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Service Of Arbitration Notice Electronically

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Introduction

Arbitration can either arise by an order of court, by statute or most commonly by agreement of the parties. An agreement to refer a dispute to arbitration can either be reached before or after the dispute has arisen.

To get the arbitration ball rolling, the claimant is expected to serve a notice of arbitration on the respondent. The content of the notice of arbitration and service of same are as important as the entire arbitration proceedings. This is because any defect in the notice and the manner in which it was served may result in the setting aside of any arbitral award rendered in the proceedings. Failure of an arbitrator to give notice to the other party of the time and place of meeting could be tantamount to misconduct and may ground a setting aside of the award.[2] Among other things, the claimant must ensure that the notice of arbitration is in compliance with the enabling law.[3]

We briefly address in this paper whether electronic service through cyberspace is permissible Second, who is competent to receive notice if a company is to be served and third, whether agency principles are applicable.

Is service of notice of arbitration through cyberspace permissible?

One of the possible objections to the enforcement of an arbitral award is lack of proper service of notice of arbitration. Ordinarily, parties should provide in the arbitration agreement the mode of service of the arbitration notice and other correspondence which could be by physical service, or electronically. In fact, apart from stipulating the modes of serving correspondence, the arbitration agreement should contain the particular address for service,

for example, mailing address, fax, or email. [4] It is however not surprising that this provision could be missing in some arbitration agreements.

The first hurdle for a claimant who wishes to commence arbitration proceedings is to determine how effectively the notice of arbitration may be served. In the recent English case of Glencore Agriculture BV v Conqueror Holdings Ltd, [5] the claimant sought to set aside a final arbitration award of US$43,176.27 and costs on the ground that it did not take part in the arbitration and was not aware of the proceedings until the arbitration award was served on it by post. The respondent had sent the notice of arbitration to the email address of an employee of the claimant. One of the issues which arose for determination before the court was whether the notice of arbitration was validly served. There was incontrovertible evidence that the notice of arbitration in this case was served on a relatively low level employee of the claimant.

The dispute arose from a charter party agreement between the parties which contained an arbitration clause in the following terms:

> "All the disputes from time to time arising out of this contract shall, unless the parties agree forthwith on a single Arbitrator, be referred to the final Arbitrament of two Arbitrators carrying on business in London who shall be members of the Baltic Exchange and engaged in the Shipping and/or Grain Trades, one to be appointed by each of the parties, with power to such Arbitrators to appoint an Umpire... Arbitration in London in accordance with LMAA terms 1997, English Law to apply."

The relevant provision of the English Arbitration Act is section 76, it provides as follows:

> "76. Service of notices etc.
>
> 1 The parties are free to agree on the manner of service of any notice or other document required to be given or served in pursuance of the arbitration agreement or for the purposes of the arbitral proceedings.
>
> 2 If or to the extent that there is no such agreement the following provisions apply.
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> 3 A notice or other document may be served on a person by any effective means.
>
> 4 If a notice or other document is addressed, pre-paid and delivered by post:
>
> (a) ...
>
> (b) where the addressee is a body corporate, to the body's registered or principal office,
>
> it shall be treated as effectively served." [6] (Emphasis supplied)

The court held that service by email was permissible since in the words of the Act, service is to be carried out by any effective means". It must however be served on a recipient who has authority (actual or ostensible) to receive the notice.

The Nigerian Court of Appeal was invited to determine the relevant provisions on service of arbitration notice by email under the English Arbitration Act of 1996 in the case of

Continental Sales Limited v. R. Shipping Inc. [7] The dispute in that case arose from a time charter party agreement under which the relationship between the parties is to be determined in accordance with the laws of England and dispute to be referred to arbitration in London in accordance with the English Arbitration Act 1996. The respondent initiated the arbitration process by sending the notice of arbitration through email inviting the appellant to nominate its own arbitrator. The appellant acknowledged the invitation but refused to participate in the arbitration proceedings consequently, the respondent appointed an arbitrator who acted as a Sole Arbitrator and found in the respondent"s favour.

The respondent applied to the Federal High Court [8] under section 52 of the Arbitration and Conciliation Act ACA for the registration of the arbitral award. Section 52 (a) (iii) of the ACA provides that the court where recognition or enforcement of an award is sought or where application for refusal of recognition or enforcement thereof is brought may, irrespective of the country in which the award was made refuse to recognise or enforce the award if the party against who it is invoked can satisfy the court with proof that he was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise not able to present his case.

The court had to decide if service of arbitration notice by email was permissible under the English Arbitration Act, in view of the provisions of section 76 3 of the Act which provides that [a] notice or other document may be served on a person by any effective means."

The Appellant counsel had contended that unless agreed by the parties as to the prescribed mode of service of arbitration notice, it is mandatory that parties be served written notice which must be delivered by post to the corporate headquarters and/or principal/registered office of the parties. [9] The Appellant counsel conceded that service of arbitration notice by email could be valid if there is a mutual agreement by the parties to use that method of service as a means of communicating arbitration notice. The court had no difficulty in accepting the mode of service as effective on the following grounds:

(a) Habitual means of communication:

The court found that all the communication between the parties including the signing of the agreements were performed electronically. It therefore stands to reason that any previous accepted and acceptable means of communication among the parties would remain an effective means of service of any subsequent notice of arbitration proceedings [10]

(b) Evidence of service and reactions from appellant:

The court found that the appellant cannot deny that service of the arbitration notice was effected on it and reactions elicited from the appellant. It should be recalled that in the Glencore Agriculture case where the English court refused to accept the service of arbitration notice by email as effective, no response was elicited from the respondent, further there was uncontroverted evidence that the recipient of the email was a junior staff who had left the company"s employment earlier.

(c) Email is a form of communication in writing:

The appellant had contended that the notice was not in writing. The court held that communication by email is not oral because it is set down in writing. The fact that it is electronic does not make it any less written. It can be downloaded as a hard copy.

The equivalent of section 76 3 of English Arbitration Act, which provides for service by any effective means" is section 56 of the Arbitration and Conciliation Act. It provides as follows:

" 1 Unless otherwise agreed by the parties, any communication sent under or pursuant to this Act shall be deemed to have been received-

(a) When it is delivered to the addressee personally or when it is delivered to his place of business, habitual residence or mailing address; or

(b) Where a communication cannot be delivered under paragraph (a) of this subsection, when it is sent to the addressee"s last known place of business,

habitual residence or mailing address by registered letter or any other means which provides a record of the attempt to deliver it." [11] (emphasis supplied)

It would appear that the above section is yet to be tested in a Nigerian court. While the English Arbitration Act used the expression: "any effective means" the Arbitration and Conciliation Act adopts the description: "any other means". That said, existing judicial authorities shows that the Nigerian court has acknowledged the effective use of email in communication. It is suggested that should the opportunity arise, the courts in Nigeria will interpret "any other means" to include service through cyberspace so long as there is proof of attempt to deliver" the notice, especially, giving the accommodating interpretation by the Court of Appeal Nigeria) of equivalent provisions of the English Arbitration Act in the case of Continental Sales Limited v. R. Shipping Inc., cited above. Nevertheless, the claimant must satisfy the preconditions in section 53 1)(a), by first attempting to serve the respondent personally with the notice of arbitration in his place of business, habitual residence or mailing address before he can adopt "any other means" of service [12]

Nigerian Courts have long ago acknowledged the use of electronic means in communicating. The Supreme Court noted that the law cannot be ignorant of modern business methods and must not shut its eyes to the mysteries of the computer. [13] Similarly, Salami JCA had clearly observed that "Although the law does not talk of "computer" and "computer prints out" it is not oblivious to or ignorant of modern business world and the technological advancement of the modern jet age." [14] The current Evidence Act now takes cognisance of modern means of communication in Nigeria. [15]

More so, Justice Ogunwumiju JCA [16] was persuaded by the dictum of Clark J when the learned Judge held in Bernuth Lines Ltd. v. High Seas Shipping Ltd [17], that the provisions of the CPR was not an appropriate benchmark by which to judge whether service my email was effective in the context of arbitration. The court accepted the fact that arbitrations are usually conducted by businessmen represented by, or with ready access to lawyers. Section 76 3 which provides that a notice could be served on a person by any effective means was purposely wide and drafted in an accommodating manner to include emails and other modern means of communication.

The email address:

Another crucial angle which demands clarity on the issue of service of arbitration notice by email relates to the email address to which the arbitration notice is sent. An important distinction has been drawn by the courts between an email address which is generic and that which is the personal business email address of the addressee. An example of a generic email address is info@fanville.com while an example of an individual email address could be name@domainname. For example, if a company holds out its generic email address and arbitration notice is sent to that email address, it may be effective service because the email address was held out to the whole world, [18] it is reasonably expected that the recipient would pass the content of the email to the appropriate person within the company with authority to deal, and if the recipient fails in his or her responsibility, the risk is on the company. The rationale for this conclusion is further strengthened on the account that those who are saddled with the responsibility of opening mail addressed to a company"s address are deemed or expected to ensure that the mail gets to whoever needs to deal with it on behalf of the company. [19]

However, the scenario is completely different with personal business email address. If an email is sent to someone in the respondent"s company who has no authority (actual, ostensible or otherwise) to deal, such service is not effective service. To determine if such service is effective, it must yield the same answer as if the notice of arbitration was physically handed to that person. If physically handing the notice of arbitration to the individual constitutes good service, then sending it to his or her personal business email address would also be good service.

Are agency principles considered in determining if notice of arbitration has been effectively served?

As already noted above, service of arbitration notice by email on the appropriate individual"s email address who has authority to deal within the company is good service. To determine whether the recipient of the email has authority to deal or not, agency principles may be triggered. A company is a persona ficta, and the rules of attribution qualifies the receipt of email by an individual to be attributable to the company but not in all cases as some individuals may lack the authority to receive emails that will pass as good and effective service on the company. [20]

When this poser came before the court for determination in Glencore Agriculture's case, the court held that agency principle was applicable, but whether or not the service was effective under the English Arbitration Act would be determined by whether the agent had actual or ostensible authority to receive the notice on behalf of the party being served. [21]

What is effective service?

When can a notice of arbitration be said to have been effectively served? Effective is defined as achieving a result. [22] The service must produce the result intended for it to be

effective.[23] And as rightly held by the court of appeal in Continental Sales Ltd, since the intention of the e-mail messages and correspondence from the respondent and the arbitrator to the appellant was to achieve the result of communicating the fact that the arbitration proceedings had been initiated, it is justifiable to conclude that there has been effective service of the notice to commence arbitration.[24]

Conclusion:

The notice to commence arbitration demands careful attention since it is the jurisdictional foundation for the entire arbitration proceedings. A well rendered arbitration award can be faulted and enforcement made impossible due to the manner in which the arbitration process was commenced. It is therefore important that an arbitration process is commenced in accordance with the terms of the arbitration agreement between the parties, the applicable legislation and institutional rules.

On the other hand, a party to arbitration who has been effectively informed through cyberspace of the notice to commence arbitration has a duty to take appropriate steps, if he wishes to be heard and take part in the arbitration proceedings. If he refuses to take steps or avail himself of the opportunity to be heard, he cannot complain that he has not been granted fair hearing or that the rule of audi alteram partem has been breached.[25]

Footnotes

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2 Taylor Woodrow Nig. Ltd v. S. E. GmBH 1993 4 NWLR PT. 286 127 at 130 132.

3 The enabling law in Nigeria is the Arbitration and Conciliation Act, ACA CAP A18, LFN 2004.

4 Section 56 of the ACA.

5 2017 EWHC 2893 Comm) or http://www.bailii.org/ew/cases/EWHC/Comm/2017/2893.html (accessed on 20 11 2017 .

6 Subsection 5 provides that the section does not apply to service of documents for the purposes of legal proceedings. Recourse must be had to the relevant High Court Rules for service of court processes. The equivalent provision in the Arbitration and Conciliation Act is section 56 3 .

7 2013 4 NWLR PT. 1343 67.

8 Lagos Judicial Division.

9 This argument was hinged on section 76, 1 , 2 , 3 and 4 (a) (b) of the English Arbitration Act 1996.

10 The Continental Sales Ltd case, supra, at p. 87.

11 Subsection 3 provides that this provision shall not apply to communications in court proceedings.

12 This precondition does not under the English Arbitration Act.

13 Esso West Africa Inc. v. T. Oyegbola 1969 NMLR 194, 198.

14 Trade Bank Plc v. Chami 2003 13 NWLR PT.836 158 at 216 217.

15 Section 84 of the Evidence Act, 2011.

16 Continental Sales case . 86 87.

17 2006 1 Lloyd's Reports 537 at p. 541.

18 Bernuth Lines Ltd v High Seas Shipping Ltd The Eastern Navigator) [2006 1 Lloyd's Reports 537.

19 Glencore Agriculture BV v Conqueror Holdings Ltd (supra) at para. 25.

20 Glencore Agriculture"s at p. 27.

21 Glencore Agriculture BV v Conqueror Holdings Ltd (supra) at para. 35.

22 Blacks" law Dictionary 9th Edition.

23 Oxford Advanced Learner"s Dictionary 7th Edition.

24 At p. 85.

25 Newswatch Comm. Ltd v. Atta 2006 12 NWLR Pt. 993 144.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.