A Newsletter on Labour Law and Emerging Trends

'Arbitration Clauses in Contracts of Employment?'

- A NECESSITY OR SUPERFLUITY

After years of academic and professional pursuit, a white-collar job is the desire of many, and Richard had just secured one. Having scaled through the inevitable hurdles of school and series of professional training, this is the perfect bounty for the moment. To formalize this relationship and as is the practice, Richard's employer handed him a contract of employment - a contract which he (Richard) never had an input but was expected to either accept or reject without more. Still basking in the euphoria of his newly-found love (a new job), Richard swiftly communicated his acceptance of the offer, oblivious of the legal implication of a particular term contained therein. As innocuous as this term seemed to be, it turned out a sweet-bitter peel in the mouth of Richard and an ominous beat which he cannot help but dance to its rhythm. What is that term? You may ask! Very simple. It's an Arbitration Clause contained in Richard's contract of employment which signalled the beginning of his undoing.

Interestingly, the above hypothetical scenario played out in ***Giuseppe Francesco E. Ravelli v Digitsteel Integrated Services Limited NICN/LA/599/2016 (February 16, 2018)***. Apart from the procedural issues (e.g. the appropriateness of commencing an action by Originating Motion) that came to the fore, the central question is somewhat more fundamental, and inextricably linked to what appears to be the trend nowadays – must all contractual documents necessarily have an arbitration clause?

FACTS

By a contract of employment dated August 17, 2012, Giuseppe Francesco E. Ravelli (*"Ravelli"*) was offered an employment in Digitsteel Integrated Services Limited (*"DIS Ltd"*). By Article 22.3 of the contract of employment:

> *"Any dispute which has not been resolved by negotiation of the parties as set out above within sixty days after delivery of the initial notice of negotiation, or if the parties failed to meet within 30 days after delivery, shall be finally resolved by arbitration in accordance with the provisions of the Arbitration Act of Nigeria and its rules by a sole arbitrator. Judgment upon the award rendered by the arbitrator may be entered by any court having jurisdiction thereof. The place of arbitration shall be Abuja, Nigeria."*

Subsequently, dispute arose in the course of the employment relationship between Ravelli and DIS Ltd. Aside the allegations of non-payment of remuneration due to Ravelli, as well as intolerable mistreatment meted out on him, the crux of the dispute was that DIS Ltd was allegedly in breach of material terms of the employment contract. All efforts to resolving the dispute ended up in unrequited toil and blighted hope. In accordance with the terms of the contract, Ravelli delivered a notice of arbitration dated August 16, 2016, to DIS Ltd nominating three (3) persons for possible appointment as arbitrators, and invited DIS Ltd to concur on the appointment of any one of

them, or otherwise make its own nomination within twenty-one (21) days of delivery of the notice of arbitration. Whilst DIS Ltd objected to the appointment of any of the proposed arbitrators, it did not make its nomination.

By an originating motion dated September 29, 2016, Ravelli approached the National Industrial Court (NICN), Lagos, for an order appointing an arbitrator on behalf of the parties pursuant to the Arbitration and Conciliation Act 2004 (ACA). In response, DIS Ltd filed a counter-affidavit and written address in opposition to his application. The above in view, the NICN was minded to deliberate on whether Ravelli's application was competent, same having been commenced under the ACA. The issue for consideration was also expanded to include: ***whether the ACA itself applies to the NICN as to warrant/permit the applicant filing this suit before the court/bring an application for the appointment of a single arbitrator, as envisaged under the contract, and made subject to the ACA.*** In other words, ***whether the NICN falls within the intent of the ACA when it says 'court' shall be the 'High Court' or 'Federal High Court'?***

FINDING/DECISION

The court held that arbitration in Nigeria is governed at two levels, by two separate laws. The first is arbitration in its general form often termed commercial arbitration, regulated by the ACA, the law under which the instant suit was filed. The second is in relation to labour disputes, regulated by the Trade Disputes Act (TDA) Cap T8 LFN 2004, an Act specifically listed in section 254C(1)(b) of the 1999 Constitution (as amended) as one of the Acts over which the NICN has exclusive jurisdiction. The court further held that the two forms are treated separately because under section 12 of the TDA, "*the Arbitration and Conciliation Act shall not apply to any proceedings of an arbitration tribunal appointed under section 9 of this Act or to any award made by such a tribunal.*" While this provision may have been specifically made within the context of trade disputes, it does not take away the tenor that the ACA itself was not meant to apply to labour/employment disputes- as it indubitably applies only to commercial disputes.

With a community reading of the long title/explanatory note of the ACA, section 57(1) which *inter alia* defines/restricts the words "*court*" and "*Judge*" to the High Court of a State, the High Court of the Federal Capital Territory, Abuja or the Federal High Court and the case of *Statoil (Nigeria) Ltd & Anor v. FIRS & Anor [2014] LPELR- 23144(CA)*, the court also held that the ACA does not by any figment of imagination cover labour/employment issues and as such, the court lacks the requisite jurisdiction and cannot make any order as to give effect to the Act or its application; *the instant suit is incompetent as filed and consequently struck out.*

COMMENTS

The decision of the court is premised on whether the suit as presently constituted is competent- the originating motion having been brought pursuant to the relevant provisions of the ACA. From the reasoning of the court, one cannot help but be swayed by the well-considered judgement delivered by Hon. Justice B. B. Kanyip, PhD. Admittedly, parties have the right to agree on terms that govern their contractual relationship, as well as the mechanism for resolving disputes arising from the contract. However, parties cannot by agreement confer on a court the right to adjudicate on a matter when such right itself is not conferred by statute. The point is not lost

that arbitration avails parties the opportunity to resolve their dispute 'privately', and away from the intrusive delays of court hearings. But that is just a side view to the entire picture.

Arbitral hearings in these parts, are now increasingly bogged down by objections, and all manner of dilatory tactics that were hitherto the exclusive preserve of adversarial court hearings. Even where awards are issued, often, the losing party objects or flimsily accuses the tribunal of some misconduct and parties are made to still go through the court system to resolve their dispute one way or the other. All the while, the underlying dispute remains unresolved. Invariably, arbitration as a first resort agreed to by the parties, must be explored before any court hearing. Where provided for in the contract between willing parties, it however now appears to be adding extra layers of burden to a timeline which ultimately resorts finally to litigation for resolving disputes. To say the least, it smacks of superfluity to insert arbitration clauses in all manner of agreements that are non-commercial in nature (landlord/tenant, employer/employee etc.) when parties may in its stead, simply have allowed themselves an unfettered right to approach the court to determine their dispute.

Take, for instance, the instant case. Here, Ravelli had applied to court for the appointment of an arbitrator, contending that the parties' contract has an arbitration clause which provides that where there is a dispute, same shall be resolved by a sole arbitrator to be appointed by the parties; as is sometimes the case, the parties failed to agree on the sole arbitrator and Ravelli thus sought the court's discretionary power in appointing an arbitrator for the parties pursuant to the relevant provisions of the ACA (as stated in the employment contract). The court, in an exhaustive manner, analysed the relevant provisions of the ACA before concluding that the NICN would not be able to exercise the judicial discretion sought by the applicant. The central dispute between parties in the instant case, remains unresolved; whilst Ravelli will next have to approach the appropriate forum to appoint an arbitrator.

As we draw the curtain, let us pause a little and take a leap into the future: If Ravelli decided to approach the appropriate forum (court) to appoint an arbitrator and an award is eventually given, such an appointment, when made is just a step in the attempt to resolve the underlying dispute between parties. Enforcement of the award(s) subsequently issued by the arbitrator may still be subject to long-drawn litigation, not least as to the appropriate forum to seek enforcement. The employment related dispute could have, in the meantime, been determined; and even if alternative dispute mechanisms were necessary, or preferred, could have gone through the same at the NICN (the Rules, and structures are well in place for that)– but for the parties' contractual autonomy that-as the law provides- is to be followed to the letter.

Arbitration clause in contracts of employment- a necessity or superfluity. Ponder!

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