PEARLS OF LAW

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Food Art: Intellectual Property Law Protection

Nigeria is on the cusp of a food renaissance. A strong indication of this Cultural Revolution is the emergence of chefs who have become popular through Instagram and other social media platforms, which is quite interesting and a reflection of the growing sophistication in the Nigerian food and Beverage Industry. Chefs are distinguishing themselves by their ability to give local dishes a new lease of life and using world class presentation standards. For wedding menus, people are no longer satisfied with traditional dishes such as rice, chicken and salad but pay extra for exotic continental dishes and desserts. Nigeria is among the countries that recognise chefs as celebrities, in the UK Jamie Oliver and Gordon Ramsey are very popular and have television programmes and top restaurants. Surprisingly, there are museums dedicated to food, such as the food museum in Hangzhou, China, where visitors can admire expertly presented Chinese dishes and the New York's Museum of Food and Drink and Chicago's Foodseum.

With this trend, we might soon witness new forms of Intellectual property rights in the food and beverage industry. Every business in the food sector creates intellectual property which has to be protected at the initial stages of the business. Intellectual property protection is available by way of patents, trademarks, and copyright.

Patents: generally, patents are used to protect new inventions or improvements to older inventions. Under Nigerian Law, patents are governed by the Nigerian Patents and Designs Act. Section 1 of the Act (PDA) states that an invention is patentable if: i. it is new, results from inventive activity and is capable of industrial application, or, ii. if it constitutes an improvement upon a patented invention, and also results from inventive activity and is capable of industrial application. It is debatable whether food preparation techniques and creative designs are protected under the Act. However, in other jurisdiction such as the USA patents are usually granted for innovative cooking techniques and creative food designs but the requirement of inventiveness is crucial to the grant of the patent. For example Smuckers an American company was denied its utility patent because its peanut butter and jelly sandwiches (called Uncrustables®) was not original. Some examples of food patents granted under US law include a utility patent covering a recipe for instant stuffing mix, a method of making microwavable sponge cake, a design patent for Cold Stone Creamery's signature Strawberry Passion ice cream cake, and a design patent issued for Breyer's Viennetta ice cream cake.

Trademarks: The name of a product, restaurant or chef can be registered as a trademark. In addition the design and appearance of food can be trademarked. A major prerequisite for the registration of a product under the trademark category is that the product must be distinctive and must not be a mere description of a product or a generic name. In other jurisdictions the concept of trademark in the food industry is evolving to include trade dress, the design and appearance of food arrangements. According to Natasha Reed in her piece titled ***"Eat you Art out: Intellectual Property Protection for Food"*** In the US a New York-based Bakery obtained a trademark registration for its cupcakes bearing its signature swirl icing and an "icebox cake" containing different alternating layers of cake wafers interwoven with frosting. A Minneapolis ice cream shop Izzy's Ice Cream Cafe obtained a trademark registration for ice cream cones topped with a "baby scoop" of ice cream (called the "Izzy Scoop®").

Regarding food presentation, chefs can protect their food presentation or plating under the law if it fulfills the requirement of distinctiveness. Apparently, the presentation styles of chefs is not to be trifled with. In the US in 2014 there was a scandal involving a chef Robin Wickens who had imitated dishes by renowned American chefs Wylie Dufresne, Jose Andres, and Grant Achatz and copied their plating design. Experts in the food industry are of the opinion that chefs might be able to obtain copyright protection for their signature dishes or original plating or food design. However they might not want to pursue copyright infringement actions over their plating designs because of the tradition of sharing in the food industry. An interesting case involving an American Pizzeria (New York Pizzeria Inc) illustrates the fact that individuals are beginning to take protecting their food presentation very seriously. In that case a Pizzeria brought an action against its former owner for copying its distinctive plating techniques, it argued that it utilised a specific distinctive visual presentation of its baked ziti, eggplant parmesan, and chicken parmesan. In its opinion, the Southern District of Texas emphasised that there were "rare circumstances" where food plating may be protected by trade dress if it is distinctive and serves no functional purpose, and that a party may be able to prove infringement of food plating if there is a likelihood of confusion. However, the action failed because NYPI did not state which food designs were protected by trade dress and failed to state the defendant's dishes infringed by them. Experts note that for a particular plating design to cause a likelihood of confusion in the customer's mind, the chef must be able to demonstrate that if a customer sees a similar presentation at another restaurant, he might think he is being offered the dish by the original chef.

Copyright: Copyright protection is only available to ideas that have been expressed in a fixed medium. Applying this test to the food industry, food can only be copyrighted if it contains creative elements that are distinct from its utilitarian features. For example a wedding cake design might be protected under copyright law if the design is really artistic and goes beyond the appearance of a normal wedding cake. Therefore the cake's design is being protected and not the actual cake. A recipe book can be protected under copy right law. However merely listing ingredients in a book will not suffice for copyright protection.

In conclusion, as the Nigerian food industry is evolving, chefs and other stakeholders should avail themselves of the various forms of protection available under our intellectual property law regime.

CHALLENGES IN THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS IN NIGERIA

CONTINUED FROM PAGE 12

also introduced an innovation, the Arbitration Claims and Appeals Procedure Rules to apply to court applications relating to arbitration matters. The rules are a set of specialised procedural rules aimed at enabling the expeditious determination of court applications in support of arbitration. However, at the time of this paper, the Draft Bill is yet to be enacted into law by the National Assembly. It is suggested that renewed impetus should be given by the stakeholders in the arbitration community to ensure that the Bill is passed by the legislature.

Unrestricted appeals against Orders Enforcing Arbitral Awards

One of the greatest challenges facing the enforcement of foreign arbitral awards is the penchant for unsuccessful parties to appeal orders of the enforcing court – sometimes up to the Supreme Court. The right of appeal against the decisions of a High Court is undoubtedly protected under the Constitution. However, the exercise of this right of appeal appears to make a mockery of the nature of arbitration as being final and binding and a speedy means of resolving disputes. Where the enforcement of an arbitral award is challenged all the way to the Supreme Court and taking years to resolve what are sometimes interlocutory applications, then the attractiveness of arbitration over litigation becomes whittled down. In that sense, it becomes a first step towards litigation rather than an alternative to litigation. It is suggested that the right of appeal in arbitration cases should be severely restricted. For instance, it is possible to draw a parallel between an arbitral award and a consent judgment in the sense that both require the consent or approval of the parties to be made. In the case of arbitration, the consent is given in the arbitration agreement by which the parties agree to resolve their dispute by arbitration and to be bound by the outcome. If this is the case, then it is our view that an appeal over an arbitral award should also be with the leave of the Court just as is the case with an appeal over a consent judgment under the Constitution. In considering the application for leave, the court will be expected to exercise its discretion judiciously and judicially in order to avoid a needless appeal and in line with the overall objective of promoting arbitration by holding parties to their bargain.

Conclusion

It is clear that obtaining a foreign arbitral award is one thing while enforcing the award is entirely another matter. The successful party must take the time to decide under which regime the award should be enforced as the different regimes make different demands on the successful party. Also, although it cannot be confidently said that Nigeria has attained its height in the support of the arbitral process, particularly in the enforcement of foreign judgments and arbitral awards unlike developed societies such as United States, France, and United Kingdom; however, one can say that with the free democratic society Nigeria has found itself, there is an increasing hope that better days lie ahead in making Nigeria the hub of international commercial arbitration in Africa. Achieving this will require a lot of legislative effort as well as sincerity on the part of users and practitioners of arbitration.

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