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**RE-EVALUATING THE TRIANGULAR
EMPLOYMENT MODEL: THE POTENTIAL
EXPOSURES AND MITIGATING STRATEGIES**

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Introduction

The landscape of employment relations in Nigeria has witnessed a dramatic shift giving rise to several new generation models. One of such models fast becoming a preferred option by a significant number of corporates is the triangular employment model. Triangular employment involves three relationships viz the commercial relationship between the outsourcing agency and the end user; the employment relationship between the outsourcing agency and the employee; and the secondment of the employee from the outsourcing agency to the end user.

The advantages of this model are obvious to the end users. Corporates are becoming increasingly focused on their business operations and wish to avoid the distractions that typically arise from employment relationships. The model thus assists in ensuring the provision of labour without the added burden of employer liability that is usually attached to employment relationships.

Simply put, the triangular employment relationship is an arrangement where the user of the employee's services is not the primary employer. The most common form of this kind of arrangement is where an outsourcing agency hires employees and then secondments them to the end user.

Triangular employment arrangements usually create the problem of who should perform the obligations of the employer under a triangular employment relationship. There are two issues that arise from this question. Firstly, who is an employee in law and secondly, who is the legal employer under the relationship. It is necessary to address this because the legal employer will be liable to the employee where he fails to discharge his obligations under the contract of employment.

Who is an employee?

The Labour Act defines a worker to mean any person who has entered into or works under a contract with an employer, whether the contract is for manual labour or clerical work or is expressed or implied or oral or written, and whether it is a contract of service or a contract personally to execute any work or labour.

The Employees' Compensation Act defines an employee to mean a person employed by an employer under oral or written contract of employment whether on a continuous, part-time, temporary, apprenticeship or casual basis and includes a domestic servant who is not a member of the family of the employer including any person employed in the Federal, State and Local Governments, and any of the government agencies and in the formal and informal sectors of the economy. The Pension Reform Act defines employee to mean any person employed in the service of the Federation, the Federal Capital



territory, a Government of a State of Nigeria, Local Government Council or private company or organisation or firm.

The court defines a worker as “an employee, that is to say, any public officer or any individual or (other than a public officer) who has entered into or works under a contract with an employer¹.”

Who is an employer?

The Labour Act defines the word “employer” to mean “any person who has entered into a contract of employment to employ any other person as a worker either for himself or for the services of any other person and includes the agent, manager or factor of that first mentioned person and the personal representatives of a deceased employer” whilst a contract of employment means “any agreement, whether oral or written, express or implied, whereby one person agrees to employ another as a worker and that other person agrees to serve the employer as a worker”.

The Employees Compensation Act defines employer to include any individual, body corporate, Federal, State or Local Government or any of the government agencies who has entered into a contract of employment to employ any other person as an employee or apprentice. Under the Pension Reform Act, an employer is defined to include the Federal Government of Nigeria, the Government of a State of Nigeria, Local Government Council or any organisation or business that employs three persons or more. The courts have defined an employer as “a body of persons who employ a worker.”

The definitions provided above reveal that the Nigerian Labour Law jurisprudence recognises triangular employment relationships where an employer enters into a contract of employment to employ any other person for the service of another party (“the end user”). This triangular relationship has also been recognised by judicial pronouncements.

Are triangular employment relationships prohibited under Nigerian Law?

Further to the NIC’s powers under the Constitution of the Federal republic of Nigeria (Third Alteration) Act 2010, to deal with matters pertaining to the applications of international conventions, treaties and protocols that relate to employment relations and jurisdiction with respect to best practices in labour, employment an industrial relation matters, the NIC has expressly considered the position of the International Labour Organisation (ILO) on triangular employment relationships.² The Court explained in *PENGASSAN v Mobil* that the ILO has not labelled the triangular employment relationship

¹ National Union of Electricity Employees & Others v Bureau of Public Enterprises (2010) 18 NLLR 161

² Petroleum and Natural Gas Senior Staff Association (PENGASSAN) v Mobil Producing Unlimited Suit No: NIC/LA/47/2010



or outsourcing of labour as illegal or as an unfair labour practice however it enjoins that respective laws of member states on the issue should be respected and applied.

Similarly, from the definition of “employee”, “worker”, and “employer” under the employment legislation in Nigeria as well as case law, triangular employment is recognised under Nigerian law.

Who is liable to the employee in the event of a dispute?

Under Nigerian law, the position has always been that in the event of a dispute, the employee’s recourse would be with the employer and not with the end-user. This position is largely based on the principle of privity of contract.

The doctrine of privity of contract portrays that as a general rule, a contract affects the parties and cannot be enforced by or against a person who is not party to it. Simply put, only parties to a contract can sue or be sued on the contract, even if the contract is made for the benefit of a 3rd party. The fact that a person who is a stranger to the consideration of a contract stands in such near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue or be sued upon the contract.

The decision of the National Industrial Court (NIC) in *Stephen Ayaogo & Others v Mobil Producing Nigeria Unlimited & Anor* suggests that in some circumstances, the courts are likely to hold that the end user is a co-employer with the outsourcing agency and would share in the liability of the outsourcing agency. According to the NIC, the doctrine of privity of contract is a general principle of contract which is not absolute and admits certain exceptions because the court will carry out an “...enquiry into the merits of the case to reveal the true position of things...”

Furthermore, the NIC in *Petroleum and Natural Gas Senior Staff Association v Mobil Producing Nigeria Unlimited* held that the resolution of the question of the party who would be responsible for performing employer responsibilities will depend on the facts found by the court in each case. In this instance, the Court has held that the determination of the existence of an employment relationship will be guided by the facts of what was actually agreed and performed by the parties, and not by the name the parties have given the contract.³ Thus, the question will be decided on the basis of the facts, irrespective of how the parties describe the relationship.

Flowing from the above, the issue is, in what instance would the Courts be willing to hold that the end user is also liable to the employee for obligations required of an employer? This will depend on the true position and facts of the particular case. The courts have stated that a relevant factor in determining the true position of the case is considering

³ *ibid*



whether or not the triangular employment relationship is a sham. In making a finding, the courts will look at the implementation of the employment relationship based on the facts and circumstances of the case to establish whether the triangular employment relationship is in fact a sham arrangement merely for the purpose of avoiding liability as an employer.

The courts have held that what will constitute a sham would be determined on a case by case basis. For instance, where the termination of a contract of employment of an employee by a company (employer) is on the instruction of the end user, both companies may be held to be co-employers for the recourse of the employee. It has also been held that where the employer can be construed as an agent of the end user, the two companies would be treated as one.

Generally, a triangular employment relationship might be viewed by the courts as a sham where there is evidence of major control or involvement by the end user in the affairs of the employees. Evidence of control may be gleaned from the following parameters:

- i. Recruitment: Is there proof of significant participation in the recruitment of the employees? Does the final decision rest with the end user?
- ii. Supervision and Direction: Does the end user conduct appraisals, set yearly objectives and give directives to the employees including setting the terms for remuneration, benefits, holidays amongst others?
- iii. Discipline: Does the end user provide for disciplinary measures and carries same out without recourse to the outsourcing agency?
- iv. Termination: Is the end user, on his own, absolutely responsible for termination of employment of the employees?

The answers to the questions posed above will provide an indication as to the measure of control the end user wields over the employees.

Conclusion/Recommendations

As stated earlier, the triangular employment relationship model is not prohibited under Nigerian law. However, an end user may have potential exposure where he exerts a significant measure of control over the employees as the courts may hold that the relationship is a sham merely to avoid the burden/ liabilities of an employer.

In view of this it is highly recommended that in mitigating their exposure, corporates seek the services of experienced labour and employment practitioners to avoid being caught in the web of a co-employer.

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