

Arbitration Clauses And The Employment Disputes: The Pros and Cons of Employment Arbitration Agreements In Nigeria.

Introduction

Arbitration is becoming increasingly popular as parties look for a more efficient conflict resolution mechanism. Arbitration creates a forum for resolving disputes outside of the courtroom setting. Because arbitration is less formal than judicial proceedings and is run by arbitrators who are not required to adhere strictly to the law, it is less expensive and less time consuming than court proceedings.

Arbitration clauses and issues relating to arbitration agreements do not arise very frequently in employment disputes. However, when these issues do arise, they can pose significant challenges because dealing with them requires familiarity with substantive law relating to their enforcement as well as their interpretation. If a contract of employment includes an employment arbitration clause, then it means that the employee has agreed not to pursue any legal action against his employer in court. Instead, any dispute that the employee has with his employer must be settled first through a process known as arbitration. In other words, there are a number of factors to consider in deciding whether or not to include arbitration clauses in the employment contract despite the employer's quick resolve to initiate arbitration clauses.

Most of the employers include arbitration clauses in employment contracts because of their apathy of having their company drag on in court for years. The employers would prefer that certain information remain confidential and

not exposed to public access by litigation, hence the preferred choice of arbitration as a faster and more discreet means of resolving employments

This article examines some pros and cons of employment arbitration contract, effect of signing arbitration clauses in employment contract, and the appellate jurisdiction of the National Industrial Court of Nigeria in employment disputes.

Pros and Cons of Arbitration Clauses in an Employment Contract

Deciding to include an arbitration clause in an employment contract requires careful consideration as the advantages and disadvantages will differ according to each particular situation. A careful thought is required when an employer is drafting an arbitration clause to ensure that the benefits of the arbitration process are maximized and that unnecessary difficulties or disadvantages are not being created because of poor drafting.

Pros of Arbitration

1. **Cost:** Depending on the nature of the dispute, and whether parties choose to forego some of the more time-consuming steps aspects of the process, arbitration in employment disputes may be a less expensive method of dispute resolution for both parties.
2. **Speed:** Foregoing some of the formalities and procedures of litigation will lead to a more expeditious resolution of disputes through Arbitration.
3. **Expertise/Experience of the Arbitrator:** The parties may select an arbitrator with particular expertise relating to their dispute. Some parties feel that being able to select a person by mutual agreement to arbitrate their dispute is a benefit.
4. **Confidentiality:** Arbitration hearings do not take place in open court and decisions or awards delivered by the arbitral tribunal are not published. This can be very valuable for parties in some cases.

Cons of Arbitration

1. **Cost**: Depending on several factors, arbitration can be more expensive than trial. If there are a number of preliminary issues to be decided (e.g., issues around the appropriate parties to the dispute, the seat of arbitration, etc.), or if the agreement calls for more than one arbitrator, the costs can add up very quickly. In some cases, these costs can well exceed the costs of proceeding through the courts.
2. **Fairness:** Since arbitrators are hired and paid for, by the parties the more powerful party especially the employer may have an unfair advantage in terms of selection and outcomes.

3. **Speed**: As arbitration is not always less expensive, it is also true that arbitrations are not necessarily always faster than litigation. This is particularly true where the case is complex.
4. **Drafting Arbitration Clauses**: A poorly drafted arbitration clause can result in added expense and delay arising from the preliminary resolution of the issues posed by the ambiguity or conflict in an arbitration clause. As such, if an employer chooses to include an arbitration clause in an employment agreement, care and diligence should go into its drafting.

Signing an Arbitration Agreement with the Employer

Employers are increasingly asking workers to give up their rights through arbitration agreements, so be careful what you sign. Many employers ask employees to sign arbitration agreements, in which they give up their right to sue in court over job-related issues such as wrongful termination or breach of contract. An employee who signs an arbitration agreement promises to pursue any legal claims against the employer through arbitration, rather than through a lawsuit. It might not sound like a big deal when an employee is just starting a new job and do not see any legal disputes on the horizon. However, if the employee's rights are later violated at work, that arbitration agreement might come back to haunt him.

Employees often sign arbitration agreements unintentionally. How can this happen? Some employers give new employees piles of paperwork to fill out on their first day, and some employees, in turn, sign documents without reading them. Although many employers are straightforward and present the arbitration agreement to employees openly in a separate contract. When an employee signs a contract, letter, handbook, acknowledgment form, or any other document from his employer, he agrees to all the terms of the document, even the ones that he may not have read. This is a particular problem with handbooks, which might be very long. To protect himself from unwittingly giving up his rights, the employee should not sign any document acknowledging he has read something unless he actually have read it and understood it completely. In addition, an employee should not sign any document that says he agrees to the terms unless he has read all of the terms and do in fact agree to them.

If an employer asks an employee to sign an arbitration agreement, the employee can refuse, but that may put his job in jeopardy. Usually, an employer can rescind an employment offer if a prospective employee refuses to sign the arbitration agreement. In addition, an employer can fire an employee who refuses to sign one. Therefore, declining to sign the agreement could jeopardize the employee's job. Some employers will negotiate this point, however, especially if they are more excited about the employee than they are about arbitration.

Why Employees need to negotiate Arbitration Agreements

Here are some provisions that an employee may ask for negotiation in other to create a more balanced arbitration process.

1. **Choice of arbitrator.** An employee should get as much say in choosing the arbitrator as the employer. Given the power of the arbitrator, an employee will want to have rights equal to those of his employer in selecting the arbitrator.
2. **Disclosure of information.** A potential arbitrator should have to disclose information about his or her business and personal interests so that the employee can make sure that the arbitrator is not biased in favour of the employer. For example, the arbitrator should not be someone who is a stockholder in the company.
3. **Costs of arbitration.** Because the employer is the one who wants to use arbitration, the employer should have to pay for it.
4. **Remedies available.** The employee should make sure he receives through arbitration all of the remedies that he would have gotten if he had filed his claim in a court of law.
5. **Legal representation.** An employee should have the right to be represented by a lawyer throughout the arbitration process.

Appellate Jurisdiction of the National Industrial Court of Nigeria over Arbitral Awards on Employment Disputes and its Implications

In Nigeria, it remains the position of the Courts that where the award to be made in arbitration is agreed by the parties as final and binding on them, no court shall have the powers to sit on appeal over that award. A court can only hear and determine applications to have the award set aside for misconduct of the arbitrator(s) or for being improperly procured. A court cannot review, reassess or vary the findings or conclusions of the arbitrator in making the award. The only discretion the court can exercise over an award is to determine whether or not the arbitrator applied proper methods in arriving at the award. **See Baker Marine Nigeria Ltd. v. Chevron Nigeria Ltd. (2000) 12 NWLR (Pt. 681) 393**. This position is apt for commercial arbitration but does not appear to be applicable to employment/labour disputes' arbitration in light of the provisions of Section 254C of the Constitution of the Federal Republic of Nigeria 1999 (As Amended).

The provisions of the Constitution of the Federal Republic of Nigeria 1999 (As amended) introduced by the Third Alteration Act which are relevant to arbitra-

tion in Nigeria are Sections 254C (3) and (4) of the Constitution (as amended). While Section 254C(3) provides that the National Industrial Court may establish an Alternative Dispute Resolution Centre in respect of Labour/Employment disputes, Section 254C(4) provides that the National Industrial Court exercises jurisdiction over the enforcement of arbitral awards made in respect of labour/employment-related disputes.

However, the critical provision to this discourse is the proviso to Section 254C(3) of the Constitution which confers the National Industrial Court with appellate jurisdiction to hear and determine appeals against any award made by an arbitral tribunal in respect of labour/employment-related disputes or any other matter over which the National Industrial Court exercises original jurisdiction. For clarity and ease of reference, Section 254C (3) of the 1999 Constitution (as amended) is reproduced hereunder as follows:

"***(3) The National Industrial court may establish an Alternative Dispute Resolution Centre within the Court premises on matters which jurisdiction is conferred on the Court by this Constitution or any Act or Law:***

Provided that nothing in this subsection shall preclude the National Industrial Court from entertaining and exercising appellate and supervisory jurisdiction over an arbitral tribunal or commission, administrative body, or board of inquiry in respect of any matter that the National Industrial Court has jurisdiction to entertain or any other matter as may be prescribed by an Act of National Assembly or any Law in force in any part of the Federation.

It is clear from the above provision that the Constitution has conferred the National Industrial Court with the powers to sit on appeal over any arbitral award made in respect of labour/employment disputes or any other subject matter within its exclusive original jurisdiction. The National Industrial Court has the constitutional powers to review the merits or otherwise of the findings and/or conclusions reached by an arbitrator(s) in making an award over a labour/employment dispute. The ultimate implication of the foregoing is that any party to employment/labour dispute arbitration, who is dissatisfied with the award made thereon, can engage litigation by lodging an appeal against the award at the National Industrial Court to have same reviewed, upturned, varied or set aside. This right of appeal is applicable even where the arbitration clause has stated the award to be final and binding on the parties.

Inevitably, the right to appeal an arbitral award made over a labour/employment dispute displaces or defeats the comparative advantages of speed and confidentiality which arbitration generally bears over litigation. This is because even after the dispute is resolved by arbitration, an appeal to the National Industrial Court and a further appeal to the Court of Appeal protracts the dispute and brings all facts and documents relating to the dispute to public

access. Recall that all decisions of the National Industrial Court, both in its original or appellate jurisdiction, can be appealed against to the Court of Appeal. **See Section 240 of the Constitution, Skye Bank v. Iwu (2017) 16 NWLR (Pt. 1590) 24**. Even more, these appeals would definitely bring about more cost on the parties in addition to the cost they bore during arbitration. Inexorably, the perceived reasons or benefits for including an arbitration clause in a contract of employment and ultimately engaging arbitration instead of litigation to resolve employment disputes, are completely undone by the right of either party to the arbitration to appeal the award to the National Industrial Court and to further appeal to the Court of Appeal.

Given the above, one is left wondering whether there is any need engaging arbitration to resolve an employment/labour dispute in Nigeria. It would appear that it is perhaps a faster, more cost-effective and neater process to litigate employment disputes directly at the National Industrial Court instead of engaging arbitration, as appeals against the decision of the National Industrial Court on employment/labour disputes can be made to the Court of Appeal.

Conclusion

Both parties should be mindful of the disadvantages and pitfalls of choosing arbitration. Arbitration can be an attractive alternate to litigation under particular circumstances. However, before deciding to require an agreement to arbitrate as a condition to employment, an employer should be certain that arbitration is a better method of protecting the parties. Once the employer decides to require an arbitration provision, it should consult with a legal practitioner to ensure the terms of the provision do not create enforceability issues.

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