

Arbitration agreements versus insolvency proceedings: the Nigerian Court speaks

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Let's get to the main point quickly, leaving out unnecessary preamble because the issues are quite clear. The parties have executed a contract which has an arbitration agreement to resolve any dispute between them. For the purpose of this article, we will call them Party A and Party B. Party A is of the view that the debt is not in dispute, Party B is not in a financial position to pay the debt. Consequently, Party A decides to commence insolvency proceedings against Party B in court. Party B, as expected, claims that the debt is in dispute and the parties must resolve the dispute via arbitration as agreed. What position has the Nigerian Court taken to resolve this issue?

One of the advantages that jurisdictions such as Nigeria have, is that many legal issues tend to be resolved by many foreign jurisdictions before these same legal issues are faced in Nigeria. Accordingly, the local counsel can easily refer the court to foreign persuasive authorities to assist in resolving the issue in Nigeria.

The threshold question which parties seem to tussle over to determine the dispute mechanism is 'What exactly is a disputed debt?' In *Atoju v Triumph Bank Plc* (2016) 5 NWLR Pt 1505 P. 252 the Court of Appeal in Nigeria considered the issue of what constitutes a dispute for the purpose of reference to arbitration and held that: 'Dispute means the act of arguing against controversy; debate; contention as to rights, claims and the like or on a matter of opinion'. In *Sakamori Constr Nig Ltd v L.S.W.C.P.* (2022) 5 NWLR Pt. 1823 P. 339 the Supreme Court in Nigeria notably held as follows (page 407 paragraph H):

'The question that arises is whether there is any dispute at all, capable of being referred to arbitration? It is on record that the respondent, through several correspondences, acknowledged and admitted its indebtedness to the appellant in the sum of N462, 068, 742.00. See respondent's letters

dated 8th January 2002 and 16th May 2005 at pages 71 and 72 on record. Where there is an admission of liability, there is no dispute capable of being referred to arbitration.'

The question that would then arise is that assuming there is no admission of liability by Party B, does that suffice to say that there is a dispute because there was no admission? The English courts in *Salford Estates (No 2) Ltd v Altomart Ltd (No 2)* (2014) EWCA Civ 1575; 2015 Ch 589 (*Salford Estates*) adopted a wider approach in resolving this issue. In this case, the claimant was the lessor seeking to recover service charges under a lease which contained an arbitration clause. The lessor had already obtained a detailed arbitration award resolving various issues of construction under the lease and quantifying the amount then due thereafter, based on the resolution of those issues, to which there was no genuine defence on substantial grounds, but the lessee company failed to pay, so the lessor presented a winding up petition. The lessee sought a stay under section 9 of the Arbitration Act 1996 (the '1996 Act').

At first instance, the judge held that section 9 of the 1996 Act applied to the winding up petition. In other words, a creditor's winding up petition necessarily involved a claim by the petitioner to be a creditor and therefore fell within section 9 of the 1996 Act implying that the petition must be restrained by the Court to enable parties to respect the terms of the arbitration agreement. On appeal, the additional reasoning was adopted. First, it would be anomalous for the Companies Court to undertake a 'summary judgment type analysis' to see whether the debt was genuinely disputed on substantial grounds if, in the light of *Halki Shipping Corp v Sopex Oils Ltd* (1998) 1 WLR 726, it was a purpose of the 1996 Act to ban claims in court based upon summary judgment.

Second, exercising a discretion to wind up would encourage parties to arbitration agreements to bypass the arbitration agreement and the 1996 Act as a standard tactic by presenting a winding petition. The Companies Court was basically concerned with the draconian threat of liquidation which a creditor could adopt to put pressure on a debtor as opposed to resolving the dispute via arbitration which may take a more significant amount of time to prove the debt.

The British Virgin Island in *Sian Participation Corp (In Liquidation) v Halimeda International Ltd* (2024) UKPC 16 delivered on 19 June 2024 adopted a different approach in resolving this question. The Board (ie, the Judicial Committee of the Privy Council in BVI) held as follows:

‘None of the general objectives of arbitration legislation (efficiency, party autonomy, *pacta sunt servanda* and non-interference by the courts) are offended by allowing a winding up to be ordered where the creditor’s unpaid debt is not genuinely disputed on substantial grounds. To require the creditor to go through an arbitration where there is no genuine or substantial dispute as the prelude to seeking a liquidation just adds delay, trouble, and expense for no good purpose. Party autonomy and *pacta sunt servanda* are not offended because seeking a liquidation is not something which the creditor has promised not to do. And by ordering a liquidation the court is not resolving anything about the debt, nor interfering with the resolution of any debt about it.

‘Above all, there is nothing anti-arbitration in this conclusion. In most agreements where one party is likely to be the creditor, (such as any typical loan agreement), it is that party which will generally have the whip-hand in choosing or vetoing the detailed terms of agreement. Such a party is much more likely to agree to include an arbitration clause if it does not impede a liquidation where there is no genuine or substantial dispute about the debt. And where there is such a dispute, then arbitration will prevail as the means of the resolution.’

The Board went further to analyse the concerns raised in *Salford Estates* and held as follows:

‘The reasoning advanced by the Court of Appeal concerns the temptation to bypass an applicable arbitration agreement, or the use of an improper threat to present a petition as a means of applying pressure on a company to pay the debt, or to have to establish a genuine and substantial dispute to the debt in an appropriate forum. In the Board’s view neither of these concerns does anything to bridge the gap in the reasoning about the supposed extent of the

legislative policy. They are concerns well known in the Companies Court, in relation to bypassing the need for litigation about disputed debts in ordinary claims in court and applying improper pressure otherwise than by threatening an ordinary claim to recover debt. They are treated by the Companies Court (or similar insolvency court) as types of abuse of process, and orders for indemnity costs are commonly visited upon the perpetrators. There is nothing peculiarly “anti-arbitration” about such conduct.’

Consequently, the Board concluded that the correct test for the Court to apply to the exercise of its discretion whether to make an order for liquidation of a company where the debt on which the application is based is subject to an arbitration agreement or an exclusive jurisdiction clause and is said to be disputed is whether the debt is disputed on genuine and substantial grounds. In other words, it is not enough to show that there is an arbitration agreement or claim that the debt is in dispute, the party must show that the debt is disputed on genuine and substantial grounds.

In Nigeria, this question came up before the Federal High Court in Suit No: *FHC/CA/CS/167/2022-BB Energy Holding Mauritius Ltd & Anor v Samuel Chuba Okeke & 2 Ors*. In this case, the foreign investor had executed a convertible loan agreement (CLA) with the Nigerian entity and the directors pursuant to which it agreed to grant a US\$4.5m facility to the Nigerian company and the directors. The dispute resolution clause provided that any dispute arising out of or in connection with the CLA shall be resolved by arbitration under London Court of International Arbitration (LCIA Rules).

Interestingly, the foreign investor and the Nigerian entity also executed a security deed which provided that the foreign investor may appoint a receiver manager over the affairs of the Nigerian entity if an event of default had occurred. The dispute resolution clause of the security deed provided that the CLA shall be governed in accordance with the laws of the Federal Republic of Nigeria and the courts in Nigeria.

The foreign investor exercised its powers under the security deed and appointed a receiver manager over the affairs of the Nigerian entity and sought the Nigerian Court’s protection to enable the receiver manager to perform his statutory functions. The Directors filed an objection on the grounds that the parties ought to resolve the dispute via arbitration as contained in the CLA. The foreign investor argued that the debt was not disputed on any genuine and substantial grounds. Moreover, the security deed was a distinct agreement which allowed same to activate the jurisdiction of the Nigerian Court without the said arbitration under the CLA.

In resolving the issue on 7 December 2023, the Nigerian Court held that the security deed was a distinct contract that enabled the foreign investor to appoint a receiver manager and activate the jurisdiction of the Nigerian Court. However, the Court noted that since the parties had agreed to resolve any question or dispute via arbitration, the parties should explore arbitration as agreed before proceeding with court action in Nigeria. The Court therefore granted a stay of the Nigerian proceedings to enable the parties explore arbitration as agreed. The parties did not appeal the ruling of the Nigerian Court.

It is worth noting that the Nigerian Court has taken a different approach when the proceedings instituted in court is not an insolvency proceeding but a civil debt recovery action with monetary claims against the respondent. In such a circumstance, the party requesting for stay of proceedings must have taken definite steps to commence the arbitration before filing the application for stay of proceedings, otherwise, the application may be dismissed as held in *UBA Plc v Trident Consulting Ltd* (2023) 14 NWLR Pt 1903. P. 95, and the parties will be ordered to proceed with the hearing in court.

Conclusion

It would therefore seem that as a matter of Nigerian law, the test that the Court has adopted in the exercise of its discretion in relation to arbitration agreements and insolvency proceedings is whether there is a dispute between the parties which falls within an arbitration clause in an arbitration agreement regardless of whether it is disputed on substantial grounds. On the other hand, the test that the Court has adopted in the exercise of its discretion in relation to arbitration agreements and monetary claims in court is whether the party applying for stay of proceedings has taken definite steps to commence the arbitration proceedings before applying for stay of proceedings.

About the author

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