EMPLOYMENT RELATIONSHIP AND PARTIES' AUTONOMY IN CHOICE OF LAW: A CASE COMMENT

Bebizuh Mulugeta Menkir*

•*Federal Cassation File No-54121,Volume-11*

•*Federal Cassation File No-50923,Volume-9*

1.THE CASES, IN BRIEF

The first case was *C.A.S Consulting Engineers Salzgitter GMBH vs. Kassahun Teweldebirhan,* applicant and respondent respectively.[1] When it was started in the Federal First Instance Court, the present respondent; here after called the respondent, was the plaintiff. The cause of action was the alleged illegal termination of contract of employment that the respondent had with the present applicant, here after called the applicant.

---

* LLB, LL.M, Lecturer of Law, University of Gondar, School of Law. The author can be reached at:babimulugeta@gmail.com

[1]C.A.S Consulting Engineers Salzgitter GMBH v. Kassahun Teweldebirhan, Fed Sup.C, File No.54121, Vol.11 (2009)

Using the employment contract, the respondent sought justice from the Federal First Instance Court, for compensation and all other benefits to be paid tohim bythe applicant.

The applicant objected the material jurisdiction of the court by alleging the existence of an agreement between the parties to use Germany law, in the case of disagreement between them.

The Federal First Instance Court then passed an order for the case to be filed in the Federal High Court commenting, among others, that the case would trigger the application of Private International Law.

An appeal was lodged in Federal High Court, by the respondent, opposing the order of the Federal First Instance Court. The applicant also appealed against the decision of the Federal First Instance Court regarding the absence of evidence as to the managerial status of the respondent.

By referring Art.341 of the Civil Procedure code of Ethiopia, the Federal High Court then remanded the file to Federal First Instance Court, for the latter to decide on the merits of the case according to Labour Proclamation No 377/96.

The applicant then appealed to the Federal Supreme Court, Cassation Division, against the above decision of the Federal High Court.

The Cassation Division considered, *inter alia*, the following material facts on its judgment.

- The parties have agreed, in their employment contract, for the German law to be used when dispute arises between them.

- The respondent is an Ethiopian, residing in Ethiopian, taking responsibility to perform his duties in Ethiopia.
- The applicant is a foreign company which is registered and performing its functions in Ethiopia.

On its judgment, the Cassation Division discussed (obiter dictum) that the rationale of proclamation No 25/1996[2]is to give first instance jurisdiction for the Federal High Court when one of the parties to a case raises question of conflict of laws. In other words, the Cassation Division note that the Federal High Court can exercise first instance jurisdiction over cases demanding the application of more than one set of legal systems.

But, the Cassation Division decided (*ratio decidendi*) that the mere existence of the above mentioned factors do not mean that all the cases that parties agree on contrary to the law of Ethiopia will trigger the application of Private International Law.

The Cassation Division then rejected the agreement between the present parties to use Germany Law. One of the reasons given by the bench for rejecting the parties' agreement is because it makes the Labour Proclamation No 377/96 inapplicable to the case. It further commented that according to the Art.3 (3) (b) of the same Proclamation, there has to be Council of Ministers Regulation for the parties to be out of the ambit of the Proclamation.

The bench further went to the extent of saying that the agreement of the parties is contradictory to the objective of Proclamation No 377/96 and to the overall government's interest on the application of the law.

---

[2] Federal Courts Proclamation, FED. NEG. GAZETTA (No. 25/1996)

The Second case was Foundation *Africa vs. Alemu Taddesse*, applicant and respondent respectively,[3]on which the Cassation Division passed the same kind of judgment with the one discussed above.

Again on this case, the parties agreed between themselves for their disputes to be resolved by the court of Netherland and according to Dutch Law.

The Cassation Division again rejected the agreement between the parties to be ruled by Dutch Law. For the bench, this kind of agreement will run against the law and the interest of the government. So, it held the agreement as invalid. As the reasons that the bench forwarded are materially the same with the first case discussed above, to save time and space the details of the judgment will not be discussed here.

In the following sections, this paper examines whether the decisions of the Federal Supreme Court, Cassation Division, on the above mentioned cases, are proper and compatible with the principles of Private International Law, mainly on the following point of whether an agreement between two parties in employment contract, made under Non-Ethiopian laws, in the case of dispute, could be against Ethiopian law and public interest?

2.PARTIES' AUTONOMY TO CHOOSE APPLICABLE LAW TO THEIR EMPLOYMENT CONTRACT: INTRODUCTORY CONCEPTS,CASE COMMENT AND ANALYSIS

Choice of law is one of the perplexing issues in the process of resolving contract cases involving the application of Private International Law or Conflict of Laws.[4]In the

---

[3] *Foundation Africa vs. Alemu Taddesse*, Fed Sup.C,File No.50923,Vol.9 (2008)

case of disputing contract involving a foreign element, the court should first, by taking different connecting factors in to consideration, identify the applicable law that must be used to resolve the case.[5]

It is a general principle of Private International Law that contracts are governed by the law intended by the parties.[6] This general principle is also adopted by Rome Convention on the Law Applicable to Contractual Obligations(1980). According to this Convention, the law that the parties have chosen must be used to resolve issues related to the contract.[7]Parties to a contract are bestowed with the freedom to choose a set of rules which must be adopted in case of dispute.[8]

Indeed, the freedom that the contracting parties have in choosing the set of rules that should govern their relationship is not an absolute one. Contracting parties rather

---

[4] PETER NORTH,JJ FAWCETT, CHESHIRE AND NORTH'S PRIVATE INTERNATIONAL LAW,P.534(13th ed. Oxford University Press 2006)

[5] ABLA J MAYSS, PRINCIPLES OF CONFLICT OF LAWS, P.109, (3rd ed. Cavendish Publishing Limited 1999). These connecting factors include *inter alia* the place of contract, the domicile of the parties, and nationality of the parties and so on.

[6] J.G COLLIER, CONFLICT OF LAWS,P.11, (3rded.,Cambridge University Press 2001)

[7] MAYSS, *Supra* note 5, at 112

[8] Id

cannot derogate mandatory rules of the country with which all other relevant factors of the case are connected to.[9]

The restriction on the application of foreign law, which would otherwise be applicable, is based on the doctrine of "*public ordre*", for the sake of public policy of the forum state.[10] According to the doctrine, the agreement between parties can be rejected if it is against fundamental principles and moral standards of the forum state.

The restriction on the freedom accorded to the parties gets strong when it comes to employment contract.[11] In employment contracts, even though parties are free to choose applicable law, they cannot do so in such a way that it deny the minimum rights that the employee would be entitled if other laws were applied.[12]

Hence, so far as the parties are in compliance with these mandatory rules, they are free to choose a law and the same shall be applicable to resolve their dispute. It is when the parties failed to exercise their autonomy of choosing the applicable law that the court

---

[9] Id, at 115

[10] PARAS DIWAN, PEEYUSHI DIWAN,PRIVATE INTERNATONAL LAW, P.126(4th ed. Deep & Deep Publications 1998)

[11] It is for the purpose of protecting the interest of the employee, who is believed to be with comparatively less bargaining power, compared to the employer, that employment contracts are to be treated in different eyes at the time of choosing the applicable law to regulate their relationship.

12 MAYSS, Supra note 5, at 120

can resort to other mechanisms of identifying the applicable law.[13]But here, it should be noted that, restricting the parties' freedom on choice of law for the sake of public interest is an exception to the general principle that must be construed narrowly.[14]

In the cases at hand, the Cassation Division rejected the agreement between the parties to use Germany law in the first case and Dutch law in the second case, for the settlement of disputes related to their respective employment contracts. The first reason that the bench forwarded for its decision is the absence of Council of Ministers Regulation, thereby setting the parties out of the scope of the Proclamation.

Here, the bench committed a mistake from the outset, because the existence of the Council of Ministers Regulation (to exempt employers) is needed when the employment contract involves religious or charitable organizations.[15] But, from the facts of the cases, there is no evidence presented showing (C.A.S Consulting Engineers Salzgitter GMBH and Foundation Africa) are either religious or charitable organizations. Thus, it is erroneous to demand specific regulation for the applicants be out of the scope of the proclamation.

The above mentioned requirement of the Cassation Division could have been proper had the parties failed to choose the law that they want to be applicable to their case. In such kind of situation, there could be a possibility for Ethiopian law to be

---

13 Id, at 115

14 JHON O'BRIEN, CONFLICT OF LAWS,p.59,(2nd ed. Cavendish Publishing Limited, 1999)

15 Labor Proclamation, FED. NEG. GAZETTA,art.3(3)(b) (No 377/2003)

applied. In the absence of law chosen by the parties the court will resort to the application of some other law.[16]

As it is discussed in the introductory part of this paper, as a matter of principle, parties (by agreement) can choose the law that they want to be applicable to their case.[17]But, if the case is employment relationship the agreement of the parties, shall not deny the minimum rights that the employee would be entitled by the law that would be applicable in case when there is no law chosen by the parties'.[18]

So here, one can safely argue that the prime purpose of the law, while it set limits to the parties' freedom to choose law in employment matters, is protecting the interest of the employee. In Ethiopian case, the law does not simply demand the Ethiopian Labor Proclamation to be applied on every single case. What the Cassation Division should have asked, before it passed its judgment of rejection of the parties agreement, was whether the law chosen by the parties (the law of Germany in the first case and the law of Netherlands in the second case) is prejudicial to the interest of the respondent. If it is prejudicial, then it is justifiable to ignore it. But if it to the best interest of the employee, it can do nothing other than applying it straight away.

In addition, application of the law that the parties have chosen and which is to the best interest of the employee is also justified when we examine the issue in the light of

---

[16] PETER NORTH,JJ FAWCETT, CHESHIRE AND NORTH'S PRIVATE INTERNATIONAL LAW,P.534(13th ed. Oxford University Press 2006)

[17] DIWAN, *Supra* note 10

[18] MAYSS, *Supra* note 5, at 120

the Labour Proclamation. As far as the protections and rights given to the employee (in the contract of employment) are better than what is stipulated in the Labor Proclamation, parties are free to agree on the terms of their respective right and duties in their contract of employment or they can even choose the law that they are comfortable with. What matters most here is the interest of the employee.[19]

Though how the cassation bench should have entertained the case is as it was discussed in the aforementioned paragraphs, it made an error of law while it rejected the law chosen by the parties, by commenting the following

> .....ከዚህ አንፃር ግራ ቀኙ አደረጉት የተባሉትን ስምምነት ስንመለከት የኢትዮጵያ የአሰሪና ሰራተኛ ጉዳይ ህግ ተፈፃሚነት እንዳይኖረው የሚያደርግ በመሆኑ ስምምነቱ ተቀባይነት አለው ሊባል የሚችልበት ህጋዊ ምክንያት አለመኖሩን ከአሰሪእና ሰራተኛ ጉዳይ አዋጅ አላማ እናመንግስት አዋጁ ላይ ካለው ጠቅላላ ፍላጎት አንፃር የምንገነዘበው ጉዳይ ነው፡፡[20]

This can be approximately translated as:

> *Since the agreement, that is claimed to have been signed by the parties, will hold the Ethiopian Labor Proclamation inapplicable, there is no valid legal reason which makes the agreement acceptable. This is what we can discern from the objective of the Proclamation and the overall interest of the government. (Translation mine)*

---

19 Proclamation, Supra note 15, Art.4(5)

20 Supra note 1, see also, Supra note 3. The words and expressions used by Cassation Division to reject the laws chosen by the parties in both cases are exactly the same, except reference to the parties' choice of the Court of Netherlands was made in the second case.

Indeed, the Cassation Division, in above comment, not only ignored some of the most important aspects of Private International Law but it also deviated from the purpose and objective of the Labor Proclamation which is ensuring maximum possible protection to the employee.[21]Application of the Labor Proclamation is not the end by itself; rather it is a means to accord maximum protection/benefit to the employee.

This enthusiasm of the bench to the mere application of Ethiopian law might results in unintended consequence of denying benefit to the employee that he/she would otherwise enjoy if the chosen foreign law were applied. And this is not the purpose of the Labor Proclamation.

Moreover, the Cassation Division, in both cases, made a comment as to the existence of government interest in the application of the Labor Proclamation. But failed to tell us what kind of specific interest does the government has in the application the Proclamation. It just simply gave generalized and unjustified assertion saying "....መንግስት አዋጁ ላይ ካለው ጠቅላላ ፍላጎት አንፃር...."

In spite of this, it is pretty clear that the government cannot possibly have any other interest other than protecting the interest of the employee.

Therefore, the Cassation Division's judgment that rejected the law chosen by the parties, in the name of government interest, before examining what the protection given

[21] This is what we can infer from the provision of the Proclamation which grants contracting parties (in employment relationship) the autonomy to sign contract of employment ,which can include choosing their own law, provided the agreement and the law chosen is to the best interest of the employee.

to the employee in the chosen law looks like; is wrong and by itself in contradiction with the interest that the government has on the proclamation.

In addition, the same Cassation Division, in another case, gave judgment containing the following paragraph:

> ....የአሰሪ እና ሰራተኛ ጉዳይ.......በግራ ቀኙ መካካል ክርክር ቢነሳ በየትኛው ህግ መሰረት ታይቶ ዳኝነት መሰጠት የሚገባው ስለመሆኑ....ለይተው ካስቀመጡ.......ጉዳዩ የሚታየው በየትኛው አገር ህግ ነው? የሚለውን ጥያቄ ስለሚያስነሳ ይህን የመሰለ የህግ ጥያቄ ያካተተ....በአለም አቀፍ የግል ህግ መሰረት ታይቶ የሚዳኝ ነው፡፡[22]

This can be literally translated as:

> *In the case of dispute involving labor relationship, if the parties choose the applicable law to their case, since this triggers the question of choice of law, the same shall be resolved in accordance with Private International Law.(Translation mine)*

The above paragraph can somehow tell us that, the Cassation Division recognized parties' autonomy in choice of law and the importance of Private International Law in resolving the issue. And regarding the application of the law the principles to be adopted must be as they are discussed in the aforementioned paragraphs of this paper.

Moreover, the draft Private International Law of Ethiopia incorporates the following paragraph regarding the party's autonomy in choice of law.

---

[22] *Bezabih EsheteVs Salini Construction*, Fed Sup.C , File No. 69685, Vol. 11(2009)

> *Where a contract involves a foreign element as laid down in Article 5, the parties may choose the law governing the substance of the contract, that is the law of nationality, the law of domicile, the law of the place where the transaction was made, the law of the place where the subject matter is situated, the law of the place where the transaction is to be performed, or the law of the place which is reasonably connected to the matter.*[23]

What we can discern from the draft provision is parties' freedom to choose non-Ethiopian law so far as it has reasonable connection with the case.

So here, if the Cassation Division wanted Ethiopian law to be applied to the cases, it should have, at least, before it rejected the law chosen by the parties, examined the existence/absence of reasonable connection between the chosen laws and the employment contract or with the parties. If reasonable connection exists, then the same shall be made applicable, provided that it grants better protection to the employee.

It is when there is no law chosen by the parties or when the law chosen lacks connection with the dispute that the court can resort to the application of any other law *i.e.* the law of the place with which the contract is significantly connected.[24]

Generally, the Cassation Division committed error of law on its judgments, when it rejected laws chosen by the parties, by its unsound justifications as to the existence of

---

23 Draft Proclamation to Federal Rules of Private International Law, Art.72(1)

24 Id, Art.73

huge public and government interest in the mere application of Ethiopian Labor Proclamation No 377/2003.

3.CONCLUSION

In the cases of employment relationship, involving foreign element, as a matter of principle, disputes shall be resolved by giving priority to the law that the parties choose on their agreement, provided that the chosen law does not deny the minimum rights that the employee would be entitled by the law that would be applicable in case when there is no law chosen by the parties. This is for the purpose of protecting the interest of the employee, who is believed to be, with comparatively lesser bargaining power than that of the employer.

The objective of the Ethiopian Labor Proclamation cannot different from the above principle. Parties, in employment relationship, are free to frame their own contract of employment by using the terms of the Proclamation as a bench mark. If that is so, so far as it provides better protection to the employee, they can also agree/choose to be ruled by a foreign law which has reasonable connection with their relationship.

If these preconditions are fully satisfied, the court shall apply the law chosen by the parties. Here, the existence of reasonable connection with the case is to be decided on the case-by-case basis and can be applied if one is convinced in narrowing down the parties' autonomy in choice of law.

Hence, the Federal Supreme Court, Cassation Division, committed error of law in this regard for rejecting Germany and Dutch laws (the law chosen by the parties in the two cases discussed) before examining thoroughly in the light of the above criteria. The

judgment of the court will have the outcome of denying potential benefits that the employee could otherwise enjoy if the chosen foreign law were applied to their case.

Generally, the Cassation Division is erroneous because its judgments are against the recognized autonomy of parties in the choice of law so long as they fulfill the requirements. Hence, the judgment of the court is against principles of Private International Law and objectives of the Labor Proclamation, to say the least.