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SIGNIFICANCE OF ARBITRATION IN EMPLOYMENT DISPUTES

1. INTRODUCTION

Traditionally, parties to employment and labour relation disputes have submitted their disputes to courts of law for resolution and in the process have gotten entangled in the delays that characterize our court processes.

In a bid to address the issue of backlog of cases in court, alternative dispute resolution mechanisms have been adopted into the Kenyan context and, arbitration, due to its perceived efficiency, is now widely utilized in Kenya as a form of alternative dispute resolution to resolve contractual disputes (including employment and labour relation disputes) in accordance with Article 159 (2) (c) of the Constitution of Kenya 2010.

The purpose of this article is to highlight the advantages and disadvantages of arbitration and putting these into perceptive with respect to the resolution of employment and labour relations disputes under Kenyan Law.

2. ADVANTAGES AND DISADVANTAGES OF ARBITRATION

Arbitration in Kenya is provided under the Arbitration Act No. 4 of 1994 (the "Arbitration Act").

2.1 Advantages of Arbitration

Confidentiality
Arbitration is a private and confidential process. Everything done in arbitration which extends to choosing the arbitrator, the proceedings, and the final award are confidential and there is no pubic access to the file. There are however circumstances in which the details of an arbitration may become public particularly where such proceedings are challenged in a court of law or where a party seeks to enforce an arbitral award in court.

Certainty
The process of arbitration is straight forward as clearly outlined under Part III, IV and V of the Arbitration Act making it easier for parties (despite at times not having legal knowledge) to track proceedings as compared to litigation.

Flexibility
The process of arbitration is more flexible than litigation as there are no hard rules on issues such as persons qualified to represent the parties, the venue, time of proceedings, production of documents and rules of evidence.

Speed in dispute resolution
The process of arbitration has more often than not proved to be faster compared to litigation as the arbitrators dedicate their time to the dispute with less disruptions and congestions than court processes. The matter is therefore capable of disposition faster. However, it is worthwhile to note that the efficiency of the Arbitrator is determined by the parties and in the event that one or all the parties takes longer than is necessary to comply with the Arbitrator's directions, the effect is that the dispute cannot be handled expeditiously.

Limited Appeals
In court litigation, every order and judgment is generally appealable as a matter of right. In arbitration however, the principle of finality is emphasized offering parties a quick and final method of resolving disputes. This is envisaged under Section 10 of the Arbitration Act.

It should be noted however that Section 35 of the Arbitration Act provides that an aggrieved party may approach the court to have the decision set aside where:-

a. A party to the arbitration agreement was incapacitated;
b. The arbitration agreement was invalid under the governing law chosen by the parties;
c. Notices on appointment of arbitrators were not duly served;
d. The award is out of scope of the purpose of the arbitration;
e. The arbitral procedure and composition was not in accordance with the agreement; and
f. The arbitral award was marred by an illegality or undue influence.

Autonomy of Parties
Pursuant to Section 12 of the Arbitration Act, parties to an arbitration proceeding have the liberty of choosing an arbitrator who they trust due to such arbitrator's integrity and experience in the subject matter of the dispute. Court litigation on the other hand restricts litigants to the Judge or Magistrates allocated the matter. The only way parties can have the adjudicator changed in court is by making an application for recusal which unfortunately is heard and determined by the same Judge or Magistrate.

2.2 Disadvantages of Arbitration

Despite the upshots associated with arbitration, the process has the following disadvantages:

Costs
This is the most prominent drawback of arbitration as parties are required to remunerate the arbitrator based on the arbitrator's years of experience and number of sittings leading to the resolution of the matter. The costs of an arbitrator are much higher compared to the costs of court litigation. However, once a decision has been made in arbitration there are no further costs incurred. In court litigation, costs continue to be incurred after decisions are made as the right of appeal can still be exercised.

Lack of Attention to Documents and Evidence Adduced
Due to the flexibility of the processes in arbitration, laws of evidence may be bent and evidence adduced in an unprocedural manner. This is supported by Section 20 (3) of the Arbitration Act which confers on the arbitrator the power to determine the admissibility, relevance, materiality and weight of any evidence. The Act fails to align the Arbitration Act with the Evidence Act when the arbitrators are exercising their discretionary powers. This may at times result in occasioning injustice to a party thus rendering the whole process null.

Jurisdiction
Section 17 of the Arbitration Act provides for the jurisdiction of an arbitrator. The jurisdiction of an arbitrator is limited to an agreement to refer disputes arising from contractual relationships to arbitration and agreements by parties which should be in writing as required by Section 4 of the Arbitration Act.

Section 17 of the Arbitration Act adopts the doctrine of Kompetenz kompetenz where the arbitrators have the power to rule on their jurisdiction. The opportunity to raise an objection on jurisdiction is restricted to the period before the filing of the statements of defence by the respondent during arbitration proceedings.

3. PROCESS OF ARBITRATION

A well-drafted employment contract ought to provide a clear road map for enforcing the agreement by initiating an arbitration process once a dispute arises. Parties ought to be aware of timelines provided under the agreement to initiate arbitration proceedings once a dispute arises.

3.1 Appointment of an Arbitrator

Pursuant to Section 12 of the Arbitration Act, the agreement should contain a clause that provides for how parties will elect an arbitrator once a dispute arises. To save on time, the best practice is to have the contract provide for a third party, the Chartered Institute of Arbitrator's or the relevant professional body that regulates the matter under dispute (whichever is applicable), to be responsible for the appointment of an arbitrator in case the parties fail to agree on election. If parties are unable to choose an arbitrator the courts may intervene and choose one.

3.2 Preliminary Conference

Once an arbitrator has been picked, a preliminary conference will be held between the arbitrator, the parties and their representatives (if any). This meeting is convened after the arbitrator receives a letter of appointment. Notices of the meeting will be served upon all parties with the agenda of the meeting disclosed.

At the preliminary conference, parties will agree on the mode of proceedings, timelines for filing submissions and how they will communicate with the arbitrator. In the event parties fail to agree on the mode of proceedings, Section 20 of the Arbitration Act permits the arbitrators to exercise their discretion.

3.3 Hearings

Once the preliminary conference has been dispensed with, hearing notices will be issued to parties in accordance with Section 25(2) of the Arbitration Act. Parties may be represented in the proceedings as allowed by Section 25 of the Act. Parties will have the right to be heard under Section 19 of the Arbitration Act.

3.4 Awards and Costs

Once the hearing is done, the Arbitrator will make an award in accordance with Section 32 of the Arbitration Act. The award ought to be in writing and signed, dated, delivered to each party, and must be reasonable. The arbitral award should inform the parties of the decision of the arbitrator and enable the successful party to enforce the decision of the arbitrator through the courts.
Section 32B of the Arbitration Act allows parties to agree on costs. In the event they fail to arrive at a consensus the arbitrator will decide on who bears cost of the process. However, if no order has been made as to costs, each party will bear its own legal costs and the cost of arbitration will be equally shared by the parties.

4. SUITABILITY OF ARBITRATION IN RESOLVING EMPLOYMENT DISPUTES

Generally speaking arbitration remains a preferred method of resolving contractual disputes and there is no reason as to why it should not be suitable for resolution of employment disputes.

The following limitations should however be addressed while incorporating arbitration in employment contracts:

4.1 Contracting out of statutory requirements

There have been questions as to whether an employee can contract out of benefits or obligations set out in statute and whether the same is binding on such an employee.

Courts in some jurisdictions have held that in the absence of manifest unfairness there is no reason to hold arbitration as inferior to other contracts even in employment matters. Other courts have held that arbitration may not be appropriate for all statutory claims and that in determining

whether arbitration is suitable, courts should look to the text of the statute, its legislative history, and whether or not there is an "inherent conflict" between the statutory purpose and arbitration.

Employers should therefore be careful to ensure that in an arbitration clause or agreement an employee's substantive rights and particularly those set out in statute are at a minimum upheld.

4.2 Employee lack of bargaining Power

More often than not employees find themselves in a situation where they have no bargaining power and have to execute the employment contract or forgo the job offer and the question therefore arises whether such contracts of forced or mandatory arbitration are binding on employees.

It is arguable that such contracts may be held unconscionable particularly where their effect is manifestly unfair to the employee and it is advisable for employers to require employees to procure independent legal advice on such contracts. In cases where an employee is experienced and senior then this duty for an employer to require the employee to procure independent legal advice may be reduced.

The alternative of forced arbitration is voluntary arbitration, which gives the employee the option to accept or reject the arbitration option according to their preferences.

4.3 Public Policy Considerations

The very advantage of confidentiality in arbitration may also be a disadvantage in the sense that an employee may be compelled to enter into contracts binding them into confidential settlement of disputes even where an employer has perpetuated negative work place conduct including but not limited to discrimination, harassment, racism etc. It is likely that under such circumstances such a process may be successfully challenged due to the importance of public policy on such issues.

4.4 Employer vs Employee Benefit

It may be thought that the confidentiality of an arbitration agreement will appeal to employers but not to employees. Of course, there are cases where the employee wants a public hearing as the employee might consider that the threat of publicity will be unwelcome to the employer and will encourage the employer to settle. The employee may therefore believe that it is in the public interest that the claim is heard in public.

On the other hand, there are many situations where an employee would prefer confidentiality rather than a public hearing (for instance in a matter that can prejudice chances of their employment in the future). The employer's defence to a claim might be that the employee had engaged in misconduct, for example, or was incompetent. Even if the employee believes the allegations of misconduct or incompetence to be wholly unjustified, there is a risk that the airing of the allegations in public will damage the employee's reputation. Similarly, a person known to have brought a whistleblowing or discrimination claim might find their future job prospects harmed as a result.

4.5 Arbitrator's lack of legal experience and lack of review of arbitrators

Despite an arbitrator's experience in arbitration, an arbitrator may not necessarily be a lawyer and may not have the necessary legal skill to interpret statutory provisions that could be key to an employee or may misapply such a law. Further whereas judges of courts of law are regularly subject to judicial review there is less oversight on arbitrators and their decisions unless there is a manifest disregard of the law.

5. CONCLUSION

Though not suitable for every employment matter, the advantages of Arbitration are compelling and parties to an employment contract should consider including it as the method of dispute resolution either in the contract of employment or by referring such disputes to arbitration when they occur.

Acceptance of an arbitration agreement usually means that the employee in question waives their right to sue the employer in court for any reason, including discrimination, breach of contract or wrongful termination, instead subjecting themselves to the remit of the arbitration process to remedy any complaints.

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