

STAY OF PROCEEDINGS PENDING ARBITRATION: A CRITIQUE OF THE DECISION OF THE COURT APPEAL IN UBA v. TRIDENT CONSULTING LTD. (2013) 4 CLRN 119



Abdu - Salaam Abbas & Co.
Legal Practitioners & Arbitrators

Faruq Abbas, MCIArb (UK)

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INTRODUCTION

There is no doubt that the insertion of an arbitration clause¹ in all sorts of agreements by Nigerian counsel is now commonplace. Whilst this development would be considered as a positive one by majority of arbitration practitioners in Nigeria, it is also clear that this development has necessitated the regular filing of an application for stay of proceedings pending reference to arbitration whenever an action is commenced in court in respect of a contract, which contains an arbitration clause.

Unfortunately for litigators and litigants in Nigeria, the Court of Appeal, has, with respect, not been consistent² in its judgments with regards to the principles, which ought to guide the court when considering an application for an order for stay of proceedings pending arbitration.

Whilst in many cases³, the Court of Appeal has held that an applicant for an order for stay of proceedings pending arbitration must adduce documentary evidence showing the steps which he has taken in respect of the commencement of an arbitration before he would be entitled to an order for stay of proceedings, the Court of Appeal, has in some other cases⁴, stated that the court has a duty to stay its proceedings and refer a dispute to arbitration so long as the dispute falls within the purview of the arbitration clause in the agreement and so long as the applicant has not taken any steps in the proceedings⁵.

The aim of this paper is therefore to critique the decision of the Court of Appeal in **UBA v. Trident (Supra)** *vis-à-vis* the proper interpretation of **Section 5 of the Arbitration and Conciliation Act, Cap A18, LFN 2004**.

In critiquing the decision in **UBA v. Trident (Supra)**, I shall contend that the Court of Appeal's interpretation of **Section 5 of the Arbitration and Conciliation Act in UBA v. Trident (Supra)** and in **MV Panormos Bay v. Olam (Nig) Plc. (Supra)** is wrong for several reasons, which shall be discussed below.

I shall conclude this paper by submitting that the only instances when an order staying proceedings pending arbitration ought to be refused by the court are:

1. where the dispute does not fall within the arbitration clause, or
2. where the arbitration clause is contrary to public policy⁶, or
3. where an Applicant has taken a step in the proceedings.



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I shall finally contend that the recent actions of the courts in refusing to grant an order staying proceedings pending arbitration due to the failure of the Applicant to adduce documentary evidence showing the steps he has taken in support of the commencement of arbitration, is incorrect and contrary to the express provisions of **Section 5 of the Arbitration and Conciliation Act**.

SUMMARY OF THE FACTS OF UBA v. TRIDENT (SUPRA)

The Respondent entered into a contract with the Appellant for the implementation of automated Customer Relationship Management (CRM) software for certain aspects of her banking business. There was an arbitration clause in this contract. A dispute subsequently arose between the parties in respect of some outstanding payments to the credit of the Respondent. As a result of the dispute, the Appellant terminated the contract and the Respondent commenced an action at the High Court of Lagos State claiming several reliefs.

The Appellant filed a motion for stay of proceedings pending reference of the dispute to arbitration and the High Court Judge refused this application.

On appeal, the Court of Appeal held that for an application for stay of proceedings pending reference to arbitration to succeed, the Applicant must adduce documentary evidence showing the steps he has taken in respect of the commencement of the arbitration. The court further held that the Applicant must exhibit a letter showing that he had notified the other party of his intention to refer the dispute to arbitration and proposing the appointment of an arbitrator. Ikyegh, JCA held thus:

“Before a stay may be granted pending arbitration, the party applying for a stay must demonstrate unequivocally by documentary and/or other visible means that he is willing to arbitrate. He does it satisfactorily by notifying the other party in writing of his intention of referring the matter to arbitration and by proposing in writing an arbitrator or arbitrators for the arbitration. In the instant case, the only paragraph of the affidavit evidence of the appellant relevant to the matter deposed in paragraph 8 thereof that:

“8. I was informed by Mr. Ugochukwu Okwesili, a Legal Officer in the applicant Bank in a meeting in our office at 57 Marina, Lagos on the 13th day of May, 2009 at about 2:30pm while reviewing this matter and I verily believe him that the parties are unable to resolve the matter amicably and that the applicant is ready to do everything necessary to the proper conduct of the Arbitration in respect of the dispute alleged to have arisen between the parties.”

The deposition above is not enough. There must be documentary evidence showing the applicant wrote to the respondent notifying her of the willingness to resort to arbitration over the dispute and, also, specifying in the letter or correspondence an arbitrator or arbitrators proposed to be appointed for the arbitration for the ratification or approval of the party.” (Emphasis supplied)

It is instructive to note that the Court of Appeal claimed to have arrived at the decision above based on its interpretation of the provisions of **Section 5 of the Arbitration and Conciliation Act** and its reliance on the judgment in the case of **MV Panormos Bay v. Olam (Nig) Plc (2004) 5 NWLR (Pt. 865) 1 at 15 Para F-H⁸**.

CRITIQUE OF THE DECISION IN UBA v. TRIDENT (SUPRA)

It is submitted that the decision of the Court of Appeal in **UBA v. Trident (Supra)** to the effect that an Applicant must adduce documentary evidence showing the steps he has taken in respect of the progress of arbitration before he would be entitled to an order staying proceedings pending arbitration is, with respect, wrong for the following reasons:



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1. The Court of Appeal's interpretation of **Section 5 of the Arbitration Act** amounts to a departure from the ordinary meaning of the words, which were used by the lawmakers in **Section 5 of the Arbitration Act**.
2. The decision of **MV Panormos Bay v. Olam (Nig) Plc (Supra)** which the Court of Appeal relied on, is no longer tenable in view of the latter decision of the Court of Appeal in **Onward Ent Ltd. v. MV Matrix (2010) 2 NWLR 530⁹**.
3. The Court of Appeal's decision amounts to an encouragement to parties to depart from the terms of their contract, which they voluntarily entered into.
4. The failure of a court to refuse to comply with an arbitration clause would affect the competence of the court.

These points would be discussed below.

1 The Court of Appeal's interpretation of Section 5 of the Arbitration Act amounts to a departure from the ordinary meaning of the words, which were used by the lawmakers in Section 5 of the Arbitration Act.

The cardinal principle of the law of interpretation of statutes is that a court, when interpreting a provision of a statute, must give the words used their simple and ordinary meaning and not venture outside those words by introducing extraneous matters that may lead to departing from the intention of the lawmakers when they enacted the statute¹⁰.

Section 5 of the Arbitration and Conciliation Act, provides thus:

"(1) If any party to an arbitration agreement commences any action in any court with respect to any matter, which is the subject of an arbitration, any party to the arbitration agreement may at anytime, after appearance and before delivering any pleadings or taking any other steps in the proceedings, apply to the court to stay the proceedings.

(2) A court to which an application is made under subsection (1) of this section may, if it is satisfied-

(a) that 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 any time when the action was commenced and still ready to do all things necessary to the proper conduct of the arbitration, make an order staying proceedings."

It is clear from the above provision that a court is expected to grant an order staying proceedings pending reference to arbitration where the Applicant has not taken any steps in the proceedings, where there is no sufficient reason why the matter should not be referred to arbitration and where the Applicant has been able to show that it is ready to do all things necessary to the proper conduct of the arbitration.

It is instructive to note that **Section 5 of the Arbitration and Conciliation Act** DOES NOT MAKE IT A CONDITION PRECEDENT for an Applicant for stay of proceedings pending arbitration to ADDUCE DOCUMENTARY EVIDENCE showing the steps he has taken for the proper conduct of the arbitration.



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Thus, it is submitted that the Court of Appeal's decision in **UBA v. Trident** making it mandatory for an Applicant for an order for stay of proceedings pending arbitration to adduce documentary evidence showing the steps he has taken in respect of the arbitration is wrong, because it amounts to a DEPARTURE from the ordinary meaning of the words in Section 5 of the Act.

In **Fred Egbe v. M.D. Yusuf**¹¹ it was held that the general principle of interpretation of statutes and instruments is that, in the absence of an ambiguity, no exposition shall be made which is opposed to the express words of the statute or instrument. The court further held that if the words of a statute are clear, even inconvenience would not justify the court to depart from their ordinary meaning.

Further, it is submitted that the Court of Appeal's interpretation of **Section 5 of the Arbitration and Conciliation Act**, which in a way prevents the reference of a dispute to arbitration, is contrary to the intention of the lawmaker in enacting the Arbitration and Conciliation Act. This is because the purpose of Section 5 of the Act is for the court to be satisfied that an Applicant who brings an application for stay of proceedings pending arbitration genuinely has a desire to go to arbitration.

Thus, if an Applicant deposes to its intention to take all necessary steps to commence arbitration in its affidavit, and the Respondent does not dispute this fact, the proper step, which the court ought to take, is to refer the dispute to arbitration and not to request for additional documentary evidence! This is because it is an elementary principle of law that where a party does not deny the averments in the opposing party's affidavit he will be said to have admitted the contents of the opposing party's affidavit¹².

It is therefore most respectfully submitted that the Court of Appeal in **UBA v. Trident** was wrong to have refused to grant an order staying proceedings pending reference to arbitration when the Applicant's deposition in paragraph 8 of its affidavit to the effect that it was ready **"to do everything necessary to the proper conduct of the arbitration in respect of the dispute alleged to have arisen between the parties"**, was not challenged by the Respondent.

2 **The decision of MV Panormos Bay v. Olam (Nig) Plc (Supra) which the Court of Appeal relied on is no longer tenable in view of the latter decision of the Court of Appeal in Onward Ent Ltd. v. MV Matrix (2010) 2 NWLR 530**

The Court of Appeal in **MV Panormos Bay v. Olam (Nig) Plc (Supra)** held that based on the provisions of Section 5 (2) (b) of the Arbitration and Conciliation Act, an Applicant for an order for stay of proceedings pending arbitration ought to adduce documentary evidence in his affidavit, showing the steps he had taken or the steps he intends to take for the proper conduct of the arbitration before his application would be granted.

It is submitted that the Court of Appeal in **UBA v. Trident** ought not to have placed reliance on the case of **MV Panormos Bay v. Olam (Nig) Plc (Supra)** because the decision in **MV Panormos Bay** has been overtaken by the recent decision of the Court of Appeal in **Onward Ent Ltd. v. MV Matrix (Supra)**.

In **Onward Ent Ltd. v. MV Matrix (Supra)**, the Court of Appeal upheld the validity of an arbitration clause and it therefore refused to follow its earlier decision in **MV Panormos Bay v. Olam**. Mshelia, JCA clarified this position by stating thus:



“Once an arbitration clause is retained in a contract which is valid and the dispute is within the contemplation of the clause,

the court should give regard to the contract by enforcing the

arbitration clause...It is therefore the general policy of the court to hold parties to the bargain into which they had entered unless there was a strong, compelling and justifiable reason to

hold otherwise or interfere. In the instant case appellant who had the onus to advance compelling reason as to why this court should interfere with the discretionary power of the trial Judge had failed to do so. There is nothing to show that the arbitration agreement was imposed on the appellant. Since both parties voluntarily, entered into the agreement same should therefore be binding on them.”

3 The Court of Appeal's decision amounts to encouraging parties to depart from the terms of their contract, which they voluntarily entered into

It is a well-established principle of law that a contract freely entered into by parties will be binding on the parties¹³. Thus, the duty of Nigerian courts is to ensure that the terms of a contract, which was entered into by parties, in the absence of fraud, duress, mistake or misrepresentation, are interpreted and given effect when called upon to adjudicate on a dispute arising from the contract. The courts will also not make new contracts for the parties or re-write the parties' contract because to do so will constitute an infringement on the freedom of parties to contract.

The implication of the above exposition of the law is that the Justices of the Court of Appeal in **UBA v. Trident** had a duty to ensure that the dispute between the parties was referred to arbitration since the contract, which was entered into between the parties had an arbitration clause. It is therefore submitted that the Court of Appeal erred in law by refusing to grant an order staying proceedings in **UBA v. Trident**.

In **M.V. Lupex v. N.O.C & S Ltd**¹⁴ Iguh, JSC whilst dilating on the need for courts to enforce an arbitration clause held thus:

“The law is settled that the mere fact that a dispute is of such a nature eminently suitable for trial in a court is not a sufficient ground for refusing to give effect to what parties have by their contract expressly agreed to. So long as an arbitration clause is retained in a contract that is valid and the dispute is within **the contemplation of the clause, the court ought to give due regard to the voluntary contract of the parties by enforcing the arbitration clause as agreed by them**”¹⁵. (Emphasis supplied)

Also, in **LSWC v. Sakamori Const. (Nig.) Ltd.**¹⁶ Okoro, JCA held thus: “An arbitration clause is a written submission agreed by the parties to the contract and like other written submissions it must be construed according to its language and in the light of the circumstances which is made. See **MV Lupex v. N.O.C & S Ltd** (Supra). It is well settled that where parties have chosen to determine for themselves that they would refer any dispute to arbitration instead of resorting to regular courts, a prima facie duty is cast upon the courts to act upon the agreement. The courts should not be seen to encourage the breach of a valid arbitration agreement voluntarily entered into by parties.”¹⁷(Emphasis supplied)



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4 The failure of a court to refuse to comply with an arbitration clause would affect the competence of the court.

Thus, a court, which refuses to stay its proceedings based on the presence of an arbitration clause in an agreement, which is the subject matter before the court, would be considered in law not to have the competence to determine the suit.

In *Confidence Assurance Ltd v. The Trustees of the Ondo State College of Education Staff Pension*¹⁹Achike, JSC held thus:

"Today, it is commonplace for parties to a contract to incorporate an arbitration clause in their agreement. It should be noted that the inclusion in an agreement to submit a dispute to arbitration does not generate the heat of ouster of jurisdiction of the court. It merely postpones the right of either of the contracting parties to resort to litigation in court whenever the other contracting party elects to submit the dispute under their contract to arbitration. Second, where such reference to arbitration under the arbitration clause is properly raised, the trial court seised of the action cannot overlook a party's right to submit to arbitration, which clearly is a condition precedent to the exercise of its jurisdiction²⁰". (Emphasis supplied)

The position above was also adopted by the Court of Appeal in the recent case of *BSG Energy Holdings Ltd & 4 Ors v. Spears & 3 Ors*²¹ where Saulawa, JCA held thus:

"In the instant case, the absence of the fulfillment of the condition precedent (to first and foremost resort to the arbitration as contemplated by clauses 16.2 and 16.3 of the Agreement) has resulted in rendering the competence of the lower court defective to determine the action. And it's a well settled fundamental principle, that any defect in competence of a court or tribunal (no matter how hierarchically eminent is fatal. For the proceedings of the said court or tribunal are tantamount to a nullity, however well conducted and determined. And this is absolutely so, because the defect is rather extrinsic to the adjudication."²²

The implication of the judicial authorities cited above is that the Court of Appeal in *UBA v. Trident* ought to have stayed proceedings in the suit pending reference to arbitration, because the court would lack the competent jurisdiction to determine the suit where it refuses to grant an order staying its proceedings pending reference to arbitration.



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Conclusion

Notwithstanding the obvious flaws in the Court of Appeal's decision in **UBA v. Trident (Supra)**, it is gratifying to note that the Court of Appeal has upheld the sanctity of arbitration clauses in the following cases: (1) **Williams v. Williams & 3 Ors**²³; (2) **LSWC v. Sakamori Const. (Nig) Ltd.**²⁴(3) **MV Panormos Bay v. Olam** ²⁵; and (4) **Maritime Academy of Nigeria v. A.Q.S**²⁶.

Given that the preponderance of judicial authorities in Nigeria is strongly in favour of the view that a stay of proceedings pending arbitration ought to be granted in cases where the disputes fall within the terms of the arbitration clause, it is submitted that the only way by which the courts can help to ensure the development of arbitration as a primary dispute resolution mechanism in Nigeria, is for the courts not to refuse to grant orders staying proceedings based on the tepid reason that the Applicant has not adduced documentary evidence showing the steps it has taken in support of arbitration or on the basis of any reason which is not contemplated under Section of the Act.

It is respectfully submitted that the courts should grant an order staying proceedings where the Applicant has deposed to an Affidavit stating his readiness to take all steps necessary for the conduct of the arbitration²⁷. This is because a Respondent would always have the option of "re-opening" the suit if an Applicant who has obtained an order for stay of proceedings pending arbitration refuses to "take necessary steps in support of the arbitration".

Lastly, since the courts' dockets in Nigeria are already extremely congested, it is submitted that the administration of justice would be better served in Nigeria if disputes, which ought not to be in court in the first place are referred to arbitration.

1. An arbitration clause is a contractual provision mandating arbitration of disputes regarding the contracting parties respective rights, duties and liabilities. The fundamental object of an arbitration clause is to avoid
2. The decision of the Court of Appeal in **UBA v. Trident (Supra)** and **MV Panormos Bay v. Olam (Nig) Plc** (2004) 5 NWLR (Pt. 865) 1 is at variance with the decision of the Court of Appeal in **LSWC v. Sakamori Const. (Nig.) Ltd.** (2011) 12 NWLR (Pt. 1262) 569, **O.S.H.C v. Ogunsola** (2000) 14 NWLR (Pt. 687) 431, **BSG Energy Holdings Ltd & 4 Ors v. Spears & 3 Ors** (2013) 4 CLRN 49, **Williams v. Williams & 3 Ors** (2013) 3 CLRN 114 and **Maritime Academy of Nigeria v. A.Q.S** (2008) All FWLR (Pt. 406) 1872
3. **UBA v. Trident (Supra)** and **MV Panormos Bay v. Olam (Nig.) Plc. (Supra)**
4. **LSWC v. Sakamori Const. (Nig.) Ltd. (Supra)**, **O.S.H.C v. Ogunsola (Supra)**, **BSG Energy Holdings Ltd & 4 Ors v. Spears & 3 Ors**, **Williams v. Williams & 3 Ors** and **Maritime Academy of Nigeria v. A.Q.S (Supra)**.
5. A step in the proceedings is an action by the Applicant showing that he wants the suit to proceed in court and that he does not intend to refer the dispute to arbitration. See: **K.S.U.D.B v. Fanz Const. Ltd.** (1990) 4 NWLR (Pt. 142) 1 at 28. An Applicant would be considered to have taken a step in the proceedings if he files a Statement of Defence or any other application other than an application seeking an order for stay of proceedings pending reference to arbitration. See: **Williams v. Williams** (2013) 3 CLRN 114 at 134-135
6. In **Fulham v. Richards** (2012) 1 All ER 414 at 424 Para 35 it was held that a winding up petition cannot be referred to arbitration because this would be contrary to public policy.
7. Page 129-130 Para 25-45
8. In this case, the Court of Appeal held that based on the provisions of **Section 5 (2) (b) of the Arbitration and Conciliation Act**, an Applicant for an order for stay of proceedings pending arbitration ought to adduce documentary evidence in his affidavit, showing the steps he had taken or the steps he intends to take for the proper conduct of the arbitration before his application would be granted.

...since the courts' dockets in Nigeria are already extremely congested, it is submitted that the administration of justice would be better served in Nigeria if disputes, which ought not to be in court in the first place are referred to arbitration.

9. The Court of Appeal upheld the arbitration clause in the agreement, which was before the Court and it refused to follow its earlier decision in **MV Panormos Bay v. Olam (Nig) Plc.**
10. See: **Kotoye v. Saraki** (1994) 7 NWLR (Pt. 357) 414 at 443 Para A-B
11. (1992) 6 NWLR (Pt. 245) 1
12. See: **Nwosu v. Imo State Environmental Sanitation Authority** (1990) 2 NWLR (Pt. 135) 688 and **Ejide v. Ogunyemi** (1990) 4 NWLR (Pt. 141) 758
13. In **A.G. Ferrero & Co. Ltd. v. Henkel Chemicals (Nig.) Ltd.** (2011) 6-7 S.C (Pt. 1) 165 at 183 the Supreme Court of Nigeria held that parties are bound by the contract they voluntarily enter into and cannot act outside the terms and conditions contained in the said contract.
14. (2003) 15 NWLR (Pt. 884) 469
15. 491
16. (2011) 12 NWLR (Pt. 1262) 569
17. 598 Para B-C
18. (2003) FWLR (Pt. 158) 1330 at 1355-1356
19. (1999) 2 NWLR (Pt. 591) 373
20. 386 Para F-G
21. (2013) 4 CLRN 49
22. 68-69 Para 40-5
23. (2013) 3 CLRN 114
24. (Supra)
25. (Supra)
26. (Supra)
27. This would however be subject to the fact that the Applicant has not taken any steps in the proceedings and that the Arbitration Clause is not contrary to public policy.

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For more information, please contact:



Faruq Abbas, MCI Arb (UK)

Managing Partner

+234 (0) 803 358 8693

foa@abdu-salaamabbasandco.com

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Abdu - Salaam Abbas & Co.

Legal Practitioners & Arbitrators

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Block A5 Suites 73, 75 & 86
Sura Complex, Simpson Street
Lagos Island, Lagos State
+234 (0) 1 453 6749

www.abdu-salaamabbasandco.com