PATRELIPARTNERS

LEGAL PRACTITIONERS

ARBITRATION CLAUSES

A presentation delivered by Mrs. Obosa Akpata[1] at the Chief G.O. Sodipo Memorial Lecture held at the Regional Centre for Commercial Arbitration, No. 1 Alfred Rewane Road, Ikoyi, Lagos on 7th December, 2015.

Introduction

Arbitration is a private dispute resolution mechanism established for the settlement of disputes by a neutral third party (the Arbitrator) or panel of neutrals referred to as the "Arbitral Tribunal".

Amongst the key features of the arbitration process is the parties' agreement to arbitrate. The agreement to arbitrate is the foundation of any valid arbitration. It is the basic source of the Tribunal's power and authority to arbitrate the dispute between the parties. The contractual nature of the arbitration requires the consent of each party for an arbitration to happen.[2] Without an arbitration agreement, there can be no arbitration.

The agreement to arbitrate is usually embedded in the main contract between the parties. In this case it is referred to as the arbitration clause. It is however possible to have it as a separate agreement. Parties may submit future or existing disputes for arbitration. Where the agreement is in respect of a dispute which is already in existence, the arbitration agreement is referred to as a submission agreement. Arbitration agreements submitting future disputes to arbitration are more prevalent.

Importance of the Arbitration Agreement

The core objective of a valid arbitration agreement is to confer jurisdiction on the arbitral tribunal to decide the dispute between the parties. It is a contract between the parties to arbitrate their dispute. It is recognized both by national laws and international treaties. In Nigeria, the governing law on arbitration is the Arbitration and Conciliation Act, 1988(ACA). Also

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[2] Comparative International Commercial Arbitration by Julian D.M. Lew, Loukas A. Mistelis and Stefan M. Kroll, published in 2003 by Kluwer Law International at page 99.

applicable to arbitrations held in Lagos State, except where otherwise agreed by the parties, is the Arbitration Law of Lagos State, 2009(LSAL).[3]

By agreeing to arbitrate their dispute, parties in effect exclude the national courts from resolving such dispute and empower the arbitral tribunal to do so. It is the arbitration agreement that establishes the jurisdiction and the authority of the tribunal over that of the courts. Unlike the national courts that derive their jurisdiction from statutory provisions, the arbitral tribunal derives its jurisdiction from the parties' agreement to submit their dispute to arbitration.

The scope of the arbitration over which the arbitral tribunal has and can exercise jurisdiction is established by the arbitration agreement. Where the tribunal goes outside the scope of the reference any award rendered will not be enforceable.

Autonomy of the Arbitration Agreement

The arbitration agreement even where embedded as a clause in the main contract between the parties is autonomous. It is a separate and distinct contract independent of the main contract. It is considered to stand on its own and is therefore not affected by the validity or otherwise of the main contract. This is based on the doctrine of separability.The essence of the doctrine is that the arbitration clause is not bound to that of the main contract as to be affected by it. This way, any illegality or termination of the main contract will not affect the power of the tribunal appointed to determine the dispute arising from such contract even where an alleged illegality or validity of the contract is in issue.

The doctrine of separability is provided for in S. 12(2) of the ACA and S. 19(2) of the LSAL. Both provisions similarly state that "…an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract…". They go further to provide that a decision that the contract is invalid shall not invalidate the arbitration clause. The parties' decision to arbitrate their dispute is therefore protected by the doctrine.

The doctrine will however not apply where the existence of the arbitration agreement itself or the main contract in which it is embedded is in issue. In that case there is nothing upon which to found the existence of an agreement to arbitrate. This issue was extensively discussed by the English Court of Appeal in the leading case of Fiona Trust and Holding Corporation & Others v. Yuri Privalov & Others.[4]

Legal Requirements of the Arbitration Clause:

[3]S. 2 Lagos State Arbitration Law, 2009
[4][2007] EWCA Civ. 20

A valid arbitration agreement is irrevocable and cannot be unilaterally defeated.[5] It will be enforced by the courts. On the basis of a valid arbitration agreement, the courts are precluded from assuming jurisdiction over a dispute where parties have agreed to arbitrate same.[6]

For an arbitration agreement to be valid and therefore enforceable by the court, there are legal requirements which must be met. Depending on the applicable arbitration law, these include:

The "writing" requirement: The ACA and the LSAL both require that the arbitration agreement be in writing.[7]It is mandatory that an arbitration agreement is in writing as it is proof of the parties' intension to submit to arbitration.

The "writing" requirement is interpreted by the ACA to include writing contained "… in a document signed by the parties, or in an exchange of letters, telex or telegrams or other means of communication which provide a record of the arbitration agreement or in an exchange of points of claim and of defence in which the existence of an arbitration agreement is alleged by one party and not denied by the another."The ACA further provides that the inclusion of an arbitration clause by reference or implication meets the writing requirement.

The LSAL has similar provisions but goes on to provide a wider interpretation of the "writing" requirement to include "… data that provides a record of the Arbitration Agreement or is otherwise accessible so as to be useable for subsequent reference." It interprets "data" to include data generated, sent, received or stored by electronic means, optical or similar means such as but not limited to Electronic Data Exchange (EDI), electronic mail, telegram, telex or telecopy.

Capacity of parties to enter into the arbitration agreement: One of the limited grounds upon which an arbitral award may be set aside is where either of the parties is under some incapacity or where the arbitration agreement is invalid under the governing law agreed by the parties. …

Arbitrability of the subject matter of the arbitration: Where the subject matter of the dispute is not one which can be arbitrated under the applicable law any award rendered will be void and unenforceable. In Nigeria as in many other countries, only commercial disputes can be arbitrated. Thus, land, chieftaincy, matrimonial, etc disputes are not ordinarily arbitrable.

Conditions precedent to arbitration proceedings: Where conditions precedent to the arbitration were not fulfilled prior to the conduct of the arbitration, any award rendered may be successfully challenged. A good example is where the parties have agreed on a multi-tiered dispute resolution clause providing for negotiation or mediation prior to arbitration, if the

[5]S. 2 of the Arbitration and Conciliation Act; S.4 Lagos State Arbitration Law.
[6]S. 4 and S. 5 of the Arbitration and Conciliation Act; S. 6(1) Lagos State Arbitration Law.
[7]S.1of the Arbitration and Conciliation Act; S. 2(3) of theLagos State Arbitration Law.

earlier process is not successful. If the arbitration is conducted without exploring the earlier mechanism, any ensuing award may be set aside.

It is therefore necessary for the parties to agree time frames within which to explore the multiple tiers to ensure that a party does take advantage of any process to delay or defeat the agreement to arbitrate.

Essential Ingredients of a Valid Arbitration Clause

There are specific attributes that must be contained in an arbitration agreement to ensure that it is valid and enforceable. These are:

Clear intent to arbitrate: One of the important functions of the arbitration agreement is that it shows that the parties have consented to resolve their dispute by arbitration. It is important therefore that the arbitration agreement states clearly and without any equivocation that the parties have agreed to a binding arbitration. Where the arbitration agreement does not contain such clear expression the courts are not able to enforce the agreement.

Scope of the arbitration: The arbitration agreement must determine the scope of the arbitral tribunal's jurisdiction. It is the usual practice to have arbitration agreements establish the scope of the arbitration with the use of broad wordings so that all differences and claims arising from a given contract can be arbitrated. Depending on the wording used, the agreement to arbitrate may cover tortuous and non-contractual claims. A good example is the case of ***Hi-Ferty Property Ltd et al v. Kiukiang Maritime CarriersInc. et al.*** *(1999) 159 ALR 142, 12(7) Maley's IAR C-1 (1997) Federal court of Australia*. The Claimants initiated court proceedings for negligence, breach of contract and a violation of Australian statutory provisions. The Defendant challenged the jurisdiction of the court on the basis of an arbitration clause. The Supreme Court held that only the claims for breach of contract were covered by the arbitration clause. The non-contractual claims had to be determined by litigation.

To avoid any restriction in the scope of the arbitration, broad terms such as "All disputes arising out of or in connection with the present contract…"are used as they will likely be interpreted to cover not only contractual claims but tortuous and statutory claims as well.

Finality of the award: While it is implied in the arbitration agreement, arbitration clauses usually contain the words "finally settled by arbitration" or words to that effect. Such expression indicates the parties' intention to be bound by the award which is enforceable by the court same as a judgment.

Other Relevant Factors

In addition to the essential ingredients of an arbitration agreement, parties are advised to consider the following factors when drafting their arbitration agreement:-

i) Number of arbitrators to appoint: This will usually depend on the complexity and value of the claims. In simple and small arbitrations, it is advisable to appoint a sole arbitrator unlike in complex and high value arbitrations where having a panel of three arbitrators may be more appropriate.

ii) Method of selecting the arbitrators: Parties may agree the method by which a sole or panel of arbitrators should be appointed. Equally important is the agreement of parties on an appointing authority in the event that they are not able to agree on the tribunal. Under the arbitration rules of the ACA for example, failure of the parties to agree on the tribunal will result in the appointment being made by the court.

iii) Where parties decide on an institutional arbitration, the proper name of the institution must be inserted. Arbitration agreements have failed where the institution appointed by the parties did not exist.

iv) Language of the arbitration proceedings.

v) Applicable arbitration law and arbitration rules.

vi) Where parties wish to establish time lines for the conduct of the arbitration, they must be careful to ensure that the time lines are realistic and can be extended without requiring the consent of both parties.

vii) Choice of arbitrator: Parties should be careful when specifying the qualifications of the tribunal. Except in submission agreements which are for existing disputes, it is not advisable for parties to specify the name of the arbitrator in the arbitration agreement as they do not know if the specified arbitrator will be available when disputes arise.

viii) Confidentiality: Whilst arbitration is essentially a private and confidential mechanism, many national laws including the ACA do not provide for the confidentiality of the proceedings and the award. Consequently, it is advisable for parties to regulate it in their arbitration agreement.

ix) The seat of the arbitration: The choice of the seat of the arbitration is an important consideration as it determines which national law governs the arbitration as well as the courts which have the power to provide support to the proceedings.

Where the arbitration agreement is silent on any of these factors, the rules of the applicable law will apply. Under the ACA for example, where parties fail to agree on the number of

arbitrators, three arbitrators will be appointed for them.[8] Under the LSAL, the Lagos Court of Arbitration is empowered to make the appointment where parties fail to agree.

It is advisable for parties to consider appointing an arbitration institution to administer their arbitration or incorporate the arbitration rules of one. This is because the arbitration rules of most arbitral institutions make adequate provisions for the effective management of the process. Parties should carefully review the arbitration rules to ensure that they suitable.

Pathological Arbitration Clauses

Pathological (defective) arbitration agreements are those agreements that create ambiguity regarding the interpretation of the arbitration agreement which may render it or an ensuing award unenforceable. Stated below are examples of such clauses:

Equivocation as to whether the parties intended to arbitrate their disputes. For example "In case of a dispute, the parties undertake to submit to arbitration but in case of litigation the Tribunal de la Seine shall have exclusive jurisdiction."[9] Another example is "Arbitration – all disputes will be settled amicably."

Where the parties' decision to arbitrate is not expressed in the agreement. Example, In the event of any unresolved dispute the matter will be referred to the International Chamber of Commerce," The clause failed to state whether the dispute was to be resolved by arbitration.

Where the parties specify the person to be appointed arbitrator in the event of a dispute and the person dies or refuses to act when a dispute arises.

It is important to note that the foregoing notwithstanding, the courts will enforce an arbitration agreement that clearly expresses the parties intention to arbitrate even where it does not say much more than that. Example "Arbitration, if any, by I.C.C. Rules in London".[10]

Where the parties agree on an institution to administer the arbitration or as an appointing authority and the institution is not in existence.

Sample or Model Arbitration Clauses

[8]S. 6 of the Arbitration and Conciliation Act; S. 8 of the Lagos State Arbitration Law.

[9]International Chamber of Commerce Arbitration by Lawrence Craig, Rusty Park and Jan Paulson (citation please) referred to by John Townsend in his article, Drafting Arbitration Clauses: Avoiding the 7 Deadly Sins published in the AAA Dispute Resolution Journal, February – April, 2003, Vol. 58, No. 1

[10] Mangistaumunaigaz Oil Production Association v. United World Trade Inc. (1995) 1 Lloyd's Rep 619 (cited in Comparative International Commercial Arbitration by Julian D.M. Lew, Loukas A. Mistelis and Stefan M. Kroll, published in 2003 by Kluwer Law International at page 167).

The arbitration rules of some of the national arbitration laws and arbitration institutions provide sample or model arbitration clauses which can be adapted by parties. These include:

The United Nations Commission on International Trade Laws (UNCITRAL) Model Arbitration Clause for Contracts:

"Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules.

Note. Parties should consider adding: (a) The appointing authority shall be ... [name of institution or person]; (b) The number of arbitrators shall be ... [one or three]; (c) The place of arbitration shall be ... [town and country]; (d) The language to be used in the arbitral proceedings shall be ... ."

The LSAL Model Arbitration Clause for Contracts:

"Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the Lagos Court of Arbitration Rules."

The ICC Arbitration Rules suggest the following clause:

"All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more Arbitrators appointed in accordance with the said rules."

The London Court of International Arbitration (LCIA) suggested clause states:

"Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the LCIA Rules, which Rules are deemed to be incorporated by reference into this clause. (i) The number of arbitrators shall be [one/three]. (ii) The place of arbitration shall be [City and/or Country]. (iii)The language to be used in the arbitral proceedings shall be [____]. (Iv) The governing law of the contract shall be the substantive law of [_____]."

Conclusion

One of the advantages of arbitration is the autonomy enjoyed by the parties in deciding how they want their arbitration conducted. The parties can exercise this autonomy when drafting their arbitration agreement to ensure that they derive the utmost benefit from the process.

Considering the effect (positive or negative) an arbitration agreement could have on the process and outcome of the arbitration proceedings, parties owe an obligation to themselves to

ensure that they carefully tailor their arbitration agreement to suit their peculiar needs while ensuring that the essential requirements of a valid arbitration agreement are satisfied. In so doing, they can be sure of the enjoying the benefits of speed and efficacy associated with the arbitration process.

Thank you.