NO DISPUTE, NO ARBITRATION!

- Kolawole Mayomi

Introduction

A typical arbitration clause will read: "*All disputes arising from this Agreement are to be referred to arbitration…*" It must, however, be noted that the mere insertion of an arbitration clause in a contract does not imply that any issue is capable of being resolved by arbitration. Parties should not overlook the fact that "*disputes*" means exactly what it is: a legal disagreement, controversy or contest arising from the contract. Accordingly, a non-dispute albeit arising from a contract with an arbitration clause cannot be resolved by arbitration.

The above principle was laid down by the Court of Appeal in the case of *United World Limited Inc v. Mobile Telecommunication Services* [1998] 10 NWLR (Pt. 586) 106.

Facts

United World Limited Inc. (United World) a U.S. based Company engaged in newspaper paper publication and advertisement, entered into a contract with Mobile Telecommunications Services (MTS), a Nigerian mobile telecommunication service company to place an advertisement in a newspaper known as USA Today in consideration of the sum of $38,250.00 (Thirty-Eight Thousand Two Hundred and Fifty Dollars). The contract stipulated that MTS was to make payment within 30 days of signing the contract, coupled with a penalty clause that the advertiser's failure to pay within the stipulated time would attract a 1.4% monthly interest rate. The contract also contained an arbitration clause.

MTS failed to make payment within the stipulated period or at all. Although it complained that the advertisement came out very late, about five months after the agreed publication date, MTS accepted its liability to make payment. When no payment was forthcoming, United World issued a writ of summons against MTS to recover the advert sum plus interests. United World also filed an application for summary judgement. In response, MTS filed an application for stay of the court proceedings, stating that the matter should be resolved by arbitration in accordance with the parties' arbitration clause. The Lagos State High Court upheld MTS's submissions, and ordered that further proceeding be stayed pending arbitration. United World was dissatisfied, and filed an appeal against this decision.

On appeal, an important issue that arose for determination was whether, considering the facts of the matter, the trial court was right to refer the matter to arbitration. World United contended that since MTS had already acknowledged its indebtedness, it should not be permitted to resile and rely on an arbitration clause to delay liability. On its own part, MTS argued that the matter should be referred to arbitration for a determination of the question of whether it was obliged to pay for the advertisement which was not placed within the contractually stipulated period.

The trial court's decision to stay further proceedings in the matter was hinged on Section 5 of the Arbitration and Conciliation Act, which provided that:

"5(1) if any party to an arbitration agreement commences an action in court with respect to any matter, which is subject of an arbitration agreement, any party to the arbitration agreement may, at any time after appearance and before delivering any

pleadings or taking any other step in the proceedings, apply to the court to stay the proceedings.
Decision:

The Court of Appeal held that the significance of Section 5 of the ACA is that the subject matter dispute is of a type which ought or should be referred to arbitration. In other words, a matter should only be referred to arbitration when it is clear that a difference or dispute actually exists.

The Court then laid down the test for determining whether a "*dispute*" exists:

> "*the dispute or difference which the parties to an arbitration agreement agree to refer must consists of a justiciable issue triable civilly. Thus:*
>
> *(a) an indictment for an offence of a public nature cannot be the subject of an arbitration agreement;*
> *(b) nor can disputes arising out of an illegal contract;*
> *(c) nor disputes arising under agreements void as being by way of gaming or wagering;*
> *(d) equally, disputes leading to a change of status, such as divorce petition, cannot be referred, nor, it seems can any agreement purporting to give an arbitrator the right to give a judgment"*
> *(e) there is no dispute within the meaning of an agreement to refer disputes where there is no controversy in being,* ***as where a party admits liability but simply fails to pay****."*

Applying the above principles to the case at hand, the Court stated that the matter is incapable of being referred to arbitration:

> *"In case of an agreement with a clause for reference to arbitration, the subject must be such as is capable of being referred to arbitration. Where a party has admitted liability or compromised his stand by some admission capable of altering the position of the parties in respect of the matter in dispute, the matter can no longer be for reference to an arbitration."*

Comment

The principle of arbitrability came into play in this case. A debtor had clearly admitted liability, but refused to pay. In reality, it had no defence to the claim. The issues that it wishes to submit to arbitration are an afterthought that should not warrant the additional expense of arbitration proceedings. The judgement of the Court of Appeal reflects sound common sense that it is an utter waste of time to take non-disputes to arbitration, thereby creating an opportunity for recalcitrant debtors to further waste the creditor's time and money. In such cases, the debtor's admission of liability negatives the need to arbitrate, and confers the court with jurisdiction to swiftly enforce the parties contractual obligations. By logical inference, where the debt is only partly admitted, the creditor may submit the disputed part to arbitration, and file an action in court to summarily enforce the admitted debt.

The overall lesson here is that the existence of an arbitration clause does not automatically confer a right of arbitration. Once a party had admitted liability, there is no "dispute" that can be referred to arbitration.

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