One-Sided Right to Arbitration?

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Introduction:

Ordinarily, arbitration clauses provide a level playing field. The parties will usually agree that any dispute arising from their contract can be referred to arbitration by either party (or any party in a multi-party contract). This approach reflects the general equal bargaining positions of the parties.

Unilateral option clauses adopt a different approach. They are bespoke clauses which confers an option on one party to choose a convenient forum; either arbitration or litigation, for the resolution of the parties dispute, *after* the dispute have arisen, while the other party is restricted to litigation (or vice-versa).

Unilateral option clauses are commonly used in financing agreements, as it affords an exposed lender the procedural advantages of choosing the forum that best suit a specific dispute that has arisen. If, for instance, the matter is a simple recovery of an undisputed debt, the lender may be best served by filing an application for summary judgement at the court. However, if the dispute raises knotty issues which required expert adjudication, or the debtor's assets have been moved abroad and the enforcement of a local court judgement may become difficult in that foreign country, the lender can choose to go for international arbitration.

A unilateral option clause which confers a "one-sided right of arbitration (or litigation)" raises serious public policy questions. Indeed, the validity of such clauses had been questioned in Nigeria in the case of *United World Limited v. MTS Limited* [1998] 10 NWLR (Pt. 568) 106.

Facts:

The dispute resolution clause in a newspaper advertisement contract provided that any dispute should be referred to arbitration, but reserved a unilateral right for the publisher (United World) to initiate court proceedings. The advertisement was duly published, and the publisher made a demand for payment as contractually agreed. Although the advertiser (MTS Ltd) accepted liability, it failed to make payment. Eventually, several demands, the publisher filed a suit for summary judgment at the

Lagos State High Court. In response, the advertiser applied to stay further proceedings in the suit, on the premises that the dispute ought to have been referred to arbitration. The High Court accepted this argument, and stayed further proceedings to await arbitration. The publisher challenged this decision on appeal.

The Appeal:

One of the issues that the Court of Appeal had to consider was whether the appellant (United World) had a right to file an action in court, given the existence of an arbitration clause in the parties' contract. The respondent contended that the subject matter was within the contemplation of the contractual agreement and as a result the matter should have been resolved in arbitration.

In response, United World argued that, notwithstanding the reference to arbitration, it had equally reserved the right to undertake legal proceedings against MTS as a precautionary measure in the jurisdiction where MTS had its assets by inserting a clause in the contract. Accordingly, it urged the court to uphold the validity of its unilateral option to refer the case to litigation.

In its decision, the Court of Appeal accepted the appellant's argument that if the trial court had given a proper attention to the publisher's unilateral option in the dispute resolution clause, it would not have referred the matter to arbitration. The court stated that:

> *"The more one looks into the matter the more one appears to discern an inescapable belief nagging at the back of the mind that notwithstanding the provision for arbitration, the appellant* (Publisher) *had a ready-made alternative remedy* ***which is by court process****…*
>
> *When a party to an agreement with reference to arbitration has compromised his position by being signatory to the agreement the contents of which give numerous alternatives remedies to the other party, other than resort to arbitration, and by evincing an intention to compromise to an act of the party which he is complaining about,* ***he has robbed himself of competence or premise of referring the subject matter of complaint to an arbitration****."*

Comment:

The principal strategy behind unilateral option clauses is the dispute forum control. A unilateral option clause is a powerful procedural advantage for a lender to optimize its position in anticipation of legal disputes. The *United World Ltd v. MTS Limited* case reflects the current position of Nigerian law that unilateral dispute resolution clauses are, in principle, valid; and that rendering such clauses unenforceable on the basis of perceived unequal terms would be an unacceptable interference with the principle of sanctity of contract. Provided that it is reasonably clear that the parties intended that a dispute-resolution clause to operate unilaterally, the courts would be reluctant to interfere with the parties' agreement.

In our respectful view, the *United World Ltd v. MTS Limited* decision is sound in law. This is because notwithstanding a lender's *procedural* right of the choice of forum, the parties have equal *substantive* rights under law. While procedural rights regulate where and how a dispute may be resolved, the dispute would ultimately be determined in accordance with the parties' legal substantive rights. The law clearly requires that parties' contentions must be impartially heard and determined. For instance, Section 14 of the Arbitration and Conciliation Act, Chapter A18, LFN 1990, provides that: *In any arbitral proceedings, the arbitral tribunal shall ensure that the parties are accorded equal treatment and that each party is given full opportunity of presenting his case*. Thus, a "one-sided right to arbitration" does not, ordinarily, substantially prejudice the other party.

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