SUPREME COURT'S DECISION IN *MAINSTREET BANK CAPITAL LTD & ANOR V NIGERIA REINSURANCE CORP PLC*: IS THE SUPREME COURT PRO-ARBITRATION?*

Abstract

Unarguably, arbitration has become a universally acceptable means of settling commercial disputes which offers several advantages than litigation. In Nigeria, several legal and institutional efforts are being put in place to encourage the development of arbitration as a compliment to litigation despite several drawbacks. If arbitration would develop in Nigeria to an enviable height, the role of the judiciary cannot be overemphasized as the court plays vital roles before, during and after the arbitral proceedings. This paper through doctrinal research methodology, critically appraises the Supreme Court's decision in the case of Mainstreet Bank Capital Ltd. v. Nigeria Reinsurance Corporation Plc by highlighting its implications on the development of arbitration in Nigeria. It identifies landmines that a person seeking stay of proceedings pending arbitration and drafting an arbitration clause/agreement, must note to avoid having a party litigates disputes intended to be arbitrated. The paper found the decision has re-echoed the point that an arbitration agreement in a contract; does not oust the jurisdiction of a court but merely suspends it. The paper recommends for the immediate review of the Arbitration and Conciliation Act 1988 to incorporate the developmental strides in the judgment and urges arbitration practitioners especially lawyers to subscribe to professional training for skill enhancement and professionalism.

Keywords: *Arbitration, Nigeria, Stay of Proceeding, Arbitration Agreement, Litigation*

1. Introduction

Today in Nigeria, several examples abound to the fact that arbitration is gaining general acceptability within disputes settlement circle as compliment to arbitration.[1] This includes the consistent establishment of arbitration institutions in Nigeria such as the Lagos Court of Arbitration; Charter Institute of Arbitrators United Kingdom, Nigeria Branch, Charter Institute of Arbitrators of Nigeria, ADR Society of Nigeria and the various State Multi-doors Court Houses (MDCHs) has arbitration as

* **David Tarh-Akong EYONGNDI LLB (Hons) (Calabar), LLM (Ibadan) BL**, Department of Private and Commercial Law, Faculty of Law, Bowen University, Iwo, Osun State, Nigeria Email: david.eyongndi@bowenuniversity.edu.ng Phone Number: +2347033252212. He is current a Doctorate Candidate at University of Ibadan and his areas of research interest are International Commercial Arbitration, Labour and Industrial Relations Law and Private International Law.

***Caroline A. FABODE-BALOGUN, LLB (Hons), LLM (OAU), MPhil (in view), BL**, Department of Public and International Law, Faculty of Law, Bowen University, Iwo, Osun State. Phone: 08033936336.

[1] D. T. Eyongndi, 'International Arbitration Agreement under Nigerian Law: Form, Content and Validity' Vol.1, No. 5, *Babcock Socio-Legal Journal*, 2016, P. 108.

one of the doors.[2] Hence, the various High Courts Civil Procedure Rules (HCCPRs) makes room for amicable settlement of which arbitration is the most preferred option. While there has been consistent campaign by arbitration protagonists for its full entrenchment in Nigeria, the fact is that the role the judiciary has to play in order to achieve this is enormous. The reason is that aside the fact that before, during and after conclusion of arbitration proceedings, the Courts play vital roles, an arbitration agreement does not sequestrate the Court of jurisdiction over a dispute subject to arbitration. Thus, interestingly, Nigerian Courts have progressively taken a pro-arbitration posture in several matters pertaining to arbitration particularly stay of proceedings, appointment of arbitrator, enforcement and setting aside of arbitral awards, refusal or anti-arbitration injunction, etc. Recently, the Supreme Court of Nigeria delivered judgment in *Mainstreet Bank Capital Ltd. v. Nigerian Reinsurance Corporation Plc.*[3] wherein the Court dealt extensively with several nuances of arbitration. Some of which include the meaning and nature of arbitration, the jurisdictional tension created by an arbitration clause/agreement vis-à-vis arbitral tribunal and Court, the important issue of stay of proceedings pending arbitration as provided for under section 4(1) and 5(1) of the Arbitration and Conciliation Act[4], the binding effect of an arbitration clause between the parties. This decision has far reaching pronouncements on the desired growth and development of arbitration in Nigeria especially that the Supreme Court unequivocally, stated judicially delineate its hitherto sweeping statement in *Obi Obembe v. Wemabod Estates Ltd.*[5] The main aim of this article is to examine the impact of this decision on arbitration in Nigeria by highlighting its merits and demerits and based on that make vital recommendations towards overcoming the demerits with a view to fostering the growth of arbitration.

For the purpose of presentation, the article is divided into four parts. Part one contains the introduction. Part two is a review of the fact and decision in *Mainstreet Bank Capital Ltd. v. Nigerian Reinsurance Corporation Plc.*[6] Part three discusses various nuances of arbitration that the case dealt with by highlighting the impact of the decision on these issues against the background of the clamour for growth of arbitration in Nigeria. Part four contains the conclusion and recommendation based on the findings in the preceding sections.

2. A Survey of *Mainstreet Bank Capital Ltd. & Anor. v. Nigeria Reinsurance Corp Plc*

Before a review of the decision of the Supreme Court in *Mainstreet Bank Capital Ltd. v. Nigerian Reinsurance Corporation Plc.*[7] is undertaken, it is pertinent, howbeit, passively to adumbrate on the

---

[2] E. A. Akeredolu, 'Enforcement of Alternative Dispute Resolution Agreements: What is New under the Lagos Multi-door Court House Law?' Vol. 6, No. 1, *Nigerian Bar Journal*, 2010, Pp. 201-202.
[3] [2018] 14 NWLR (Pt. 1640) 423.
[4] Arbitration and Conciliation Act 1988 Cap. A18 LFNN 2004.
[5] (1977) 5 SC 70 (Reprint).
[6] [2018] 14 NWLR (Pt. 1640) 423.
[7] [2018] 14 NWLR (Pt. 1640) 423.

subject of arbitration.[8] According to Ajokwu[9], arbitration is the fair resolution of a dispute between two or more parties by a person or persons other than by a court of law. It is the reference of a dispute by parties thereto for settlement by a person or tribunal of their own choice. Ajetumobi[10] posits that arbitration is a form of alternative dispute resolution in which two or more parties agree to submit a dispute to the binding decision of a person called arbitrator who acts in a judicial manner in private, rather than to a court of law.[11] He lists the flowing as prerequisites to a valid arbitration, the existence of a dispute[12], an agreement to refer the dispute to arbitration when it arises, agreement to be bound by the award, and initiation of the arbitration.[13] Eyongndi[14] defines arbitration in the following manner, 'arbitration is a private alternative dispute resolution mechanism where the parties to a contract either through an arbitration clause inserted in the contract or a post-dispute settlement agreement (submission agreement) agree to surrender their dispute to an arbitrator or a panel of arbitrators selected by the parties to hear in an adjudicatory manner the dispute between the parties in a place and time agreed upon by the parties whereby at the end of the proceedings, a decision known as an award is given which is final and binding on the parties to the arbitration.' Sublime from the above definition is the fact that arbitration is private, flexible, confidential and informal.[15]

From the above definitions, one issue that needs further articulation is the question, is arbitration an ADR process? Thus, with regard to the statutory and institutional status of arbitration, in recent times, it has been doubted whether arbitration can be described as an ADR process. According to Orojo and Agomo,[16] 'the general stand on this issue is fluid in that opinions are divided.' By its characteristic nature, arbitration has some of the features of ADR properly so-called and some of the features of

---

[8]J. D. M. Lew, L. A. Mistelis & S. Kroll, *Comparative International Commercial Arbitration, London, Kluwer Law International, 2003*, Pp. 1-3.

[9]F. Ajokwu, *Commercial Arbitration in Nigeria: Law and Practice*, Lagos, Mbeyi and Associates (Nig.) Ltd., 2009, P. 5. He posits that 'therefore, arbitration is a method of dispute resolution in which a neutral third party, an arbitrator, conducts an evidentiary hearing and/or reviews written submissions from the parties. Upon consideration of the evidence, the arbitrator makes a legally binding decision which can be enforced in the same manner as a civil court judgment. The basis for the arbitration is the consent of the parties to submit or refer their dispute to arbitration. The strength of arbitration lies in the enabling law that confers it with the sanction of enforcement once a final award is made in a judicious manner.'

[10]O. A. Ajetunmobi, *Alternative Dispute Resolution and Arbitration in Nigeria: Law, Theory and Practice*, Lagos, Princeton and Associates Publishing Co. Ltd., 2017, P. 105.

[11]See Hirst L J dictum in *O' Callaghan v. Coral Racing Ltd.* [1998] WL 10444030, 1.

[12]See generally *London & Amsterdam Properties Ltd. v. Waterman Partnership Ltd.* [2003] EWHC 3059 (TCC).

[13]Ajetunmobi, (No. 8) *Op. cit.* P. 106.

[14]D. T. Eyongndi, 'International Arbitration Agreement under Nigerian Law: Form, Content and Validity' Vol. 1, No. 5, *Babcock Socio-Legal Journal*, 2016, P. 111.

[15]G. Ezejiofor, *The Law of Arbitration in Nigeria*, Lagos, Longman, 2005, P. 33.

[16]A. J. Orojo & M. A. Agomo, *Law and Practice of Arbitration and Conciliation in Nigeria*, Lagos, Mbeyi and Associates (Nigeria) Ltd., 1999, P. 4.

adjudication through court process. Thus, arbitration can be likened to a bat which has the features of a bird as well as a mammal. Since arbitration has the features of ADR which are absent in court litigation, it is regarded as an ADR process nonetheless. These ADR features of arbitration include autonomy of the parties, informality of the process and proceedings, confidentiality, privacy and intoxicity of outcome (relationship fostering). On the other, weighty arguments have been advanced in support of the position that arbitration is not an ADR process, in fact, dispute resolution mechanism have been classified into three, litigation, ADR and arbitration.[17] Chukwuemerie[18] in support of the view that arbitration is distinct and different from ADR and litigation posit as follows:

> Let it immediately be said very clearly that arbitration is no longer regarded as an ADR. Though an alternative to litigation in the general sense, experts in the field no longer see it as an ADR. Disputes resolution mechanisms are therefore now generally classified as litigation, arbitration and ADRs. However when exposure to (or awareness of) Western style arbitration and ADRs are new in a jurisdiction as they are in Nigeria, or awareness of the vibrancy of recourse to their customary law equivalents is dull amongst lawyers trained in Western law nuances (as the case also presently is in Nigeria), it is common to hear assertions-sometimes profuse and resolute – to the effect that arbitration is an ADR. A lawyer who has been sufficiently exposed to litigation... is well pleased to easily understand the principles and workings of arbitration and such ADR as conciliation.

Ajetunmobi[19] also advocates the in favour of the fact that arbitration is distinct from ADR although it shares certain similarities with it such as flexibility and this feature is what distinguishes it from litigation while the fact that it is conducted in a judicial manner makes it synonymous to litigation.[20] Agomo and Orojo have present weighty arguments against classifying arbitration as an ADR process, they argue as follows:

> Arbitration is said to be closer to litigation in its approach. In the first place, an agreement to enter into arbitration will be enforced by the Courts whereas agreements to enter into an agreement to enter into an ADR process will not be. Secondly, in arbitration, the outcome is determined in accordance with an objective standard, the applicable law. In mediation, for example, any outcome is determined by the will of the parties. This is why it is often said that said that mediation is an 'interest-based procedure'. Thirdly, in an arbitration, a party's task is to convince

---

[17] E. O. I. Akpata, *The Arbitration Law in Focus*. Lagos, West African Book Publishers Ltd., 1997, P. 163.
[18] I. A. Chukwuemerie, 'An Overview of Arbitration and the Alternative Dispute Resolution Methods (ADRs)', *A Journal of the Civil Litigation Committee of the Nigerian Bar Association*. Lagos, Pearls Publishers, 2010, Pp. 100-118 at P. 100.
[19] Ajetunmobi, (No. 8) *Op. cit.* Pp. 107-108.
[20] See *England and Wales Cricket Board Ltd. v. Kaneria* [2013] EWHC 1074 (Comm) at 27, Per Cooke J.

> the arbitral tribunal of its case. On the other hand, in mediation, for example, since the outcome must be accepted by both parties and is not decided by the mediator, a party's task is to convince or compromise with, the other side. Fourthly, mediation and conciliation, in many countries, are not subject to any statutory regulation. The position was the same in Nigeria until 1988 when the Arbitration and Conciliation Decree was promulgated. Part II of the Decree, section 55 and the Third Schedule to the Decree make provisions in respect of conciliation. In the light of what we have said above, it is submitted that arbitration is in a curious position when discussing ADR processes. It is basically a form of adjudication, though like ADR properly so-called, it is also an alternative to litigation.[21]

The above assertion is worthy of scrutiny. The assertion that 'an agreement to enter into arbitration will be enforced by the Courts whereas agreements to enter into an agreement to enter into an ADR process will not be' is misleading. Arbitration like any other ADR process within commercial sphere is purely contractual (subject to instances where it has been made statutorily as the first option for dispute resolution e.g. where a statute establishing an agency provides where the agency transacts with anybody and a dispute arises, arbitration or any other ADR process will first be resorted to, thus, any contractual obligation of the agency, is subject to such a provision) and once parties have so agreed on any mode of settling their dispute, upon its occurrence, the court would enforce such an agreement where same is valid and subsisting. Thus, it does not matter whether the agreement is a mediation, conciliation, negotiation, early neutral evaluation, mini-trial, rent a judge or arbitration agreement. Court recognition and enforcement is not an exclusive advantage of arbitration but any other lawful means of dispute resolution chosen by the parties including media, negotiation, conciliation, etc. Hence, to assert therefore that an agreement to arbitrate will be enforced and other ADR agreements will not be is not correct and enforcement of an arbitration agreement cannot be advanced as a distinguishing feature distinguishing it from ADR.

The facts of the case are as follows: The Appellants commenced an action against the Respondent at the Federal High Court by way of Originating Summons. In the action, they sought several issues *inter alia*, determination of their shareholding status and rights in the Respondent, and their right to participate in the meetings and management of the Respondent pursuant to the MOU and underwriting agreement between the 1st Appellant and the Respondent. They sought 16 declaratory reliefs against the Respondent in the event that the suit was determined in their favour. Upon being served with the Originating Summons, the Respondent entered conditional appearance and filed a Notice of Preliminary Objection (NPO) to the jurisdiction of the Court on the ground that the Appellants failed to comply with clause 7 of the MOU, which provided that any dispute arising from the MOU may be resolve in accordance with the provisions of the ACA. The Appellants opposed the objection.

[21] Orojo & Agomo, (No 14) *Op cit* P. 5.

Subsequently, the Respondent file a counter-affidavit and written address in opposition to the originating summons; a motion for extension of time to file counter-affidavit and written address in opposition to the originating summons; and an affidavit of compliance. The Respondent denied most of the pertinent depositions of the Appellant in the affidavit in support of the originating summons and challenged the Appellant's claim for dividends on the ground that none has been declared for its shareholders for ten year preceding the suit. The Appellants contended that the several acts of the Respondents constitutes waiver of their right to seek stay of proceedings pending arbitration as they have taken steps in the proceedings.The NPO and the originating summons were heard together and the learned Trial Judge held that pursuant to clause 7 and 8 of the MOU, arbitration was a condition precedent to activating its jurisdiction and that having failed or neglected to fulfill the condition precedent, the Appellants suit was premature. The NPO was upheld and the suit was struck out.

The Appellants being dissatisfied with the Judgment filed an appeal at the Court of Appeal urging it to uphold their appeal and invoke its powers under the Court of Appeal Act to hear its originating summons on the merit. The Court of Appeal in its judgment held that the filing of processes against the originating summons by the Respondents did not amount to taking steps in the proceedings within the ambits of section 5(1) of ACA to bar them from applying to the court for stay of proceedings pending arbitration under the ACA. However, it held that due to the failure of the Respondents to fulfill certain conditions different from those prescribed in section 5(1) of the ACA, their application ought to have be refused. Consequently, the Court of Appeal allowed the Respondent appeal and set aside the judgment of the trail court but refused to hear the originating summons on its merit but transfer the suit to the general cause list to be heard by another judge. Thus, the Appellant being dissatisfied but some part of the judgment appealed to the Supreme Court which dismissed the appeal but made very remarkable pronouncement which has far reaching effects on the growth and development of arbitration in Nigeria on such matters as the nature of arbitration, the proper language in which an arbitration clause must be couched in, the steps which if taken by a party would amount to waiver of the right to apply for stay of proceedings under the ACA, binding effect of arbitration agreement between parties, the effect of an arbitration court on the jurisdiction of a court, etc. The arbitration pursuant to which the Respondent sought for an order of the court staying proceedings pending arbitration reads thus:

> This memorandum will be governed by Nigerian Law and any dispute arising therefrom may be resolved by the Arbitration and Conciliation Act, Cap. A18 LFN 2004 or any statutory modification or enactment thereof for the time being in force. It is agreed that any claim, controversy, or dispute under, arising out of, or with regard to the terms contained in this agreement shall be determined by a sole arbitrator to be appointed with the consent of the parties to such disputes, claims, controversy or difference. The place of arbitration shall be Lagos.'

The first paragraph of the above arbitration clause is faulty. The fault is in the choice of word for the *lex arbitri*. The supposed applicable law to the arbitration is the Arbitration and Conciliation Act, Cap. A 18 LFN 2004 however, instead of selecting it in a mandatory term of 'shall' or at least, 'will' it was provided in a permissive language of 'may.' Generally, an arbitration clause must be couched in mandatory language giving the impression that parties have an obligation to first and foremost subscribe to arbitration. There must be a command to arbitrate and not a mere intention to arbitration. Thus, it is inappropriate to use the word may in an arbitration agreement because it is permissive rather than mandatory and an unscrupulous party may exploit it to avoid arbitration.

3. *Mainstreet Bank Capital Ltd. & Anor. v. Nigeria Reinsurance Corporation Plc.* and the Development of Arbitration in Nigeria

Several principles of arbitration were enunciated and expounded in this case. This section of the paper discusses them in no particular order. The principle of taking a step in the proceedings in application for stay of proceedings pending arbitration is foremost in the decision of the Supreme Court in the case. Of outmost importance in dispute resolution is the fact that adjudicatory powers of the Federal Republic of Nigeria by virtue of section 6 of the 1999 Constitution, resides in the Courts listed in section 6(5). This means that ordinarily courts have adjudicatory powers over all disputes between individuals and even government and its agencies. This notwithstanding, parties subject to certain exceptional instances, parties can choose to settle their disputes especially those of a commercial nature by means other than the courts. Thus, where parties so decides, the Courts are statutorily enjoined under the Arbitration and Conciliation Act[22] to give effect to this agreement.[23] Thus, it is possible for a party if defiance to such an agreement to commence proceedings in court on a subject matter which the parties have agreed to settle through arbitration. Where this happens, the other party has the options of waiving the agreement and litigates or applies to the court to stay the proceedings and refer the parties to arbitration.[24] The above position is the purport of sections 4 and 5 of the ACA. For clarity sake, section 5 of the ACA provides as follows:

> If any party to an arbitration agreement commences ay action in any court with respect to any matter which is a subject of arbitration agreement any party to the arbitration may, at any time after appearance and before delivering any pleading or taking any steps in the proceeding, apply to the court to stay the proceedings. A court to which an application is made under subsection (1) of this section may, if it is satisfied-(a) there is no sufficient reason why the matter should not be referred to arbitration in accordance with the arbitration agreement; and (b) that the applicant was at the time when the action was commenced and still remains

[22] Arbitration and Conciliation Act 1988 Cap. A18 LFN 2004.
[23] Section 2 Arbitration and Conciliation Act 1988 Cap. A18 LFN 2004.
[24] Section 4 and 5 Arbitration and Conciliation Act 1988 Cap. A18 LFN 2004.

ready and willing to do all things necessary to the proper conduct of the arbitration, make an order staying the proceedings.

Thus, the Respondent case against the Applicants' originating summons was that it was brought contrary to the provisions of clauses 7 and 8 of the MOU. Particularly clause 7 thereof provides that disputes between the parties would be submitted to a one man arbitration panel to be conducted in accordance with the provisions of the ACA.[25] However, the Respondents in applying to the Trial Court to stay proceeding and order the parties to arbitrate took certain steps beyond the expected steps. Before there is further amplification on this, it is germane to highlight a crucial sublime point made by the court with regard to the relationship between the jurisdiction of court and an arbitration clause or any other ADR clause in a contract. The court adopted the definition of arbitration as contained in Black's Law Dictionary 8th Edition thus 'arbitration is a method of dispute resolution involving one or more neutral third parties who are usually agreed to by the disputing parties and whose decision is binding.'[26] The neutral third party referred to in the definition is the arbitrator as the court had held in cases such as *Nigerian National Petroleum Corporation v. Lutin Investment Ltd. & Anor.*[27] and *Kano State Urban Development Board v. Fanz Construction Company Ltd.*[28] The Court succinctly described the nature of arbitration by emphasizing that it is purely consensual. Thus, the parties have a choice, they may choose to have their dispute resolved by a court of law or they may choose to have it decided by an arbitrator as it was held in *Ras Palgazi Construction Co. Ltd. v. Federal Capital Development Authority*[29] Deductively, it can be safely asserted that every arbitrable dispute is a litigable dispute but not every litigable dispute is arbitrable and this partly underscores the doctrine of arbitrability and the immutability of the jurisdiction of the court by an arbitration agreement.[30] Thus, where the parties opt for arbitration as opposed to litigation, they are at liberty based on the principle of party autonomy to choose the how the arbitration is to be conducted as well as the law that will guide the procedure provided this does not contravenes the public policy for the time being applicable. Thus, based on this agreement of the parties, the duty of the court is to respect same and pronounce on it and not to make a contract for them or rewrite the one they have already made as was held in *J.E.S. Investments Ltd. v. Brawal Line Ltd. & Ors.*[31] and *Sona Breweries Plc. v. Peters.*[32] This, goes to show that an application for stay of proceedings pending arbitration is an attestation to the fact that an

[25] [2018] 14 NWLR (Pt. 1640) 423 at 433-434, Paras. G-A
[26] *Ibid.* at P. 444, Paras. B-C.
[27] [2006] 2 NWLR (Pt. 965) 506.
[28] [1990] 4 NWLR (Pt. 142) 1.
[29] [2001] LPELR-2941 (SC) at 12, Paras. E-F.; [2001] 10 NWLE (Pt. 722) 559.
[30] M. O. Ajayi, D. T. Eyongndi & K. O. Onu, 'Arbitrability and the Doctrine of Party Autonomy under Nigerian Arbitration Law: Same or Strange Bed Fellows?' Vol. 6, *University of Ibadan Journal of Public and International Law*, 2016, Pp. 169-172.
[31] [2010]18 NWLR (Pt.1225) 495.
[32] [2005] 1 NWLR (Pt. 908) 478.

arbitration clause or any other none litigation dispute resolution clause in a contract does not oust the jurisdiction of court but at most, merely keeps the court's jurisdiction at abeyance. This is the reason the application is for the court to 'stay proceeding pending arbitration' and not to 'quash' or 'prohibit' the court from further proceedings. Thus, a court can only stay proceedings over a dispute that it has the power to conduct the proceedings and not otherwise. Hence, a stay of proceedings is an action in exercise of jurisdiction to conduct the proceedings. This point was underscored by the Supreme Court in *Obembe v. Wemabod Estates Ltd.*[33] Per Fatia-Williams JSC (of blessed memory) thus:

> As we have pointed out, any agreement to submit a dispute to arbitration, such as the one referred to above, does not oust the jurisdiction of the court. Therefore, either party to such an agreement may, before a submission to arbitration or an award is made, commence legal proceedings in respect of any claim or cause of action included in the submission.[34]

Thus, it is based on the fact that the jurisdiction of the court is not ousted that is why an application for stay of proceedings can be made pursuant to section 5(1) of the ACA. Thus, any decision or statutory provision that seeks to limit the extent to which the court can intervene in arbitration is null and void to the extent of its inconsistency because it seeks to oust the jurisdiction of the court.[35] Thus, stay of proceedings is not as of right but discretionary. As to application for stay of proceedings, the law is that a party seeking the court to exercise its discretion to grant stay of proceedings, 'must have taken no step in the proceedings.'[36] Thus, where a party takes a step beyond seeking for a stay of proceedings, he/she will be deemed to have waived the right to seek a stay of proceedings and therefore unintended opted to litigate. The principle of taking a step in the proceedings was enunciated by Fatai William CJN (of blessed memory) in *Obembe v. Wemabod Estates Ltd.*[37] in a rather omnibus manner as the court did not specify step (s) if taken by an applicant, would amount to waiver of the right to seek a stay of proceedings. Thus, in the case under review, the Respondent/Applicant at the trial court had taken various steps in response to the originating summons. These steps includes the filing of a counter affidavit and written address in opposition to the originating summons filed on 24/11/2014; motion on notice for extension of time to file the counter affidavit and written address in opposition to the originating summons files on 26/11/2014; and affidavit of compliance filed on 26/11/2014. These are steps beyond applying for a stay of proceedings. The Court of Appeal had it in plausible manner attempted to periscope the rather blanket statement of Fatia William CJN in the case

[33] (1977) 5 SC Reprint 70.
[34] See also *City Engineering Nigeria. v. Federal Housing Authority* (1997) LPELR-868 (SC) at 21-25 Paras. D-C.
[35] See generally section 34 Arbitration and Conciliation Act 1988 Cap. A18 LFN 2004.
[36] *M. V. Lupex v. N. O. C. & S. Ltd.* [2003] 15 NWLR (Pt. 844) 469.
[37] (1977) 5 SC Reprint 70.

of Wemabod Case[38] which failed to define steps that once taken will defeat an application for stay of proceedings. In the case of *Onward Enterprises Ltd. v. M V Matrix & Anor.*[39] it was held that application for extension of time, filing of an affidavit in opposition to summons for summary judgment, service of a defence, application to the court for leave to serve interrogatories or for a stay of proceedings pending the giving of security or cost or for extension of time to file defence are all steps that once taken would bar the right to apply for stay of proceedings as was reiterated in *Fawehinmi v. O. A. U.*[40] Thus, merely entering an appearance whether conditional or not is neither controlling nor relevant to the party's right to rely on an arbitration clause as was held in *Nisan (Nig.) Ltd. v. Yaganathan*[41] What really matters is the nature of the step taken by an applicant after entering an appearance.[42]

Despite the acts taken by the Respondent in the case under review, the Court of Appeal held that they did not constitute steps precluding it from applying for stay of proceeding. This finding of the Court of Appeal is contrary to its earlier position in cases such as *M V Panormos Bay v. Ola (Nig.) Plc.*[43] and *Neo-Afric Agricultural & Industrial Company Ltd. & 2 Ors. v. Ministry of Finance & Incorporation Anor.*[44] Hence, the Supreme Court aptly recognized this anathema and held that:

> ...with due respect to the lower court, it was wrong when it held that the steps taken by the respondent after the filing of the preliminary objection did not preclude it from applying for stay of proceedings pending arbitration vide section 5(1) of the ACA... any step taken apart from seeking a stay of proceedings (or seeking to oust the jurisdiction of the court) amounts to a step in the proceedings and the applicant is presumed to have waived his right to insist on the arbitration agreement. Indeed, in this instant case, having not objected to the preliminary objection being heard along with the originating summons, it was evident that if the objection was overruled, the court would proceed to determine the substantive case.

s pronouncement, the Supreme Court has unequivocally catalogued steps that if taken by an nt for a stay of proceedings, would preclude him from urging the court to exercise its discretion granting same. While this for the time being is the position of the law as regard application for proceedings pending arbitration, it is unlikely that the court would deemed that an applicant e to the perishable nature of the subject matter or extreme urgency to preserve the res, makes

5 SC Reprint 70.
2 NWLR (Pt. 1179) 530 at 551, Paras. A-E.
6 NWLR (Pt. 553) 1 at 183, Paras. E-F.
4 NWLR (Pt. 1183) 135.
e v. Ogoloma [2008] 14 NWLR (Pt. 1107)247.
5 NWLR (Pt. 865) 315.
0 NWLR (Pt. 1416) 515.

an application other than merely entering an appearance and applying for the stay is precluded. It is unconscionable to expect that where it is necessary to take preservatory steps in the interest of the subject matter, the applicant right to arbitrate should be sequestrated. For example, where the respondent enters an appearance and applies for a mareva injunction[45] against the party who is overtly removing assets from the jurisdiction of the Court as well as seat of arbitration to frustrate the outcome of an award; it would be fools hardy to expect such a party to fold his arms and allow the perfection of such a roguish act. While an arbitration award can be executed anywhere in the world, the justice system must be operated it a manner that a party is saved from avoided expenses and an act done in furtherance of this should not prejudice a person's right. Thus, steps taken in a situation where expedience requires it would not be deemed as foreclosure to the right to apply for stay of proceedings because they are beyond the control of the party who is constrained to take them to preserve his interest.

Another fundamental issue highlighted in the case is the appropriate language in which an arbitration clause ought to be couched in. It is not enough to just have an arbitration clause inserted in a contract or as an independent agreement either before or after the occurrence of a dispute but same must be capable of achieving the intention of the parties to arbitrate in the event that a dispute occurs. Thus, an arbitration clause must be couched in clear and unambiguous terms as it pertains to the number of arbitrator, the seat of arbitration, the language of the arbitration, the applicable law, the procedure for conducting the arbitration, etc. The fact that the parties intend that their dispute should be resolved by arbitration must be so clear that no other intention can be conceived from the totality of the arbitration agreement. The arbitration agreement in the case under review was couched in a way that the applicable law (i.e. the Arbitration and Conciliation Act) was made applicable discretionary. The arbitration clause in the MoU between the parties was couched as follows 'this memorandum will be governed by Nigerian Laws and any dispute arising therefrom may be resolved by the Arbitration and Conciliation Act Cap. A18 LFN 2004 or any statutory modification or enactment thereof for the time being in force."[46] The intention of the parties as far as the *lex arbitri* and mode of settling any potential disputes is through arbitration to be regulated by the ACA. However, the use of the discretionary word 'may' in the selection of the applicable law is anomalous. The implication of this is that any party could choose not to be bound by the ACA as far as the arbitration is concerned. This practice should be avoided as it creates opportunity for avoided disagreement which may lead to delay. Ajokwu,[47] in support of the need to draft an arbitration agreement in clear and unambiguous words, posits that:

> In drafting an arbitration agreement, it must be clear from the wordings of that contract that the parties intend to have their dispute resolved by arbitration, and not by the courts. If this intention is blurred or cannot be inferred on the face and substance of the agreement, then there is a defective basis for arbitration. The arbitration clause must not be ambiguous of the options available to parties, as between going to arbitration or going to court.

[45] This is a preemptory equitable injunction granted by the Court to prevent a party from removing his assets from the jurisdiction of the Court so that where the judgment of the Court is rendered against him/it, the judgment creditor would be able to satisfy the judgment by execution.

[46] [2018] 14 NWLR (Pt. 1640) 423 at 443-444, Paras. H-A.

[47] Ajokwu, F., (No. 9) *Op. cit.* P. 38.

Thus, it is germane for the parties to ensure that the wordings of their arbitration agreement are framed n mandatory terms which are clear and unambiguous explicating the fact that they have agreed that rbitration rather than any other dispute resolution mechanism, including litigation is the means hrough which their dispute is to be settled.

Conclusion

rbitration has become the dispute settlement jewel of persons engaging commercial transaction :cause of its several advantages over other dispute resolution mechanism. Arbitration has grown and quired a distinct stature and status from litigation and ADR to the extent that in classifying dispute solution mechanisms, they are grouped in litigation, ADR and arbitration. The growth of arbitration Nigeria is catalyzed not only by the fact that it has statutory support but it has received judicial tification. A classic example is the case of *Mainstreet Bank Capital Ltd. v. Nigerian Reinsurance rporation Plc.*[48] the Supreme Court in this case has laid to rest the contentious issue of how to :cessful stay court proceedings and order parties to arbitrate pursuant to their arbitration agreement ich has been neglected. The Supreme Court in a commendable manner has outlined steps that if en by applicant will sequestrate his right to have the proceedings stayed. Also, the court has laid vn the tone of language an arbitration clause which parties expect to be recognized and enforced st be couched in. it is not enough to have an arbitration clause, same must be couched in mandatory n clearly indicating the fact that it was intended to be abide by failure to so, would exculpate ies from abiding by it. Thus, person (individual or corporate bodies) and counsel selecting tration must ensure that their arbitration agreement is couched in mandatory terms in order for the rt to enforce same. Thus, it is trite that the Supreme Court of Nigeria has demonstrated beyond any of doubt, that it is pro-arbitration. Based on the above, it is hereby recommended that to give atory backing to the decision of the Supreme Court as regarding steps that if taken would defeat an ication for stay of proceedings; the Arbitration and Conciliation Act be amended to incorporate steps listed in the decision. Also, there is the need for arbitration practitioners and the justice ery sector to continue to enlighten the public on the benefits of arbitration as an alternative to nkerous litigation so that more persons can embrace it.

8] 14 NWLR (Pt. 1640) 423.