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Eat and Run: The Pan Ocean's Case

Introduction

Arbitration is one of the mechanisms of alternative dispute resolution. This is a method where a neutral third party hears the evidence between two disputing parties and makes a final binding decision called an award. One significant distinction between arbitration and litigation is that arbitration is consensual, and the award from that is binding on the parties.

Where such consent has been given by the parties, can a party who has freely agreed to an arbitral award declare it illegal?

Factual Background

Appeal No: SC/684/2023 - Pan Ocean Oil Corporation (Nigeria) Limited v. KCA Deutag Drilling GMBH and KCA Deutag (Nigeria) Limited

KCA Deutag Drilling GMBH and KCA Deutag (Nigeria) Limited (“Respondents”) entered into a land drilling agreement with Pan Ocean Oil Corporation (Nig.) Ltd (“Appellant”). The contract was for the provision and operation of a land drilling rig and other associated drilling services by the Respondents to the Appellant. KCA Deutag Drilling GMBH.

Invoices were issued to the Appellant by the Respondents, but these were not paid. After several unsuccessful attempts to get the Appellant to pay the outstanding invoices, the Respondents submitted the dispute – the refusal of the Appellant to pay – to arbitration.

During the arbitration, the parties notified the tribunal of a settlement agreement entered. They requested the tribunal to issue an award by consent of the parties. The tribunal made a consent award based on the settlement agreement in favour of the Respondents with respect to the services provided by the Respondents. The Appellant voluntarily made payment of a part of the award sum, however, a substantial part of the award sum remained outstanding.

Following the failure of the Appellants to fulfil the settlement agreement and pay the award sum, the Respondents applied for an order from the High Court of Lagos State that the award be enforced in the same manner as the judgment of the court. The application was granted.

After the appellant had made some payments voluntarily and the respondents had recovered some amounts through garnishee proceedings, the appellant filed an application at the High Court seeking a stay of further execution and an order setting aside the award on the grounds of alleged illegality of the underlying contract.

This application was dismissed for lacking merit. Dissatisfied, the Appellant appealed the decision.

The Court of Appeal affirmed the decision of the High Court. Still dissatisfied, the Appellant further appealed to the Supreme Court. In a unanimous decision, the Supreme Court affirmed the decision of the Court of Appeal and dismissed the appeal.

Issues Considered by the Court

1. Can a party who failed to raise a jurisdictional objection during arbitration be allowed to raise it afterwards in court?
2. Can a party who has benefitted from a contract declare it illegal?
3. Which court has the jurisdiction to enforce an arbitral award arising from non-payment for services rendered under a contract for the provision and operation of a drilling rig?

On the first issue, the Appellant contended that the contract was void and illegal because the 1st Respondent is a foreign company incorporated outside Nigeria and has not satisfied the condition precedent to it doing business in Nigeria. That by failing to comply with the provisions of Section 78 of the Companies and Allied Matters Act (CAMA), 2020 before carrying on the business, all acts carried out in performance of the drilling agreement are illegal and void. As such, just as the contract is void and illegal between the 1st Respondent and the Appellant, it is also void and illegal between the 2nd Respondent and the Appellant. So, since the contract is illegal, the High Court lacked jurisdiction to recognize and enforce the arbitral award.

In response, the Respondents argued that the Appellant ought to have raised the objection before the tribunal according to **Section 19 of the Lagos State Arbitration Law**. Since the Appellant did not raise the issue earlier at the tribunal, such rights have been deemed foreclosed.

The Court agreed with the Respondents' submission and held that the Appellant was foreclosed from raising the issue of illegality at the High Court, having failed to raise the issue before the tribunal.

On the second issue, it was held that it is morally wrong and dishonorable for a party who has benefitted from a contract to avoid the obligations that come with it based on the allegations of illegality.

On the third issue, the Appellant contended that the contract which gave rise to the award, being a contract for supply of drilling rig and associated equipment and services was a matter connected with oil mines, minerals, including oil fields, mining, geological surveys, and natural gas within the meaning of **Section 7(1) of the Federal High Court Act** and **Section 251(1)(n) of the Constitution of the Federal Republic of Nigeria 1999 (as amended)**. The Appellant submitted further that the application for the enforcement of the award that resulted therefrom ought to have been filed in the Federal High Court and not the State High Court, so, the ruling of the State High Court enforcing the award should be set aside for lack of jurisdiction.

The court, in its wisdom, held that the Respondents' claim was for a breach of contract and payment of outstanding fees, which did not fall within the purview of **Sections 251(1) of the Constitution and 7(1) of the Federal High Court Act**. The contract between the parties, and the activities in the contract are two different things, and for this claim to fall under **Sections 251 and 7** of the Constitution and Federal High Court Act respectively, it must not directly involve questions of contract, payment for services rendered but to touch on the core substance of the items listed under those provisions.

Comments

1. **Jurisdictional objection during Arbitration:** By **Section 19 of the Lagos State Arbitration Law** a plea that the issue on the tribunal's jurisdiction may be raised not later than the time of submission of the points of dispute. Raising the issue at the High Court contravenes the provision of the law.
2. **The doctrine of approbate and reprobate:** The position of law on whether a party who has benefitted from a contract can turn around and declare it illegal is clear. In **AG Abia State v. Phoenix Environmental Services Nigeria Limited & Anor (2015) LPELR-25702(CA)**, it was held that the law is that a party who benefitted from an agreement is not permitted to turn around to question the legality or validity of the same agreement as that would be unconscionable and would amount to approbating and reprobating. This was also the decision of the Court in **Fakorede v. AG Western State (1972) ALL NLR (1) 178**, **AG Rivers State v. AG Akwa Ibom State 2011 8 NWLR (1248) 3**, and other plethora of cases. This is rooted in the Latin maxim of *quod approbo non reprobo* – the doctrine of approbate and reprobate: "that which I approve, I cannot disapprove".
3. **Jurisdictional issues on the enforcement of an arbitral award:** The provisions of Sections 251(1)(n) and 7(1) of the Constitution and the Federal High Court Act are respectively explicit and unambiguous on which subject matters the Federal High Court has jurisdiction to entertain and the breach of a simple contract is not one of them. The issue between the Appellant and the Respondent is one of a simple contract because it bothers on the non-payment of the invoices issued to the Appellant. It has nothing to do with the drilling of the oil rig and other services rendered by the Respondent. The court was right to have found against the Appellant and held that the claim was for a simple breach of contract.

Concluding Remarks

This decision of the Supreme Court restates the position of the Nigerian courts toward arbitration. It allays the fears of organizations and reiterates the fact that the Nigerian courts will not allow the use of litigation to frustrate the enforcement of awards.

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