

## Nigeria

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## NNPC v CLIFCO revisited

The Supreme Court of Nigeria recently pronounced judgment on an appeal that would have been a landmark case in Nigeria, had the facts been different, essentially dismissing the appeal on technical grounds. *Nigerian National Petroleum Corporation v CLIFCO Nigeria Limited (2011) LPELR-SC 233/2003* involved a challenge of the jurisdiction of an arbitral tribunal to render an award on the basis of an arbitration clause contained in a contract

which had been substituted by a new agreement having no arbitration clause.

The Supreme Court unanimously dismissed the appeal on the basis that the appellant, NNPC, failed to raise the jurisdictional objection before the arbitral tribunal in compliance with the

provisions of the Arbitration and Conciliation Act of 1990 (ACA). Of the five sitting Justices, only one explored the effect of novation on arbitration clauses contained in abrogated contracts.

The Learned Justice J A Fabiyi, considering the issue of novation, however, made a sweeping observation that an arbitration clause survives novation of contract arrangements even when the purpose of the underlying contract fails. In arriving at that conclusion, the Learned Justice relied on the English case of *Heyman v Darwins Ltd [1942] AC 356*.

It is noteworthy, however, that at no time during his two-paragraph opinion on the issue did the Learned Justice address the observation made by Lord Macmillan in *Heyman v Darwins* which confirmed parties' freedom to treat a contract as one that never existed and to substitute a new contract for the contract which they have abrogated. Lord Macmillan observed that in such a case, any arbitration agreement in an abrogated contract cannot be invoked for determination of questions under the new agreement.

Some observations of the Law Lords in

*Heyman v Darwins* have been distinguished in subsequent English cases. Steyn J in *Habour v Kansa [1992] 1 Lloyds Rep 81* stated that Lord Macmillan's view that an issue of fraud is incapable of falling within the scope of an arbitration agreement is no longer the law.

Nevertheless, it is pertinent to note that without specifically referring to the separability doctrine in the appeal before the Nigerian Supreme Court, Justice Fabiyi observed that an arbitration clause can exist independent of the underlying contract from which it was created. The same principle is established in Article 12(2) ACA (which is modelled after Article 16(1) of the Uncitral Model Law on International Commercial Arbitration 1985).

Article 21(2) of the Arbitration Rules, made pursuant to Article 12(2) ACA, essentially provides that arbitration clauses in contracts are independent of the contract and a decision of an arbitral tribunal that a contract is null and void shall not entail by operation of law the invalidity of the arbitration clause. Article 12(2) ACA is amply supported by Article 12(1) which confers on an arbitral tribunal the competence to rule on questions pertaining to its jurisdiction and on any objection relating to the existence or validity of an arbitration agreement.

The difficulty in this instance is determining when a party is challenging "the existence of an arbitration agreement". Would a party's challenge of the jurisdiction of an arbitral tribunal to entertain claims based on an arbitration clause contained in an abrogated contract be classified as one challenging the existence of an arbitration agreement? It is submitted that a party would only be bound by the provisions of Article 12(1) ACA to submit objections to the jurisdiction of an arbitral tribunal to that tribunal in the first instance if the question can be answered in the affirmative. Otherwise, it would then be difficult to justify the decision of the Supreme Court in *NNPC v CLIFCO* on the basis of Article 12(3) (a) ACA.

In conclusion, it is difficult not to wonder what would have been had the issue been explored further; but for now, the law in Nigeria is that arbitration clauses in contracts survive subsequent novation arrangements. Corporate bodies operating in Nigeria would do well to specify their intended obligations in new contracts where they do not wish to be bound by arbitration clauses contained in old

agreements.

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