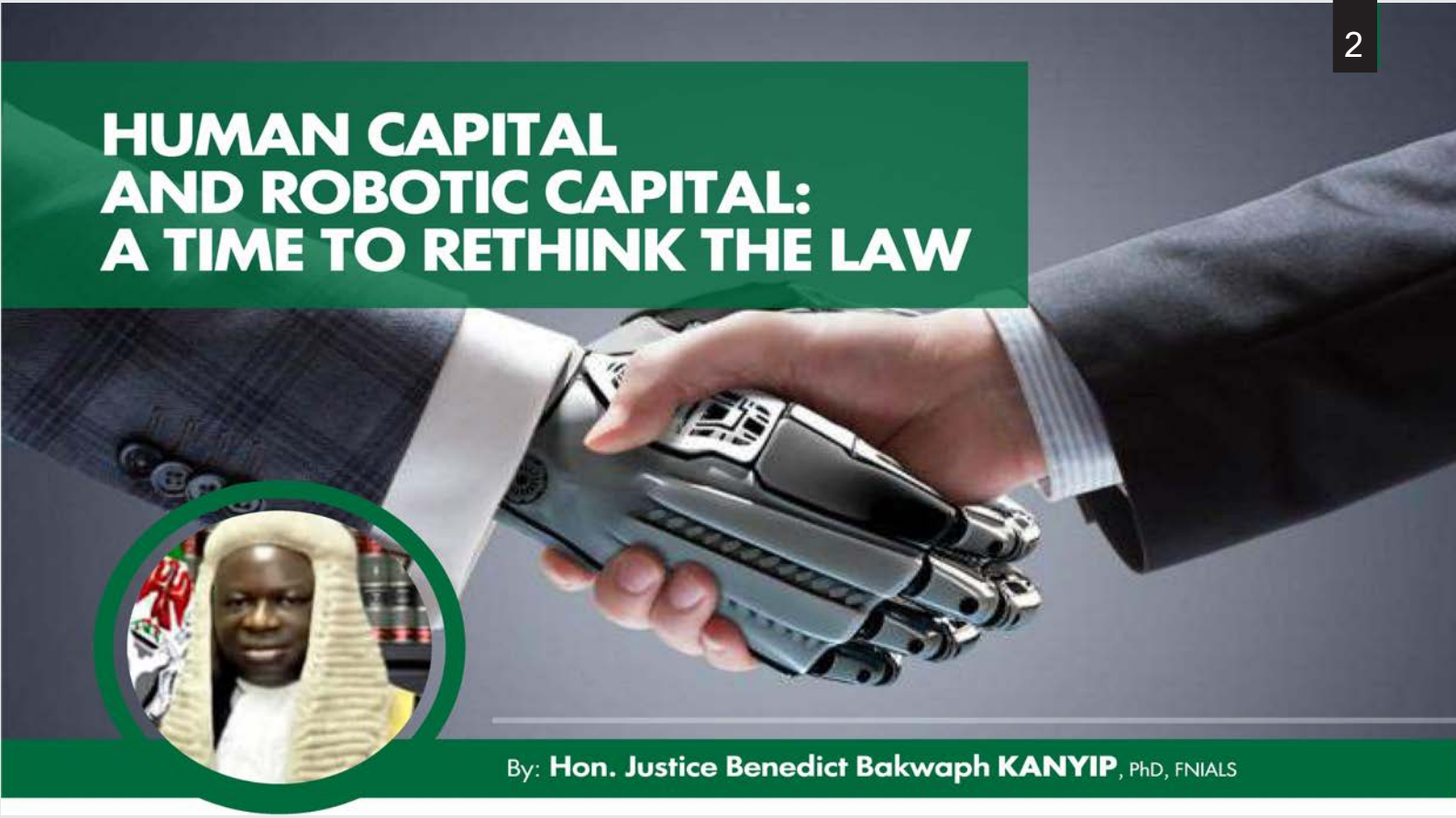
See you in Akure. See you in Kigali. See you in Livingstone.

Yours Sincerely,
Mia Essien SAN, CArb
Chairman.

Mr. Richard A. Akintunde SAN

Mrs. Folashade Alli

HUMAN CAPITAL AND ROBOTIC CAPITAL: A TIME TO RETHINK THE LAW



By: **Hon. Justice Benedict Bakwaph KANYIP**, PhD, FNIALS

1. The reality is that law tends to lag behind technological development; and nowhere is this truer than in the world of work. Other than the 2005 amendment to the Trade Unions Act, the 2006 National Industrial Court (NIC) Act, the 2010 Employees Compensation Act, the Third Alteration to the 1999 Constitution and the 2014 Pensions Reforms Act, the bulk of the laws that govern the world of work in Nigeria have their roots not just in the military dispensation but in the years of yore. This aside, including the more recent laws just listed, the laws governing the world of work appear far behind technological development in the said world of work. The Fourth Industrial Revolution is already with us; and automation and digitalization are at the heart of it. The highly industrial world is said to be ready for it; not very so the emerging or developing economies. Creativity and flexibility are now the key to participation in the evolving world of work.

2. The International Bar Association (IBA) Global Employment Institute did a study titled, Artificial Intelligence and Robotics and Their Impact on the Workplace, April 2017 . The study noted that the digitalisation of the labour market has a widespread impact on intellectual property, information technology, product liability, competition and, for our purpose, labour and employment laws. So, the question of human capital and robotic capital is an inquiry into the role of artificial intelligence (AI) in the workplace. AI accordingly describes the work processes of machines that would require intelligence if performed by humans. Key components of this are robotization, dematerialization, the gig economy and autonomous driving. AI accordingly has its impact in the world of work. Since the 19th century, production robots have been replacing employees because of the advancement in technology. They work more precisely than humans and cost less. Dematerialization in turning traditional physical products such as CDs and DVDs into software has a huge impact in say the world of work in the music industry. The gig economy has allowed the rise in self-employment with its attendant impact in the traditional notions of work as we know. I shall say more on this in due course.

3. What will be (or already is) the impact of new technology on the labour market? The truth is, both blue and white-collar jobs will be affected. A third of current jobs requiring a bachelor's degree can now be performed by machines and intelligent software. New types of jobs are coming up with creativity and science disciplines such as mathematics, statistics, computer science, the pure sciences as the key but no jobs will be lost abruptly. Instead, a gradual transition will take place, which has already commenced and differs from industry to industry and from company to company

4. Those selling these new changes in the workplace, as the IBA Global Employment Institute study revealed, have given us certain advantages that will inure:

- In high-labour cost countries, automation and use of production robots can lead to considerable savings with regard to the cost of labour and products.

- Whereas humans become ill, have children, go on strike and are entitled to annual leave, robots do not.

- An autonomous computer system does not depend on external factors meaning that it works reliably and constantly, 24/7, and it can work in danger zones.

- As a rule, the accuracy of an autonomous computer is greater than that of a human, and it cannot be distracted either by fatigue or by other external circumstances.

5. Are there associated side effects, disadvantages or problems? Certainly!

- For low-labour cost (developing) economies, only those employees who have already gained substantial IT knowledge show an interest in and a willingness to improve their technological skills. These economies may for now be still benefiting from their surplus low-skilled workers, so long as Western companies continue to outsource their production to these countries.

•Many employees and trade unions are hostile towards intelligent IT systems, although AI is a phenomenon without which certain industries and services would be unthinkable. The reservations of employees and their trade unions are primarily associated with the fear of massive job losses.

•With digitalization, work can be performed from any place which may weaken employee representative bodies and reduce the number of members of unions. Individual employees may be unlikely to have the same opportunities to negotiate better working conditions.

•Union and employee representatives may find it difficult because there is often no direct contact between the employees, whose interests are to be protected, and the negotiating partners. This makes it harder for the latter to detect problems in an establishment.

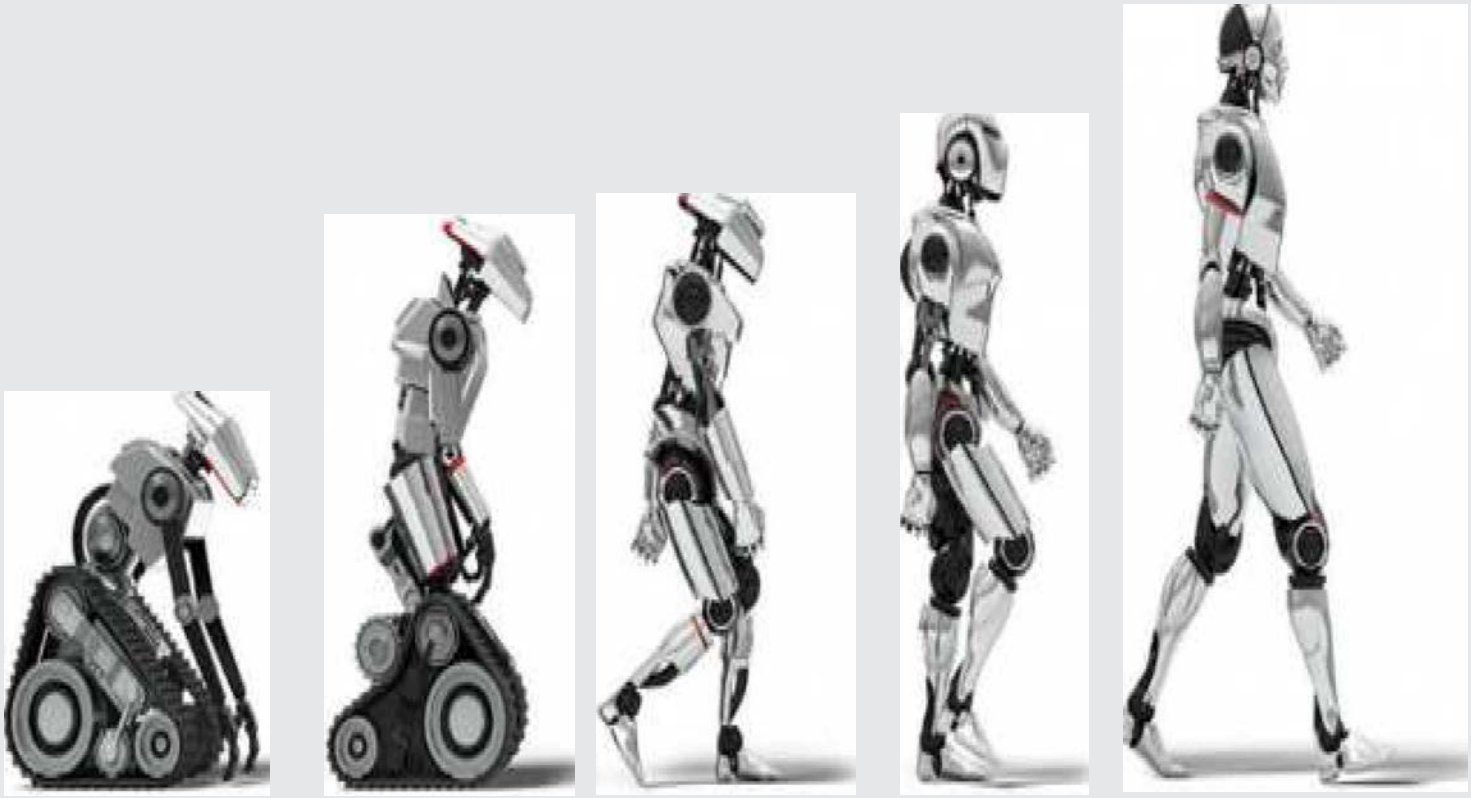
•The majority of labour regulations (e.g., laws governing working hours, occupational safety laws or the laws concerning employee representatives or trade unions) are based on the old concept of labour from the last century.

•Lawmakers will have to introduce new forms of employee representation structures if they intend to preserve the rights of employee representative bodies so that they are consulted and informed.

•Occupational and safety hazards. Robots often perform tasks that are highly hazardous.
•Production faults, as well as software faults, will arise as potential safety hazards relating to autonomous systems and assistant robots. Here, unforeseen risks (actual end products and for humans working). The solution is the training of employees in both cases. Employees must have confidence in the system but should not blindly depend on it.
•Innovation is one area humans are still required. There is no autonomous system that can be programmed to the effect that it independently develops innovative ideas and does creative research. Although needs can be analyzed using big data, the development of ideas is still up to humans.

6. The laws regulating and protecting people at work are in crisis; in part an identity crisis of labour law, for the soul of labour law is today more uncertain and technology and AI have a hand in it. Scholars are questioning not just what the boundaries of labour law are, but what is labour law itself. Today, millions of workers find themselves outside the scope of labour law given the shift towards the reign of 'free markets', and with it we are having a roll back to the harsh realities/ consequences that brought about the need for the labour laws in the first place in the early 20th Century. The thinking since the Third Alteration to the 1999 Constitution is that our labour jurisprudence now has the capacity to move away from the common law orthodoxy. But this is just not the case if decisions of our appellate courts especially on the quantum of damages is anything to go by, as Oak Pensions Ltd v. Olayinka [2017] LEPLR-43207(CA); [2018] 12 ACELR 85 and Peter Onteachonam Obanye v. Union Bank of Nigeria Plc LER [2018] SC. 569/2015; [2018] 14 ACELR 1 decided on Friday, June 8, 2018 typify. Spirited attempts by the NIC to move away from the harsh common law orthodoxy has not been successful in recent times; and so NIC had to toe the line. See, for instance, Mr Adebayo Gbolahan Adepoju v. Coscharis Group unreported Suit No. NICN/ LA/409/2014 decided on 16th February 2018 and Clement Abayomi Onitiju v. Lekki Concession Company Limited unreported Suit No. NICN/LA/130/2011, the judgment of which was delivered on 11th December 2018.

7. Two developments can be said to account for the crisis in the laws regulating and protecting people at work: the growth of the so-called informal sector and the proliferation of new forms of work relations that fall outside of the definition of 'employee' since this is the basis for most labour protections. By the use of triangular employment relationships and other atypical work arrangements, employers have succeeded in avoiding specific responsibilities, even for workers who are considered 'employees'. It is no longer certain who is an employee or employer, or what the employment relationship is. The labour with which labour law has until now been concerned seems to be found less and less and, where it is found, exhibits characteristics not readily reconciled with the traditional model. The global question, whether drivers using the Uber App and the like are workers or independent contractors of Uber is a case in point. In the United Kingdom (UK), Uber B.V. (UBV) & ors v. Yaseen Aslam & ors [2018] EWCA Civ 2748 (decided on 19 December 2018) came up. The UK Court of Appeal by a majority of 2 to 1 (Lord Justice Underhill dissenting) held that Uber drivers are workers, not independent contractors.Citing the practical reality of the relationship as well as the degree (near absolute) offers too frequently. That left drivers under a "positive obligation" to be available for work while the app is on. But the case was fact specific; and I understand that leave has been granted for it to be appealed against at the UK Supreme Court. The opportunity to have a Nigerian pronouncement on the same issue came up in Oladapo Olatunji & anor v. Uber Technologies System Nigeria Limited & 2 ors unreported Suit No. NICN/LA/546/2017, the judgment of which was delivered on 4th December 2018, but was lost given that what the claimants brought to the NIC vide an originating summons was nothing other than academic and speculative issues devoid of real or legal losses/ injuries capable of sustaining the action.
8. The dividing lines between employees and independent contractors in the sector of digital work are disappearing more and more. This affects employees and employers due to increasing legal uncertainty. The risk of wrong classification is ever present. Where an independent contractor is classified as an employee, the additional costs in meeting employment protection requirements and benefits may escalate.
9. There is the additional problem of the differentiation between employers and clients. It is becoming more common that it is not just the employee's employer (as identified in the written contract of employment) who issues orders to employees. For instance, for groups of companies, it is not necessarily the employer who tells an employee what to do. The group of companies often include clients or franchise-givers that have the power to define the individual employees' working conditions. Additionally, there is the model of an employer grouping. Two varieties of this model demonstrate this. First, the case of employees employed by a platform or a joint venture. Here, the employees will switch from one company to another. They work for every company connected to the platform that needs their special knowledge. Secondly, the case of a personnel leasing arrangement under which the employee is "loaned out" to another if the legal employer currently does not have enough work for the special employee. I must state that if the employees' employment contracts do not include an obligation to provide services for another company within the company group, personnel leasing will



10. Then comes the problem of liability among producers, employers and employees. The basic assumption is that under liability law, a natural or legal person is always responsible. As long as no "e-person (electronic person)" exists, the robots' actions and declarations will be attributed to the employer or the producer. With regard to the increased use of assistive robots in the industrial sector and the increased use of algorithms in the service sector, the question arises as to who is liable in each individual case if the linking factor for such liability is the autonomous IT system or an autonomous production robot: the employee who operated the system incorrectly, or the producer if the system contains errors of any kind, or the employer who made the system available?

11. Jacques Peretti in his seminal work titled, DONE: The Secret Deals that are Changing our World has thrown up a number of issues we need to worry about. In Chapter Twelve at pages 286 to 314, he made some of the following points and in the process asked some questions:

(a) In a world in which robot intelligence and human needs are utterly inseparable, we ourselves have become the robot, with human parts. By 2030, half of all jobs will be automated. Obsolete will be doctors, lawyers, accountants, supermarket staff, cab drivers, care workers, journalists, even tech analysts assessing future of robots. In May 2017, an AI algorithm was developed that made high court judges obsolete in that it correctly predicted 72% of high court verdicts when human judges could only predict 66%.

(b) New technology in itself is not the problem. The problem is when human error and new technology collide we may have a period of transitional mess.

(c) For technology to truly revolutionize our lives, it requires an entire reboot of the infrastructure: a clean slate from which to start again

- the kind of thing that only happens after natural disaster or a war.

(d) If machines make everyone redundant, how will we earn a living and what is everyone going to do all day?

(e) Technology has already roboticised our lives e,g monitoring out productivity using health apps and wearable technology; ever relying on data-driven improvements hence the creation of an automated self. So, while robots are becoming more human, we are becoming more like robots.

(f) The EdTech revolution that is staring us in the face has brought up a flip-side. Teachers in academics have begun to notice an interesting shift. Children are able to pass tests and tick boxes spectacularly, but when it comes to interviews, they clam up. They are used to conforming to rules, they do not know how to question them. They do not know how to question the question.

12. In specific terms of the workplace, Jacques Peretti at pages 174ff, painted in scary terms his idea of the new forms of work that would beset the world of work. To him, the new form of work is the slave army of bosses. We are all our own boss e.g. the Uber driver is made to think he is his own boss. And in this new globalized, de-unionised world whether you are a boss driving a cab or delivering food, we are all part of a giant amorphous freelance class known as the "precariat". We are the boss and a slave simultaneously. The middle-class professional has dignity at work; but as wages go down, so too does that sense of self-worth which grows into an army of slave bosses and cheap available labour. Uber, Airbnb etc. are the products of this scenario and not just transformed work but they re-conceptualised the slave boss. They did not only disrupt the economy, they reinvented the future as we are all now our own

Hon. Justice Kanyip is a Judge of the National Industrial Court.

bosses with a mobile device, all striving to be corporations of one. They redefined labour value making everything fluid. It is only a matter of time: what Uber did with four wheels (cabs) and Airbnb to four walls (flats) is sure to be replicated or applied to every type of work e.g. the tsunami-wave of work apps that take out time. The point is: there is no boss any more, only an army of slave bosses; you are the boss of you, because we are all corporations of one. Welcome to the age of sole corporations!

14. He then considered "micro-jobbing" and the "gig economy"? and noted that they are creations of Silicon Valley to mask the truth, which is making everybody an infinitely flexible
boss slave and hence infinitely exploitable. The new system is a very clever and depends on young temporary workers who will move on, so no one hangs around long enough to complain or cause trouble. There is never going to be an employee problem as there is always someone new to do the job. But the low paid workers are now fighting back e.g. the Uber cases highlighted above, where the issues calling for determination are the exploitative downside to workers as against the entrepreneurial freedom or flexibility it gives.

15. He concludes that all of this gives rise to two competing visions of a new capitalism - to be a slave or a slave boss which is the largest transformation in our working lives since the industrial revolution. Optimists for this sharing economy, refer to this free-market equality as dotcommunism, which incidentally undermines anyone setting themselves up as an authoritarian boss, because it empowers the individual to choose where and how to work. The new sharing economy may offer new 'opportunities', but the number of people offering their services massively outstrips the demand. And with technology threatening to make billions of people redundant globally, we will all be slave bosses at the exact moment we have nothing to do.

Is Nigeria Ready?

16. In terms of its laws the answer is NO. If Oladapo Olatunji & anor v. Uber Technologies System Nigeria

Limited & 2 ors unreported Suit No. NICN/ LA/546/2017, the judgment of which was delivered on 4th December 2018 is anything to go by, we do not even know the issues let alone design the rules that would grapple with them.
The UK decision in Uber B.V. (UBV) & ors v. Yaseen Aslam & ors [2018] EWCA Civ 2748 (decided on 19 December 2018) was fact specific. This means that not all cases would be decided alike. In fact, the Uber problem was litigated in Australia in Kaseris v. Rasier Pacific VOF [2017] FWC 6610 and the verdict by the Fair Work Commission was that the Uber drivers were independent contractors, not employees .

There is no doubt that the time to rethink our labour laws is more than ripe. It is easier to call for legislation. But experience shows that since 2005, the labour laws reviewed and suggested for Nigeria under the auspices of the International Labour Organisation (ILO) and termed DECLARATION PROJECT have been lying fallow in the National Assembly despite that they had the imprimatur of the Executive arm of Government. So, we may have to wait a long while for any legislative intervention. Meanwhile, we have to trust the lawyers and the Courts to in a case-by-case basis resolve the legal issues that would come. Even here, all depends on how the lawyers frame or couch the issues they bring to court.

COMPLAINT PROCEDURE

The Rules governing professional conduct for Legal Practitioners are contained in the Rules of Professional Conduct for Legal Practitioners, 2007.

The process of initiating a complaint of professional misconduct against a Legal Practitioner is provided for in the Legal Practitioners Disciplinary Committee Rules, 2006 made by the Chief Justice of Nigeria pursuant to paragraph 2 to the 2nd Schedule of the Legal Practitioners Act. Rule 3(1) provides thus:

" A complaint by any person against a Legal practitioner shall be forwarded in writing by the complainant or the person aggrieved to any of the following persons, that is – (a) the Chief Justice of Nigeria
(b) the Attorney General of the Federation
(c) the President of the Court of Appeal or any Presiding Justice of the Court of Appeal
(d) the Chief Judge of the High Court of a State or the Chief Judge of the Federal High Court or the Chief Judge of the Federal Capital Territory
(e) the Attorney-General of a State
(f) the Chairman, Body of Benchers, and
(g) the President of the Nigerian Bar Association or the Chairman of a branch of the Nigerian Bar Association."

After a complaint had been made, it is referred to the Nigerian Bar Association which investigates the complaint. Rule 4 provides as follows:
" In any case where in pursuance of Section 11(1) of the Act the Nigerian Bar Association after investigating the complaint is of the opinion that a prima facie case is shown against a legal practitioner, the Nigerian Bar Association shall forward a report of such a case to the Secretary together with all documents considered by the Nigerian Bar Association, and a copy of the complaint on which the Nigerian Bar Association is of the opinion that a prima facie case is shown."

Thereafter, upon a prima facie case being established, the complaint is referred to the Legal Practitioners Disciplinary Committee to hear the complaint in accordance with the Rules and the Legal Practitioner whose conduct is the subject matter of the complaint is afforded with the opportunity of being hear.

IS INTERNATIONAL ARBITRATION TRULY INTERNATIONAL?
- THE ROLE OF DIVERSITY

FUNKE ADEKOYA SAN

What do we mean when we use the term "International Arbitration"? Within the arbitration community, it is generally understood to connote the use of arbitration by parties from different nations, linguistic, religious, legal and cultural backgrounds to resolve their dispute in a final and binding way.

The world currently produces over 92 million barrels of crude oil per day, with Africa and the Middle East
contributing 9.4% and 34% Percent respectively [close to ½ of the world's daily total]. The biggest purchasers of African and Middle Eastern crude oil
are Japan, China, India, USA and Singapore [also comprising nearly ½ of the world's population]. Obviously where there is trade, disputes follow.

Noting the extent of impact the trade in the natural resources of these regions has on the world's population, with the possibility of resulting disputes, what is the extent of participation by the Middle East and Africa in the arena of international arbitration?

According to the ICSID Case Load Statistics -Issue [2018-1], the International Centre for Settlement of Investment Disputes registered a total of 650 cases as of 31st December 2017. Of this number, cases emanating from Sub-Saharan Africa constitute 15% while cases from the Middle East & North Africa make up 11%. In effect ¼ of the cases registered at ICSID came from these areas.

Confirming these percentages in its Special Focus Africa - May 2017 report, ICSID revealed that as of May 2017, 22% of the cases it had registered involved African State parties, while 4% involved Middle Eastern State parties. The ICC Court of Arbitration also notes an increase in disputes from the Middle East and Africa. The London Court of International Arbitration [LCIA] has been very upfront and open in publicising its arbitration caseload on an annual basis.

In 2016 it the recorded a total of 303 cases with African and Middle Eastern cases accounting for 15% of the total [up from 11.5% the previous year], divided as follows:

- Saudi Arabia: 1.7%
- Nigeria: 1.6%
- Other African Countries: 6.3%
- United Arab Emirates (UAE): 3%
- Other Middle Eastern Countries: 3.4%

So, it cannot be said that as disputants, these regions are absent from any of the recognised international arbitration arenas. When we look at participation as counsel and arbitrators however, the figures are very different. Of the 496 arbitral appointments made by the LCIA that

year, 180 (35.3%) were non-British arbitrators while 321 (64.7%) were British arbitrators.

Regardless of the increase in the number of arbitration proceedings emanating from the Middle East and Africa in recent times, it appears that there is little growth in the ethnic diversity of arbitrators being appointed in these disputes. To what extent then can international arbitration be truly international if the arbitrators do not reflect the disputes in somewhat similar proportions? The impression to an observer [and even to many involved with international arbitration] is that it is the exclusive domain of a selected few.

In 2013 less than 15% of the arbitrators appointed in ICC administered arbitrations were from Africa, Asia and the Pacific, even though these geographical regions made up 32.3% of the parties to the proceedings. In 2015, there were 221 Arab parties involved in ICC cases, but only 54 Arab arbitrator appointments were made. Some believe that the disproportionate number of arbitrators from the Western hemisphere is because international commercial arbitration was established there, and moved elsewhere, following the incursion of its merchant seamen and other trading activities into other parts of the globe. Those who take this position are unaware that mediation and customary arbitration as a dispute settlement mechanism existed in the Middle East and Africa, long before the incursion of western civilisation.

Of the "35 Most in Demand Arbitrators" globally in 2015, as listed by Chambers & Partners, only 2 were female and the majority of the 33 males were white Europeans. Why is this? A participant in a recent international arbitration survey was of the view that "Established practice in international arbitration is acknowledged to block change and keep new entrants out - the same arbitrators are chosen again and again". This cannot help the expansion of a diverse arbitral database.

ICC statistics for 2015 indicate that women represented 10% of all appointments and confirmations, and that women were more frequently appointed as co-arbitrators (43%) rather than sole arbitrators (32%) or tribunal presidents (25%). ICC data on arbitral appointments for 2016 shows that, to November 2016, only 20% of arbitrators appointed were women. LCIA statistics are more encouraging. In 2015 (compared to 2014) there was an increase in the number of female candidates put forward by the parties (6.9% compared to 4.4% in 2014) and selected by the LCIA (28.2% compared to 19.8% in 2014). SCC statistics indicate that, in 2015, 14% of arbitrators appointed were women, although the percentage fell to 6.5% where the parties themselves made the

appointment. Statistics from the Chartered Institute of Arbitrators indicate that, of the 222 arbitrators qualified to be on the panel from which presidential appointments are made, only 16 (7%) are women.

There are few statistics on minority ethnic and racial representation on tribunals but it

is suggested that the majority of men appointed (the number of women being small in number) are Caucasian men of advancing years and that minority ethnicities and candidates of non-Western geographic origin are blatantly under-represented, as are younger practitioners. There is a dearth of statistics but one commentator has examined the issue by looking at the region from which appointed arbitrators are chosen in ICSID arbitrations. He found that in 289 closed cases from January 1972 to May 2015, in nearly half of cases (45%), the tribunals were composed of all Anglo-European arbitrators. In 84% of the cases, two or more of the tribunal members were Anglo- European, or the sole arbitrator was Anglo- European. Only 11 cases (4%) were arbitrated by entirely non-Anglo-European tribunals."

Does diversity matter?

Noting that arbitration is a wholly private process and the end goal for parties will be the speedy resolution of disputes by competent hands, parties to a dispute will be interested in appointing experienced, efficient and capable arbitrator(s) who will determine the dispute fairly. Does it matter if the vast majority of arbitrators appointed are from one major racial group? In other words, while it may be evident that the arbitration community is dominated by Anglo-European males, if they are more

than capable of competently discharging their duties as arbitrators, why do the proponents of diversity seek to change the status quo? Is there any benefit to the international community's clamour for diversity in international arbitration?

We must remember that international arbitration involves individuals and organisations in different jurisdictions. It is widely believed that the inclusion of people from various varied racial, ethnic, gender and social backgrounds gives a public value to the concept of arbitration as being truly international as it should be seen to be open to participants from all over the world. It has been suggested that "A system serving the needs of a particular constituency - in this case, participants in international commerce - should reflect the make-up of that community."

Concerns have been voiced that a lack of diversity may also affect the quality of arbitral awards. Empirical studies are cited as finding that "the deliberative process before the arbitral tribunal is likely to be crucial and, therefore, the diversity of views may be fundamental for a fair process and outcome". To take a very simple example,

to an arbitrator from a culture where `silence means consent', the non- reaction to a letter may be taken to mean consent to its terms; an arbitrator from a culture where age is reverenced, may understand the non-reaction to result from an unwillingness to contradict an elderly person. A diverse tribunal will have access to these differing points of view, when determining the weight to attach to the non-responsive attitude being relied upon by one of the parties.

The end result of increased diversity will be continued acceptability and legitimacy of the arbitration process. It is also believed that a gender-balanced/ diverse tribunal will be better prepared and produce a better output that a non-diverse tribunal as research has shown that there is a relation between gender balance and improved performance in a commercial environment. Research has shown that gender mixed teams performed better than all-male teams because of greater cooperation and more variety in team members' approaches to communication.

How to increase diversity in international arbitration.
Appointments as arbitration counsel are made by the parties. Middle Eastern and African counsel seeking international arbitration appointments must acquire the requisite legal knowledge and the human capacity to undertake such assignments. Because most energy disputes in these two parts of the world tend to involve State owned oil corporations, our governments also have a role to play. For as long as our countries look first to the West when appointing arbitration counsel in energy disputes, the skills and human capacity acquired will not be utilised and the oft touted "lack of expertise" as the reason for appointing non-nationals as arbitration counsel will not be addressed. Cooperation and co-counsel arrangements between law firms in the North and the South is one way of ensuring adequate representation, whilst at the same time redressing any perceived skills deficit.

Depending on whether the proceedings are ad hoc or administered, the appointment of the arbitrator is the responsibility of either the parties or the institution. For party appointments, the in-house counsel will usually request its external arbitration counsel to provide arbitrator CVs. Obviously technical expertise, availability and human interpersonal skills weigh highly when selecting an arbitrator. The arbitration counsel should also consider diversity when drawing up a list of possible arbitrators, especially where part of the dispute may have a cultural undertone. Providing the parties with a wide enough selection list from which to make the appointment is a step towards ensuring diversity on the panel.

In similar fashion, where an arbitral institution is the appointing authority, it should also add diversity to its pre-qualification list. This is because even though the arbitral institutions make only a small proportion of appointments, they are in the best position to increase diversity, since their knowledge base of potential arbitrators is usually much wider than that available to the parties or their counsel. They have the opportunity to appoint younger, less well known, ethnically diverse arbitrators, which the arbitration counsel or the in-house counsel may be loath to recommend in the absence of a verifiable track record. The international community as a whole has a duty to commit to diversity in international arbitration. It was in recognition of this duty that the Equal Representation in Arbitration (ERA) Pledge was launched. The ERA pledge came into existence on 18 May 2016 in London, by the international ADR community, to commit to increase the

SLP Objectives

The objectives of the Section as tated in Article 1 of the Section Bye laws are: -

- To promote the exchange of information and views among members of the Section and other like minded bodies as to the laws, practices and other procedures affecting the Section locally and internationally;
- To assist members develop and improve their legal services;
- To undertake such related activities as may be approved by the Section's council fro time to time;
- To promote and provide Continuing Legal Education

number of female arbitrators on an equal opportunity basis. Their website states plainly that "In Recognition of The Under- Representation of Women on International Arbitral Tribunals, In 2015, Members of The Arbitration Community Drew Up A Pledge To Take Action."

ERA has focused on diversity from the gender perspective, and within 2 years of its formation, it has achieved formidable results, by drawing attention to the gender inequality which exists and encouraging individuals, law firms and arbitral institutions to promote gender equality in international arbitration. Many arbitral institutions have reported an increase in the appointment of female arbitrators in 2015, when compared with previous years.

In January 2018, the campaign for increased diversity in international arbitration revved up to another level with the launch of The Alliance for Equality in Dispute Resolution. The Alliance states on its website that it "was formed to advocate for increased diversity in the international dispute resolution community". It aims to "promote inclusivity in all aspects of the dispute resolution world" and "strive for equality of opportunity regardless of sex, location, nationality, ethnicity or age". In addition to dealing with the under-representation of women, it plans to "focus on addressing the lack of diversity in relation to ethnicity and geography in international arbitration". The Alliance

Conclusion

Donald Donovan, an ICCA past President speaking on how we might make international arbitration truly international, said ".... If the impact of international arbitration is to be international, the composition of those acting in the system as arbitrators, as advocates, and as administrators must be as well. That is, the profile of the participants must reflect diversity by way of nationality, ethnic origin and gender of those who have a stake...what is truly exciting about the future of international arbitration is the increasing capacity of lawyers and law firms in Brazil and Mexico, in Ghana and Egypt and Nigeria and South Africa, in Japan and Korea and Hong Kong, in Singapore and of course in Beijing and elsewhere in China."

In essence, what Donald Donovan was saying is that if we want international arbitration to be truly international, it is left to all of us to make it more inclusive for all of us.

Extracted from the Keynote Address presented by Funke Adekoya SAN at the 3rd Annual Conference on Energy Arbitration and Dispute Resolution in the Middle East and Africa on 6th March 2018.

Funke Adekoya is a Founding Partner at Aelex and she heads the Dispute Resolution Practice Group.

AFRICAN CONTINENTAL FREE TRADE AREA (AFCFTA): WHAT IT MEANS FOR CROSS BORDER LEGAL SERVICES IN AFRICA

George Etomi FNIALS, NPOM

Introduction

The African Continental Free Trade Area was borne out of the vision of the founding fathers of the Organization of African Unity (OAU) now African Union (AU) to achieve an integrated, prosperous and peaceful Africa.

Significantly, in 2012, a decision was made to establish the AfCFTA by all Heads of State and Government of the African Union (AU) at the 18th ordinary session of the AU.

A major milestone was reached in 2018, when the Agreement establishing AfCFTA was signed by 44 member states during the extraordinary summit of African Union Heads of State and Government held on 21st March 2018 in kigali Rwanda .

With the Agreement signed, the "single liberalized market for trade in goods and services" was launched.

What does this development signify for cross border legal services in Nigeria? This paper will briefly shed light on what AfCFTA means for cross border legal services in Africa.

OBJECTIVES OF AFCFTA

The AfCFTA is divided into several parts, chief of which are Protocol on Trade in Goods and Protocol on Trade in Services.

The negotiation of the agreement establishing AfCFTA was done with certain objectives in mind. In particular, Article 3 (under Establishment, Objectives, Principles and Scope) encapsulates the general objectives of the AfCFTA as follows which is to

a.create a single market for goods, services, and movement of persons in order to deepen the economic integration of the African Continent and in accordance with the Pan African Vision of "An integrated, prosperous and peaceful Africa" enshrined in Agenda 2063;
b.create a liberalized market for goods and services through successive rounds of negotiations, contribute to the movement of capital and natural persons and facilitate investments building on the initiatives and developments in the State Parties and Regional Economic Communities (RECs);
c.lay the foundations for the establishment, at a later stage, a Continental Customs Union;
d.promote and attain sustainable and inclusive social and economic development, and gender equality and structural transformation of the State Parties;
e.enhance the competitiveness of the economies of State Parties within the continent and at the global market;
f.promote industrial development through diversification and regional value chain development, Agricultural Development and Food Security; and

g.resolve the challenges of multiple and overlapping memberships and expedite the regional and continental integration processes.

Since this paper's focus is on cross border legal services, the Protocol on Trade in Services will be relevant to our discourse.

Under Article 2 (3b) of the Protocol on Trade in Services (Scope of Application) "Services" as defined by the AfCFTA "includes any service in any sector except services supplied in the exercise of governmental authority"; while Article 2 (3c) of the Protocol on Trade in Services defines "A service supplied in the exercise of governmental authority" thus: "any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers". Although there is no specific mention of legal services, it is submitted that the term legal services can fall within the ambit of the scope of the Protocol on Trade in Services whose specific objectives contained in Article 3 of the Protocol on Trade in Services are stated below, to:

a. enhance competitiveness of services through: economies of scale, reduced business costs, enhanced continental market access, and an improved allocation of resources including the development of trade-related infrastructure;

b. promote sustainable development in accordance with the Sustainable Development Goals (SDGs);

c. foster domestic and foreign investment;

d. accelerate efforts on industrial development to promote the development of regional value chains;

e. progressively liberalise trade in services across the African continent on the basis of equity, balance and mutual benefit, by

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eliminating barriers to trade in services;
f. ensure consistency and complementarity between liberalisation of trade in services and the various Annexes in specific services sectors;
g. pursue services trade liberalisation in line with Article V of the GATS by expanding the depth and scope of liberalisation and increasing, improving and developing the export of services, while fully preserving the right to regulate and to introduce new regulations;
h. promote and enhance common understanding and cooperation in trade in services amongst State Parties in order to improve the capacity, efficiency and competitiveness of their services markets; and
i. promote research and technological advancement in the field of services to accelerate economic and social development.

Now let us examine what cross border legal services mean: CROSS BORDER LEGAL SERVICE IN AFRICA: STATUS QUO The Concept of Cross Border Legal Services which is used interchangeably with Legal Practice is not novel and have even preceded the establishment of AfCFTA. It involves the provision of legal services by lawyers to clients outside of their national jurisdictions.

L. Terry in his article ''GATS' Applicability to Transnational Lawyering and its Potential Impact on U. S. State regulation of Lawyers'', referred to Cross Border Legal Practice as: "the general situation in which a lawyer, originally licensed in one jurisdiction, the Home State, provides legal services in another jurisdiction, the Host State. This can occur when the lawyer physically travels to the Host State, or when the lawyer provides services through other means..."

Its emergence in Africa is simply a function of globalization and the influx of foreign investment into the African Continent.

However, Cross Border Legal Practice is more inter-continental than intra-continental. A lot of foreign law firms have opened offices in Africa or formed legal alliances with local law firms: DLA Piper, Hogan Lovells, Allen & Overy, Baker & Mckenzie, Herbert Smith Freehills have offices in South Africa. Morocco is also home to law firms like Clifford Chance, Allen & Overy, Norton Rose Fullbright; In Nigeria DLA Piper has a formal legal alliance with Olajide Oyewole LLP, Denton has a loose relationship with Udo Udoma & Belo-Osagie.

The trend in forging alliances between African/Nigerian law firms and foreign law firms clearly demonstrates the increasing wave of participation in the global share of opportunities amongst African law firms. However there still exist notable barriers that are yet to be overcome.

BARRIERS TO CROSS BORDER LEGAL PRACTICE

Barriers to cross border legal practice may be grouped under two major headings:

1. Border/Immigration Requirement; and
2. Jurisdictional Requirement.

BORDER/IMMIGRATION REQUIREMENT:

Despite the wave of globalisation and integration sweeping across the planet, it is still the case that most countries in Africa still have stringent entry requirements for other African countries, making travel within the continent difficult.

According to the "Africa Visa Openness Index", a report published by the African Development Bank, Africans require visas to travel to 55% of other African Countries compared to North Americans who require visas to travel to 45% of Northern Countries. The report also states that Africans can get visa on arrival in 25% of African Countries compared to 35% for North Americans.

With this barrier still existing in the seamless movement of persons across African countries, cross border legal services will still be limited to the few big active law firms.

JURISDICTIONAL REQUIREMENT:

Most African countries enact laws and practice requirements that bar or make it impossible for foreign legal practitioners to practice fully in their countries.

For instance Countries like Kenya, Uganda & Tanzania in East Africa apply nationality requirements to practice their domestic laws or to be admitted to their respective bars.

South Africa also has a similar requirement. Only citizens and permanent residents are eligible for admission to their respective bars.

In Nigeria, Non-Nigerians can be admitted into the legal profession to practice. However, they are required to satisfy very stringent and rigid requirements.

Currently, the legal position is that no foreign lawyer shall engage directly in any form of legal practice in Nigeria.

Each country therefore has its own domestic regulation on services rendered within its jurisdiction. However under the Protocol on Trade in Services domestic regulations based on national policy objectives are expected to be consistent with the aspirations of the Protocol.

Article 8 of the Protocol on Trade in Services provides thus:
Each State Party may regulate and introduce new regulations on services and services suppliers within its territory in order to meet national policy objectives, in so far as such regulations do not impair any rights and obligations arising under this Protocol.

Although the AfCFTA acknowledges the right of each member state to enact domestic regulations on trade in services, it encourages member states in Articles 9 and 10 of the Protocol on Trade in Services to adopt progressively standards that will be mutually recognized in order to achieve a liberalized market.

We are yet to see steps being taken by any of the acceding member state in implementing the above provisions of the article under protocol on trade in services. There will also be need to implement a harmonized remedial system to deal with malpractices in the event of setting up mutually recognized standards for cross border legal services.

OTHER BARRIERS TO CROSS BORDER LEGAL SERVICE:

DIVERGENCE OF LAWS & LEGAL SYSTEMS:
Many African Countries are split between the civil law and common law systems of law as a result of their colonial history.

These inhibit the use of technology by Courts and smrfiin rural areas, which do not have stable power supply and are subjected to limited or no access to internet services.

Thus, liberalisation of the practice of law within the continent is more difficult due to variance of laws, legal systems and languages.

ANTI-COMPETITION: A lot of legal practitioners within the African continent are threatened by the ongoing liberalisation of the legal services market in Africa. They feel that their better equipped foreign counterparts will flood the market and push them out of business.

STRATEGIC WAYS TO BRING DOWN THE BARRIERS REGIONAL OR CONTINENTAL INTEGRATION:

There are currently eight (8) regional

economic communities that are established in Africa and they form the building blocks of the African Continental Free Trade Area.

These eight are namely:

1. Arab Maghreb Union (UMA);
2. Common Market for Eastern and Southern Africa (COMESA),
3. Community of Sahel-Saharan States (CEN-SAD);
4. East African Community (EAC);
5. Economic Community of Central African States (ECCAS);
6. Economic Community of West African States (ECOWAS);

7. Intergovernmental Authority on Development (IGAD) and
8. Southern African Development Community (SADC)

Most African countries fall under one or more of these regional blocs. Treaties signed by member states stipulate provisions on free movement of goods, services & labour as well as provisions that mandate integration and harmonisation across various sectors.

Many of these countries have failed to implement such provisions despite being signatories to several of such treaties. Therefore, governments of these countries must muster the political will to implement and enforce the provisions of those treaties that call for integration and harmonisation of their countries.

The AfCFTA anticipates countries in Africa to cement the integration requirements under their respective blocs as a major step towards meeting the aspirations of AfCFTA.

RECOGNITION OF QUALIFICATION CRITERIA FOR FOREIGN LAWYERS: African countries must adopt rules for recognizing and regulating the admission of foreign legal practitioners to practice in their respective jurisdictions. Until such measures are put in place and properly implemented the legal services sector in Africa will continue to develop at a less than optimum pace.

For example, Ghana has a very liberal admission requirements in respect of foreign legal practitioners. Foreign lawyers are permitted to practice in Ghana provided they have the required qualifications from their home jurisdiction. A letter of good standing is required from their local bar which must be certified by the General Legal Council.

The foreign lawyer must also pass the required examination in Ghanaian Constitutional law and the Customary law of Ghana. Non-Ghanaian citizens are also required to demonstrate seven years post qualified experience (PQE) in a country with compatible legal system.

Other African Countries should adopt more liberal requirements to open up the legal markets in their territory. This would lead to increased job opportunities for African lawyers, improved efficiency and standard of services and skills transfer amongst lawyers.

African countries should also establish or adopt uniform laws and a unified regulatory framework that would govern various sectors of the economy of member states. This would aid the supply of legal services across member states.

The existence and applicability of uniform rules governing cross-border transactions will enhance the capacity of legal practitioners located in different national jurisdictions to offer informed legal opinion on the viability or otherwise of proposed commercial transactions. For instance, the OHADA (OHBLA)

which is the Organisation for the Harmonisation of Business Laws in Africa is a treaty signed by seventeen (17) West and Central African nations.

Its main aim is to unify business laws throughout the member states and to promote arbitration as a means of settling contractual disputes. The treaty is currently applicable to more French Speaking countries than English Speaking Countries.

The various regional economic blocs/ communities can enact similar laws within their jurisdictions for their respective member states.

CREATING OR INCREASING CAPACITY OF THE YOUNG LAWYERS THROUGH BETTER EDUCATION:

African countries should invest in their legal education infrastructure to improve the capability and expertise of local legal practitioners. This will instill confidence in the legal sector and also equip them with the requisite expertise to compete in the liberalised legal services market which is already happening, albeit unregulated.

CONCLUSION

The aspirations of the African Union (AU) are similar to the European Union which is already an established institution. The European Union (EU) was established in 1993 and has achieved political and socio-economic integration and harmonisation across the member states. Member states have been able to harmonise their qualification requirement for EU Lawyers, immigration policies, energy policies etc.

It will not be out of place therefore to draw lessons from the EU Directives as a guide which set out model Uniform Rules pertaining to lawyers wishing to practice outside their home jurisdictions on a scale that covers the entire continent. These Rules must encompass qualification and practice requirements, such as, the global standardization of qualifying certificates and disciplinary measures to be meted out to erring practitioners, operating outside their own jurisdiction.

To accelerate the harmonization of business laws on a wider scale in Africa, efforts must be made by implementing a unified curriculum on business law at the university level as a foundation to encourage cross border legal practice in Africa.

National Bars should be more proactive to incorporate an intra-national element in practical training. There is need for increasing unification of African Lawyer's Union i.e. Pan African Lawyer's Union and (PALU) and African Bar Association to provide a more unified voice on liberalization of legal services.

Many of the integration policies that will aid in the liberalisation of legal practice in Africa have already been established but are yet to be implemented. The governments of these African countries must ensure the implementation of existing policies which will aid liberalisation in Africa.

African countries must realise that with globalisation, cross border legal service is here to stay and liberalisation of markets is ultimately inevitable. What we should seek to do is harmonise legal services/practice across borders in order to eliminate all existing barriers. This will ultimately improve the standard of the legal profession in Africa and the quality of services which is supplied to other important sectors of the economy.

With 1.2 billion Africans and a combined GDP of 2.5 trillion dollars, the potential for implementing AfCFTA is great for African legal practitioners who are prepared to participate in the shared global legal market space which is progressively defying known barriers.

George Etomi is a Principal Partner at George Etomi & Partners

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RECENT JUDICIAL DECISIONS ON THE RIGHT OF REGULATORY AUTHORITIES TO IMPOSE FINES

BY: **IKE OGUINE** & **PACER GUOBADIA**

It is commonplace for regulatory institutions to impose fines and penalties (penalties) on companies operating in the industries they oversee (operators), for alleged infraction of the rules. These penalties are sometimes so humongous that they threaten the viability of the companies fined. For example, the 'much talked about' $5.2bn fine imposed by NCC against MTN Nigeria in 2015; CBN fines totalling N5.8bn against Stanbic IBTC, Standard Chartered Bank, Citibank and Diamond Bank; other times, these penalties are relatively lower sums which however continuously bite at the heels of business profitability. Penalties are tools in a regulatory framework design, used to deter future breach by demanding a monetary sum from the operator, which is significant enough to act as a commercial incentive for operators to comply with the rules. The value of the penalties is typically prescribed in the provisions of the applicable laws, in which case they are statutory penalties. In some instances, regulators impose penalties arbitrarily to punish non-compliance and the value of such penalties depend on the circumstances and severity of the alleged breach.

One question that arises whenever regulators impose penalties on operators, is whether the regulators have the unilateral authority to impose penalties without recourse to the courts. The recent conflicting decisions of the Courts in NOSDRA v. MPNU (MPNU case) and SNEPCO v. NOSDRA (SNEPCO case), which were both delivered in 2018 on this same question, in respect of the same regulator, has once again highlighted this question and we attempt to briefly address it in this paper.

In the MPNU case, there was an oil spill at MPNU's Qua Iboe facility in Akwa Ibom State and after the clean-up, NOSDRA issued a letter notifying MPNU of its violations of the NOSDRA Act and demanding payment of a N10m fine pursuant to Sections 6(2) and (3) of the NOSDRA Act, which prescribe penalties to punish oil spillers. MPNU successfully argued at the Court of Appeal that only a court of competent jurisdiction could impose penalties and that NOSDRA being an administrative agency, lacks the inherent powers in itself or from the provision of NOSDRA Act, to impose a penalty on MPNU. The Court of Appeal in agreeing with MPNU's argument noted further that NOSDRA's letter demanding payment of the fine without giving MPNU the opportunity to be heard, amounted to NOSDRA constituting itself as the prosecutor, judge and jury in the matter, contrary to the principles of fair hearing as guaranteed by Section 36(1) of the Constitution. Furthermore, the Court held that the NOSDRA Act did not expressly grant NOSDRA the power to impose penalties.

Conversely, the Federal High Court in a subsequent judgment – SNEPCO v. NOSDRA (SNEPCO case), when presented with similar arguments in MPNU's case, upheld NOSDRA's authority to impose penalties pursuant to Section 5, 6 & 7 of the NOSDRA Act and held that the exercise of these powers was not in conflict with the Constitution. The court held that the demand letters from NOSDRA requiring payment of the penalties were not in breach of SNEPCO's constitutional rights to fair hearing as SNEPCO was at liberty to seek redress from the courts if it felt its rights were being infringed upon.

Our Perspective

The answer to this question on regulators' authority to impose penalties in our view, flows from the nature of statutory penalties themselves. Statutory penalties can either be criminal or civil in nature, and at the risk of oversimplification, it is this distinction that determines the scope of the authority of regulators to impose penalties. Section 36(1) & (4) of the Constitution lay down the rules on the forum for determining criminal and civil liability. Subsection (4) makes it clear that criminal liability must be established in court or a tribunal established by law, and the same forum is prescribed in Subsection (1) for determining civil rights of citizens. However for the determination of civil suits, Section 36(2) recognises an exception to this rule that a law may validly direct a regulator to act in a judicial capacity by determining questions arising in the administration of the law without recourse to court or tribunal, subject to 2 conditions: (a) the offending operator is given an opportunity to make representations before the regulator makes a decision affecting such an operator; (b) the regulator's decision is not stated as being final.

We consider the imposition of penalties by regulators on operators as a determination as to the liability of an operator, which surely affects the civil rights and obligations of operators and as such qualifies for this Section 36(2) exception. This consideration is reinforced by Section 13(3) & 35 of the Interpretation Act, which contemplates that a regulator may by law be vested with the authority to impose fines directly and enforce them as though they were imposed by a court. It therefore follows that while criminal penalties can only be determined by a court or tribunal, civil penalties can be imposed by courts, tribunals, including regulators (provided such regulators meet the above 2 conditions). It is important to also point out that the power to impose a penalty must be expressly vested in the regulator by its enabling legislation, for example such powers granted to the NCC, SEC, NERC, CBN, etc. This also applies to invalidate penalties imposed by regulators which the enabling act does not stipulate such authority.
In the MPNU case, the Court of Appeal seemed to consider the penalties

...continued

in subsections 6(2) & (3) of the NOSDRA Act to be criminal penalties, on the basis of which it opined that a conviction by a court of competent jurisdiction was a precondition to issuing the penalties.

We note however that the said subsections do not have the essential ingredients of a criminal offence as prescribed by Section 36(12) of the Constitution, which requires that a criminal offence must be expressly created/defined in the law and the punishment indicated thereunder. Sub-sections 6(2) & (3) of the NOSDRA Act do not define the failure to report an oil spill or failure to clean up an oil spill and remediate the environment as offences, they merely state that failure to comply with these provisions attract liability to pay specific sums as fines. Note the difference between fines created in Section 6(2) & (3) and Section 25 of the NOSDRA Act; in the latter, an offence is created for breach of secrecy by NOSDRA. Nonetheless, even though one could consider the statutory penalties prescribed in Sub-sections 6(2) & (3) NOSDRA Act as civil in nature, the way and manner NOSDRA imposed the fine in the MPNU case did not meet the condition prescribed by Section 36(2)(a) of the Constitution, for exercise of such authority. NOSDRA reached the decision to impose the penalty and issued a demand notice without giving MPNU the opportunity to make representations, which was therefore in breach of MPNU's right to a fair hearing.

In the SNEPCO case the Court's finding that SNEPCO was granted fair hearing as it had the opportunity to make recourse to the courts after it was served with the notification of sanction by NOSDRA, was in our view incorrect as it only met the condition in Section 36(2)(b) of the Constitution but failed to meet the condition in Section 36(2)(a) thereof. SNEPCO ought to have been given the opportunity to make representations to the regulator before the demand letter for the penalty was issued by NOSDRA. Furthermore, contrary to the finding of the Court, Sections 5, 6, & 7 of the NOSDRA Act do not vest NOSDRA with the authority to impose penalties on spillers or generally regulate oil and gas operators, rather NOSDRA's principal mandate is to implement the national plan in response to oil spills.

In sum therefore, we are of the view that a regulator can impose penalties, where its enabling act empowers it to do so expressly and provided it affords the offending operator its rights to fair hearing.

We note that the Court of Appeal in its previous decisions in CAC v. Seven-up Bottling Co. (2017), Moses Ediru v F.R.S.C. (2016), and Ebong V. Securities

and Exchange Commission (2017) LPELR-43547(CA) 36, had held that the CAC, FRSC and SEC respectively, have the authority to impose civil penalties without recourse to the Courts.

"These anatomised provisions, amply, demonstrate that the respondents are within the four walls of the law to enforce the penalties relative to the alleged offences. The point must be made that the respondents (FRSC) are not the imposers of the penalties. It is the statute promulgated by the legislature. They are quintessence of statutory penalty...Put the other way round, there is no confluence point where the powers of the respondents and the court meet. The powers of both are not coterminous. They are mutually exclusive such that the respondent's power of enforcement is not an usurpation of the judicial power of the court…The foregoing settles the other issue, id est, the fines must not be imposed on conviction at all event."

The decision in MPNU's case takes precedence over the decision in SNEPCO's case, because MPNU's case was decided by the Court of Appeal, a higher court in the hierarchy of Nigerian courts, than the Federal High Court, which decided SNEPCO's case. We expect both cases to ultimately end up in the Supreme Court, where the inquisition into NOSDRA's right to impose penalties will afford the Supreme Court an opportunity settle the general question whether regulatory authorities can impose penalties.

Ike Oguine is a partner in Advisory, Legal Consultants, a law firm based in Lagos. He was previously General Counsel, Chevron Nigeria Limited and Coordinator, Legal Services, NNPC.

Pacer Guobadia is a Senior Consultant in Advisory, Legal Consultants as well. He was previously Legal Counsel at Total E&P Nigeria Limited and a top tier law firm in Nigeria.

USE OF WIG & GOWN

The extant provisions of the Rules of Professional Conduct for Legal Practitioners 2007 (RPC) which guides the ethical conduct of Nigerian legal practitioners still makes robing a requirement for Nigerian Lawyers. Rule 45 of the RPC provides:

> *"(1) Except with the permission of the Court,* a *lawyer appearing before* a *High court, the Court of Appeal or the Supreme Court shall do* so *in his robes.*
>
> *(2) A lawyer shall not wear the Barrister's or Senior Advocate's robe - (a) on any occasion other than in Court except as may be directed or permitted by the Bar. (b) when conducting his own case as party to* a *legal proceeding in Court; or (c) giving evidence in* a *legal proceeding in Court."*

It is unethical for a lawyer to wear his lawyer's robes for any other business outside that which is permitted.

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Website: www.nba-slp.org

NBA National Secretariat:
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Mobile number:08108208068
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