

Ex-Parte Arbitration Proceedings?

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Introduction

Arbitration, like Litigation, is an adversarial contest. The parties to the arbitration proceedings establish their legal rights through a process of forensic advocacy whereby the parties actively challenge the case put forward by each other.

But, what happens where one side elects to stay away from the arbitration proceedings? Can the Arbitrator(s) validly continue with a one-sided hearing? Would the ensuing arbitral award be valid and enforceable in law against the other party who choose to stay away from the proceedings? This was the Gordian knot that the Supreme Court of Nigeria had to cut in the leading case of *Lagos State Development and Property Corporation v. Adold/Stamm International Nigeria Limited* (1994) 7 NWLR (Pt. 358) 545.

Facts:

The appellant and respondent entered into a construction agreement wherein the latter was to construct a certain number of housing units for the former. The agreement contained an arbitration clause. A dispute arose between the parties, and the respondent (as Claimant) initiated arbitration proceedings against the appellant. A sole arbitrator, Honourable Justice G. B. A. Coker (Rtd) was appointed by the Lagos State High Court. The appellant did not object to this appointment, and the arbitrator had a preliminary meeting with the parties where terms of reference were settled and a date was fixed for hearing of the dispute. The arbitrator also made orders as to filing of parties' respective papers, payment of deposit on account of his fees and cost of arbitration.

The respondent filed its processes within time and paid its deposit towards arbitrator's fees and cost of arbitration. The appellant did not file its processes or pay its deposit, but sent a letter on the day before the hearing impugning the appointment of Hon. Coker as arbitrator. On the hearing date, both counsel addressed the arbitrator on the content of the letter. The arbitrator ruled that he would hear the matter as there was no material fact disqualifying him from acting as arbitrator to the dispute. He adjourned the matter to the next day for counsel to the appellant to bring her witnesses or make any further applications and warned that he will proceed with hearing in the absence of any explanation or application. On the next day, neither counsel to the appellant nor its client showed up. The arbitrator proceeded to hear the respondent and rendered an award in its favor.

The appellant filed an application to set aside the award on the ground that the arbitrator had "anti-Lagos government tendencies". Counsel to the respondent filed an application in the same court, to enforce the award. After hearing both applications, the trial court decided to remit the matter to the arbitrator for reconsideration. The parties appealed to the Court of Appeal which then remitted the matter to a different trial court for reconsideration.

After hearing both parties at the, the re-trial court gave judgment in favor of the respondent to enforce the award, and dismissed the application of the appellant. The appellants appealed to the Court of Appeal, which dismissed the appeal and upheld the decision of the retrial judge. Dissatisfied, the Appellant further appealed to the Supreme Court.

Appeal

One of the major issues for determination was whether the on the facts of the case, the arbitrator's decision to proceed with the arbitration in the absence of the appellant amounted to a misconduct. On this point the Appellants contended that the arbitrator adjourned for only one day to allow the appellants come forward with their defense, and that the fact that the Arbitrator had limited time to dispose of the arbitration did not justify its *ex-parte* hearing. Counsel for the respondent however argued that where the existence of antecedent bias is known to a party to an arbitration proceeding, that party should immediately apply for the revocation of the authority of the Arbitrator or apply for his removal, and not wait for the result of the arbitration before taking action.

Decision

The Supreme Court held that the *ex-parte* proceeding in this matter was justified, and that the appellant could not be heard to say that it was not given fair hearing. The arbitrator and counsel for both parties held a preliminary meeting, and jointly agreed on a date for hearing of the dispute. The court reasoned that when the arbitrator heard counsel addresses on the appellant's letter alleging bias, and adjourned the matter to the following day, the appellant could have taken some necessary steps: she could have urgently applied to the court to have the arbitrator's mandate revoked, or even appeared before the arbitrator to ask for an adjournment to enable her make any necessary applications to the High Court. The appellant did neither, but ignored the proceedings until the Award was made. The court then held that an arbitrator may proceed with a reference in the absence of one of the parties if he does not choose to attend, once that party was put on notice that the arbitrator will proceed *ex-parte* in his absence. This was what happened in the instant case. Therefore, there was no denial of fair hearing.

Comment

The Supreme Court's decision to uphold the award confirms the certainty and integrity of the arbitral process. An adversary's failure to attend arbitral proceedings often gives room for concerns by arbitrating parties on the ground that this fact may threaten the enforcement of the award. The above decision of the Supreme Court shows that this fear is unfounded. The Supreme Court made it clear that arbitral tribunals may continue with proceedings *ex-parte* once it has given the absent party due notice of the consequences of their recalcitrant behavior. Thus, recalcitrant parties who strategically decide not to appear in arbitral proceedings on the supposition that the arbitral tribunal does not have powers to compel their attendance actually take a perilous and wrong decision which is likely to backfire as the arbitrator's award arising from the *ex-parte* proceedings would be binding on them.

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