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EDITOR'S NOTE

Welcome to the 3rd Edition of FC E-News. We have had quite an eventful quarter. The swearing in of our Chidi Ilogu (SAN) into the inner bar took place on September 12, 2012 at the Supreme Court, Abuja. He also had the privilege of being the Valedictorian for the 2012 set of Silks. Excerpts from his speech and memorable pictures are contained in this Issue.

To crown it all, Mr. Ilogu was recognized in the 2012 Who's Who Legal (the official Magazine of the International Bar Association (IBA), released at the recent IBA Conference in Dublin, Ireland as ***"...renowned for his vast experience of maritime law. He is considered an excellent practitioner and stellar consultant to the Maritime Arbitrators Association of Nigeria."***

This edition also features topical case commentaries and articles on current issues in the maritime and corporate sectors of the Nigerian legal landscape.

I smell Christmas in the air. It's that exciting season of the year once again! As this is our last edition for the year we wish you a Merry Christmas and a vibrant and prosperous Year 2013.

Any reactions or enquiries regarding any content of this E-News may be addressed to the Editor.

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NEGOTIATIONS AND TIME BARS: NNSL v EMENIKE RE-VISITED

By Joel Tyorumun Gaadi

In circumstances where parties are *negotiating a settlement*, or actions are deferred pending the *investigation of claims*, a strict application of the time bar provisions of Article 3 Rule 6 of the Hague Rules can only typify a classic case of *"law triumphant, justice prostrate"*. The argument here is that a strict application of the time bar provision in such circumstances would tend to work hardship on cargo interest.

The challenge for many a Nigerian shipper, is that some carriers, in the event of a possible claim for damage or loss of cargo, engage shippers in protracted negotiations and spurious promises of investigation of damage or loss. The prospective claimant is placed in a dilemma whether to elect to pursue his claim in the Courts or seek an amicable settlement. More often than not he is constrained to pursue the latter course only to find himself out of time when such bogus negotiations and investigations, fail to produce any resolutions.

The claimant is back to square one, and faced with the harsh realities under Nigerian law, as reiterated in ***Unity Bank Plc v Nwadike*** [2009] 4 NWLR (Pt. 1131)where it was held that negotiation of settlement, and by analogy a promise to "investigate" a claim, does not prevent the limitation period from running against claimant . This is subject however, to the very important qualification expressed in ***Nwadiaro v Shell Petroleum*** (1990) 5 *NWLR* (Pt 150) that where there has been an admission of liability during negotiations and all that remains is fulfilment of the agreement, it cannot be just and equitable that the action would be barred after the statutory

period of limitation if the defendant were to resile from the agreement during negotiations. Pointedly, with respect to claims under carriage of goods by sea, Jinadu, J, in ***JFS International Ltd v Brawal Line Ltd & 2 Ors*** (1995-7) 6 NSC 239 stated thus: "*...when in respect of a cause of action, the period of limitation begins to run, it is not broken and it does not cease to run merely because the parties engaged in negotiation. The best course for a person to whom a right has accrued is to institute an action against the other party so as to protect his interest or right in case the negotiation fails*."

Much as his Lordship's counsel is instructive, taking out a "protective writ" is usually not the commercially attractive path, in the light of protracted litigation and loss of business goodwill.

The harshness of a strict application of the limitation period to carriage matters has given rise to circumvention of the Federal High Court's admiralty jurisdiction through the institution of affreightment claims as actions in bailment on terms, as demonstrated by the plaintiff's suit in ***Triumph Merchant Bank Plc v The Vessel Roxanne Delmas*** (1997-8) **7** NSC 373. In this case, the Court implicitly endorsed that a claimant who is affected by the one year limitation provisions, can avoid the consequences of a time bar by grounding his claim in bailment rather than pursuing an admiralty action.

It is submitted that a strict application of the Rules with respect to limitation of action, under Article 3 Rule 6, needs to be balanced against principles of equity and good conscience, good faith, and common sense. Where it emerges that parties were in negotiation, or a prospective claimant is induced to defer action pending investigation of claims, it is desirable that consideration be given to:

(i) The possibility of the defendant's waiver of his right to limitation of time as illustrated in ***Nigerian National Shipping Line Limited v Gilbert Emenike*** (1987-90) 3 NSC p.163 where the Court affirmed that:

"*... limitation of action, may be waived....Waiver is an abandonment of a right; and this includes the right not to insist on limitation of action. It is of course*

always open to any party to a contract to waive his right thereunder..."

(ii) The possibility of the equitable application of the doctrine of estoppel by conduct against a defendant, especially one who seems to have no defence other than reliance on the time bar provision. Contra ***JFS International Ltd*** (supra).

(iii) The rationale that, where an action is deferred on a promise of investigation of claims, time should only begin to run when such investigations have been completed and the claim expressly refuted. In ***Emenike's*** case, the appellant had argued that the lower Court erred in law, and upon the facts in holding that, ***time for limitation purposes, started running when the plaintiff was aware that his cargo was missing***; ***this date, the lower Court had reasoned, was not the 3rd of January, 1978, when the ship arrived the port of destination, nor even the 19th of May, 1978, when the claimant respondent made a formal claim for the goods, but the 5th of September 1978, when the defendant appellant issued their shortlanding certificate after investigating the whereabouts of the lost goods.*** In dismissing this appeal and upholding the lower Court's decision, the Court of Appeal, determined when time should begin to run. It stated thus:

"... One wonders how, if the appellants were still investigating the loss of the goods by the 5th of September, 1978, the goods could have been deemed to have been delivered earlier."

A balance should be struck between cargo and ship-owner interests in circumstances where parties are negotiating or investigating claims arising from loss or damage to goods carried by sea, such that time ceases to run in the intervening period. Surely justice should not be prostrate after all.

DATA PROTECTION LAW

By Aishatu I. Auta

PERSONAL DATA

Personal Data can be defined as data which relates to a living individual who can be identified from such data, or other information which is in the possession of, or likely to come into the possession of, the data controller .It includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual.

DATA PROTECTION

Data Protection is defined as the implementation of administrative, technical or physical measures to guard against unauthorized access to such data.

In the UK, data protection is governed by, The Data Protection Act 1998. The European Union Data Protection Directive of 1995 requires member States to protect people's right to privacy with respect to the processing of personal data.

In the United States, data protection legislation is not provided for in one specific Act, rather sectoral laws are enacted which apply to certain sectors and industries.

PRINCIPLES OF DATA PROTECTION

The European Union Data Protection Directive and the United Kingdom's Data Protection Act 1998 provide certain basic principles that must be adhered to in order to protect rights, these include:

- Personal data shall be processed fairly and lawfully;
- Personal data shall be adequate, relevant and not excessive in relation to the purposes for which they are processed;
- Personal data shall be kept up to date and shall not be kept for longer than is necessary;
- Personal data shall be processed in accordance with the rights of data subjects under the Act;
- Appropriate technical and organizational measures shall be taken against unauthorized or unlawful processing of personal data and against accidental loss or destruction of, or damage to, personal data.

DATA PROTECTION LAW IN NIGERIA

With the increasing popularity of e-transactions in Nigeria, internet banking, international and domestic internet transactions, mobile transactions, ATM Machines, Online Newspapers etc, have been introduced. Whilst these have made business, banking, withdrawals and personal transactions easier, it has also given rise to cybercrimes, hacking, and invasion of privacy by email interception and online identity theft.

In Nigeria the only legislation that protects a citizen's right to privacy is the 1999 Constitution. Section 37 of the Constitution provides for the right to private and family life, where the privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications are guaranteed and protected.

There have been several failed attempts by the Government to pass various Bills for the protection of data and privacy of citizens into Law in Nigeria. There have been a number of bills dealing with computer misuse, cyber crime and data protection which have been presented before the National Assembly and were not passed into Law. Such Bills include:

- The Computer Security and Critical Information Infrastructure Protection Bill 2005(Sponsored by the Executive);
- The Cyber Security and Data Protection Agency (Establishment, etc) Bill 2008 (Sponsored by Hon. Bassey Etim);
- The Electronic Fraud Prohibition Bill 2008 (sponsored by Senator Ayo Arise);
- The Nigeria Computer Security and Protection Agency Bill 2009 (another Executive Bill);
- The Computer Misuse Bill 2009 (Sponsored by Senator Wilson Ake);

The proposed bills, when closely examined manifest the following shortcomings:

- A lack of definition of what constitutes personal data;
- No identification of the right to privacy;
- No appointment of a regulatory body to redress breach of such data or privacy;

- No identification of the fact that certain organizations can also breach data protection rules;
- Lack of Provision for circumstances where the personal data of a citizen may be utilized without their consent.

There was a directive by the Nigerian Communications Commission (NCC) towards the end of 2009 for the registration of sim cards by all existing sim card users. Whilst that in itself was borne out of the need to have a credible database of sim card users in Nigeria for easy identification, there are no laws that protect the privacy of such registered users and their information from mobile crimes. Hence the sim user's data can be accessed if the Mobile Operators systems are hacked, thereby putting such a person in danger.

It is regrettable that Nigeria is often excluded from the list of countries eligible for online shopping by stores abroad as there is no security or law that protects parties in a situation where there is an online scam.

Equally of concern is the recent publication by *Thisday* Newspaper on 21st of September 2012, of a list of one hundred and thirteen (113) companies and four hundred and nineteen (419) Directors who were banned by the Central Bank of Nigeria (CBN) from obtaining bank loans. The publication included the Company's names, Directors names, and the registered addresses of the listed individuals. This is an invasion of privacy and an exposure to different kinds of crime and theft, especially as some of these individuals had used their home addresses as their registered company address. Such data should be protected by an efficient Data Protection Law.

CONCLUSION

Whilst internet transactions are a welcome development to the society, attendant laws need to be passed to protect citizens from cybercrimes, and to ensure privacy of data and mobile communication. This is necessary to boost consumer confidence in carrying out internet and mobile transactions. It will also aid investor confidence in carrying out transactions in Nigeria through the internet or other means of technology.

It is suggested that the proposal for a Data Protection Act should be reconsidered and such a bill should be more detailed and expressly address salient definitions and other issues as to privacy, personal data and breach. A regulatory body should also be put in place to implement same.

OVERTIME CARGO: WHO BEARS THE BRUNT?

By Callistus Ojukwu

The Nigerian Customs Service (NCS) is governed by the Nigerian Customs and Excise Management Act (CEMA) Cap C45, Laws of the Federation of Nigeria, 2004. By the provisions of CEMA particularly Sections 19 and 167 the Nigerian Customs Service is authorized to detain, declare and publish by Official Gazette containers *lying undelivered at the ports over a 30 day period as* overtime containers and consequently dispose such containers by public auction.

Pursuant to the above provisions of CEMA and the recommendation of the Presidential Committee on Port Reforms, the committee is charged with the responsibility of decongesting the ports.

The NCS has periodically issued Government Notices contained in the Federal Republic of Nigeria Official Gazettes declaring various cargoes as overtime e.g. Gazette, Volume 99 of 18th September, 2012.

The said Presidential Committee has put in place a new regime to improve port services and reduce delay by directing Lagos Ports to undertake 24 hour operations. Also the cumbersome practice of having fourteen (14) different agencies at the ports peruse and treat all shipping documents in respect of each container has been scrapped. Presently the only agencies allowed to operate at the ports are, the Nigeria Customs Service (NCS), Nigerian Maritime Administration and Safety Agency (NIMASA), the National Drug Law Enforcement Agency (NDLEA), the Nigeria Police (Ports Authority Command), the State Security Service (SSS), the Nigerian Immigration Service (NIS), and the Port Health Authority. All other bodies can now only enter the ports and operate in them on the basis of specific invitation as the need arises.

Whilst commending the Federal Government efforts at evacuating the Containers and decongesting the Ports, it is pertinent to point out that the exercise should not become a scheme to perpetrate fraud and impose financial hardship on terminal operators and other stakeholders in the Shipping industry.

It is observed that a trend is gradually emerging whereby Consignees or their clearing agents in a bid to avoid paying storage charges and accrued demurrage on the containers to terminal operators, refuse to take delivery of their cargo (containers) and wait until the cargo is declared overtime by the NCS at the expiration of the 30 day period allowed by CEMA. These agents, it would appear, then influence the auctioning of such containers to themselves, usually at government regulated rates, in which case the terminal operators are merely paid 25% of the amount realized from the said auction. A case in point is a recent situation where an agent asserted to a certain terminal operator that:

> *"....Although we are not happy with the huge demurrage, we on our own part have no option than to propose the above amount for your consideration. Anything short of this, will definitely make us to allow the cargo to go on Customs auctions and the cargo will then be transferred to Ikorodu or Onne which will make it easier and cheaper for us to repurchase. We know that if this happens, your management will probably lose all the charges or collect less than N4M on the consignment*."

The practice is that after the expiration of the dwell time of 28 days, the Customs forward the unclaimed cargo list to the terminal operators directing them to transfer the containers to the Government Warehouse for safe custody pursuant to Section 31(2) of CEMA. It is however observed that often times 25% of the auction proceeds are not paid to the Terminal Operators but instead paid to the operators of the Government Warehouse at Ikorodu.

We note from the foregoing that the entire process of auctioning overtime cargo, though commendable for decongesting our port terminals appears detrimental to terminal operators who now seem to bear the brunt for "free storage" of containers.

It should be recalled that the Port Terminal operations are no longer under the auspices of the Nigerian Ports Authority(the erstwhile Government Agency for such services) and have since 2006 been concessioned to private operators who are obliged to provide quality services applying international best practices on commercial terms. These terms include demurrage for containers which have "overstayed their welcome" in the terminals. The envisaged revision of CEMA emerging from the Customs and Excise Management Bill presently before the National Assembly should be pro-active in addressing such issues in a more realistic manner to balance the challenges of port operation and revenue generation for government.

CONGESTION IN FEDERAL HIGH COURT – ADR TO THE RESCUE?

By Kashimana Tsumba

This commentary assesses the methods of addressing commercial and maritime disputes in Nigeria. It assesses the efficacy of the Federal High Court Rules and the Admiralty Jurisdiction Procedure Rules in bringing about timely solutions to disputes .It explores possible innovations where both Rules can incorporate ADR into their text as done in the High Court of Lagos State (Civil Procedure) Rules 2012.

Section 251 of the 1999 Constitution gives the Federal High Court exclusive jurisdiction over certain commercial and maritime disputes. Part V of the Federal High Court Act Cap F12 LFN 2004 gives the Federal High Court power to make rules of Court.

Section 21 of the Admiralty Jurisdiction Act Cap A5 LFN 2004 states that the Chief Judge may make Admiralty Jurisdiction Procedure rules. Order 1 Rules 3(2) of the Admiralty Jurisdiction Procedure Rules states that the Federal High Court Rules shall apply subject to the provisions of the AJPR in Admiralty matters.

The Arbitration and Conciliation Act 1988 is also applicable in Nigeria where parties have an arbitration clause in the contract. In recognition of this, Order 52 of the Federal High Court (Civil Procedure) Rules 2009 gives the parties in both commercial and maritime disputes a window of opportunity to submit the matter to arbitration where such clauses exist in the contract. The Federal High Court Rules also give parties the option of resorting to arbitration or settlement at any point in the proceedings, even if not contained in a contract. The usual practice however is that parties would at their discretion opt to settle the matter out of Court and apply to the Court for permission to do so.

The AJPR on the other hand does not make provision for arbitration or expedition of hearings rather it makes provision for palliative measures such as security for costs, reparation for needless arrest and payment of

damages. Maritime business is usually capital intensive and expediency in settling maritime disputes is of the essence. Such claims may cover a range of delicate issues like ship arrest, container detention, demurrage claims or piracy claims.

The more time runs the more the parties lose resources and income and in many instances where vessels are involved depreciation or deterioration may set in. Consequently a more proactive approach to ensure timely settlement of Maritime claims by alternative dispute resolution is desirable.

A close look at the Lagos State Civil Procedure Rules 2012 will show some differences from the approach taken by the The Federal High Court (Civil Procedure) Rules 2009.

Firstly Order 25 Rule 1 Lagos State Civil Procedure Rules 2012 makes it obligatory for parties to consider ADR regardless of whether there is an arbitration clause in the contract or not. Order 25 Rule 2 makes pretrial conferences where issues are isolated compulsory in all matters that come before the Court. The rationale behind this as stated in the Rules is twofold, namely to secure the just, expeditious and economical disposal of the matter and to promote amicable settlement of the case or adoption of alternative dispute resolution.

Order 3 Rule 11 of the Lagos State Civil Procedure Rules 2012 further states that:

> *"All Originating Processes shall upon acceptance for filing by the Registry be screened for suitability for ADR and referred to the Lagos Multi Door Court House or other appropriate ADR institutions or Practitioners in accordance with the Practice Directions that shall from time to time be issued by the Chief Judge of Lagos state".*

Order 3 Rules 11 represents a very proactive approach at referring matters before the State High Court to different streams of Alternative dispute resolution such as arbitration, mediation or conciliation as may be appropriate. It expressly makes room for matters to be

referred to the Multi Door Court House or other ADR institutions at the direction of the Court.

The key difference between The Federal High Court (Civil Procedure) Rules 2009 and the Lagos State Civil Procedure Rules 2012 is that the FHC Rules leave it to the parties to opt for arbitration if the contract contains a clause or if the parties choose to while the Lagos State High Court Rules subject all matters that come before it to pretrial conferences and sifts out matters that it thinks can be dealt with by ADR.

In order to alleviate the pressure on the Federal High Court, it is advocated that both the AJPR and the Federal High Court Rules should incorporate mandatory ADR provisions. This should result in expediting both commercial and maritime claims. Parties should be obliged to explore avenues of settling the claims while trial will be a last resort. With the emergence of the Maritime Arbitration Association of Nigeria (MAAN), and facilitators like the Nigerian Shippers Council there are specialist bodies that can assist in expediting settlement of Maritime claims. This issue is now of essence as protracted litigation discourages business men from investing in jurisdictions where enforceable solutions are cumbersome to achieve. It is hoped that a future review of the AJPR and Federal High Court Civil Procedure Rules will incorporate provisions making ADR a compulsory starting point in order to expedite resolution of maritime and commercial disputes.

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PORT TERMINAL OPERATIONS[G]

By L. Chidi Ilogu (SAN)

BACKGROUND

Prior to the year 2006, port operations in Nigeria were managed by the Nigerian Ports Authority (NPA) – a governmental agency set up essentially for that purpose. These operations were characterized by, high costs, low efficiency, obsolete equipment, under-funding, high level of centralization and poor infrastructure. The situation constrained and adversely impacted on

[*] Being summary of the paper presented at the recent IBA Conference held in Dublin, Ireland.

overall national economic development, cost of imports, turn-around time of vessels at Nigerian port, freight charges and size of ships calling Nigerian ports.

REFORM

Government embarked on port reform initiatives by introducing the Landlord model which entails:

- Engagement of private port terminal operators to take over:
  - cargo handling & storage
  - terminal management
  - investment in infrastructure such as RTGs, Gantry Cranes
  - employment of port labour, stevedores.

Land ownership and administration remain under the control of NPA as the Landlord with obligation to provide technical regulation, dredging, pilotage, towage, super/infrastructure and environmental care.

OUTCOME

The reform efforts resulted in the existing Port facilities around the country being demarcated into twenty-six (26) Port terminals and handed over to private sector operators after an international competitive bidding process. Two Build, Operate and Transfer (BOT) Terminals were separately negotiated namely: Grimaldi Group (Port & Terminal Multi Services Ltd) as a Roro Terminal in Tin Can Island; and West African Container Terminal (WATS) in Onne, Rivers State.

CURRENT CHALLENGES

Port terminal operations have been on for over six (6) years under private operators. However there is still no commercial or economic regulator to effectively monitor and regulate Port terminal operators.

Proper legal and regulatory framework are yet to be put in place as Port reform remains under the old Nigerian Ports Authority Act 1999. There is need for an

updated legislation to effectively delineate role of NPA as technical regulator and an independent entity as commercial/ economic regulator.

NPA has also failed to meet some terms of the concession agreement such as providing: dredging of access to berths of 12 – 14 metres draught as contracted in some locations; Dredging of port entrances and channels to facilitate entry of bigger ships to the ports; Poor port access and congestion due to lack of integrated rail, road, port network to meet multimodal transport requirements; and no standardized manual or regulations for terminal operators to meet international standards.

Currently, some Port terminal operators are also yet to meet terms and obligations under the lease agreement. Most berths are yet to be dredged to receive mega-carriers which would help to reduce freight rates and cost of imports.

Interpretation of Concession/Service Agreement Clauses e.g. events of default, force majeure, approval for increases of storage/terminal/operational charges, conflict between clauses and appendixes etc.

CONCLUSION

Although Port terminal operations by private operators in Nigeria are developing gradually, huge capital outlays are required for the development of infrastructure both by the Landlord (NPA) and the Terminal operators in order to bring these facilities to internationally acceptable standards.

It is envisaged that the Ports and Harbours Authorities Bill presently before the National Assembly will effectively address the concerns of both the Landlord and the Port Terminal Operators in such a manner as would enhance efficiency in port operations and management.

Hopefully, this will ultimately be in the best interest of the consumer of port services and the national economy.

The Foundation Chambers' team and Ilogu family recently attended the swearing in ceremony of Our Principal Partner, Chidi Ilogu (SAN) held at the Supreme Court Complex, Abuja.

Making the Valedictory Speech

TIT-BITS

Q: What's the difference between a lawyer and a boxing referee?

A: Unlike the Lawyer, a boxing referee doesn't get paid more for a longer fight.

Q: What do you call a smiling, courteous person at a Bar Association Convention?

A: The Caterer.

* * *

“You seem to be in some distress," said the kindly judge to the witness. "Is anything the matter?"

"Well, your Honour," said the witness, "I swore to tell the truth, the whole truth and nothing but the truth, but every time I try, some lawyer objects."

* * *

A lawyer is a gentleman who rescues your estate from your enemies and keeps it for himself. - *Lord Brougham*

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