Company Breached Arbitration Agreement by Refusing to Pay Arbitration Expenses

By Vincent E. Gentile

Businesses, especially those dealing directly with consumers, have routinely sought to bind their customers to an arbitration remedy in the event of a dispute. Generally, courts have upheld resort to arbitration as the exclusive remedy, provided that the arbitration provision is highlighted to the consumer, and its terms and effects are set forth in clear and express language, including the waiver of the consumer’s rights to bring a court proceeding. A recent decision from the New Jersey Supreme Court, however, shows that courts will weigh the party’s performance of the terms of the arbitration agreement in deciding whether to enforce it. Tahisha Roach v. BM Motoring, LLC (A-69-15) (Mar. 9, 2017).

The plaintiffs in Roach each purchased BMW cars from the defendant, BM Motoring, but disputes later arose over the purchase. Each plaintiff had signed an identical Dispute Resolution Agreement (DRA) as part of the purchase transaction, which provided for arbitration “in accordance with the rules” of the American Arbitration Association (AAA), “before a single arbitrator, who shall be a retired judge or attorney.” The provision also stated that “dealership shall advance both party’s [sic] filing, service, administration, arbitrator, hearing, or other fees, subject to reimbursement by a decision of the arbitrator.” Ibid. Plaintiff Jackson filed a claim for arbitration but, despite repeated requests by AAA, BM did not advance any filing fees or otherwise respond to the claim, so it was dismissed by AAA. Plaintiff Roach commenced an action in the Law Division; after it was dismissed on BM’s motion to compel arbitration, she filed an arbitration claim with AAA. The AAA dismissed Roach’s arbitration because BM had previously failed to comply with AAA’s rules and procedures. Plaintiffs then commenced a class action against BM, which BM moved to dismiss in favor of arbitration.

Plaintiffs opposed the motion, contending that BM had materially breached the DRA by failing to advance filing and arbitration fees in response to the arbitration demand, and that BM had waived its right to arbitration through its conduct. The BM defendants argued that the arbitration agreement did not require AAA as the arbitral forum but only mandated that the arbitration would be “in accordance with [AAA] rules.” Defendants objected to AAA arbitrations because of the significant administrative costs and filing fees. The trial court agreed with BM’s position and dismissed the complaint, and the Appellate Division affirmed.

The New Jersey Supreme Court reversed, holding that the BM defendants were barred from compelling arbitration. The court found that plaintiffs’ choice of the AAA forum complied with the arbitration provision and defendants breached the provision by failing to advance arbitration fees. The court did not reach the issue of whether the defendants’ conduct constituted a waiver of the arbitration provision. The court took note of the repeated notices BM received from AAA warning that the arbitration proceeding would be dismissed and that AAA could decline to administer future consumer disputes involving BM. Not only did BM persist in refusing to pay but it did not even acknowledge receipt of the AAA’s letters or respond in any way to either plaintiff’s arbitration demand, much less disclose its position that the parties’ arbitration agreement did not require AAA arbitration.

Justice Solomon’s opinion also relied on the fact that AAA Rule R-2 specified that parties who agree to arbitrate in accordance with AAA rules thereby consent to AAA-administered arbitration. The court noted that, even if the arbitration provision could be construed as not requiring AAA administered arbitration, any ambiguity was to be construed against BM as the drafter. Thus, plaintiffs’ choice to commence arbitration with the AAA was reasonable and BM’s failure to advance the arbitration fees, as promised under the arbitration clause, was a material breach of the agreement. In addition, the court went out of its way to note that the defendants’ conduct also breached the implied covenant of good faith and fair dealing by the “knowing refusal to cooperate with plaintiffs’ arbitration demands, filed in reasonable compliance with the parties’ agreement.” The court declined to establish a bright-line rule but indicated that the issue of whether a material breach occurred should be determined on a case-by-case basis.

In light of the Roach decision, corporations that deal with consumers should re-examine their arbitration provisions. First, parties that mean to apply the AAA rules to non-AAA arbitration proceedings will need to make clear that the parties do not thereby intend to have AAA administer the arbitration. Second, companies should follow the payment obligations under their arbitration provisions. Courts are much
more likely to accept arbitration provisions in consumer contracts when the corporate party agrees to “front” the arbitration costs subject to potential later reallocation. But if those promises of payment are not honored, as in Roach, the courts will be skeptical about the company’s commitment to arbitrate. Third, a corporate defendant that disregards a consumer’s demand for arbitration does so at its peril. Had the defendant BM responded to the consumers’ demands by explaining that it would arbitrate under AAA rules but wanted to avoid the AAA administrative costs and fees, the appeals court likely would not have allowed the plaintiffs to circumvent the arbitration provision.

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