AN ANALYSIS OF THE REQUIREMEN TO GIVE EFFECT TO PARTIES' INTENTION TO ARBITRATE AND THE PRINCIPLE OF TAKING A STEP IN THE PROCEEDINGS UNDER NIGERIAN ARBITRATION LAW

By

David T. Eyongndi[*] and Cletus Gladys Ochu[**]

Abstract

It is common for parties in commercial transactions to include an arbitration clause (or a post dispute arbitration agreement after its occurrence) in the contract. This clause or agreement expresses parties' intention to arbitrate and forms the fulcrum of arbitration. Under the Arbitration and Conciliation Act (ACA), where a party disregards the arbitration clause/agreement and commences proceedings in court, the other party is allowed to apply to the court for stay of proceedings to enable parties comply with their intention to arbitrate pursuant to section 5 (1) of ACA provided he/she has not "taken any step in the proceedings." This precondition of not taking a step in the proceedings has become a subject of controversy with regards to its interpretation and scope under the Nigerian arbitration law leading to imprecise judgments of superior courts which have made practitioners uncertain as to which step (s) amounts to steps that if taken, will bar a party from applying to the court to stay proceedings for parties to arbitrate. The genesis of this controversy is the case of Obembe v. Wemabod Estate Limited[1] decided by the Supreme Court in which the court failed to define its scope and meaning. This paper considers the proper interpretation and scope of taking a step in the proceedings vis-a-vis the need for the court to give effect to parties' intention to arbitrate through grant of stay of proceedings; it examines steps that should and should not bar parties from arbitration if taken. The paper further examines the effects the case of Obembe v. Wemabod Estate Limited as it pertains to taking a step in the proceeding on the growth of arbitration in Nigeria and recommend that the Courts through judicial activism should not adopt a blanket application of the case as precedent because of its uncertainty.

Key Words: Stay of proceedings, Arbitration, Arbitration Clause/Agreement, Litigation, Party

Introduction

In today's commercialized world, persons who carry out businesses whether at the local or international level are aware that disputes are inevitable. Hence, there is the need to make provision for the settlement of such potential disputes. Alternative Dispute Resolution (ADR) has evolved as a complement to traditional litigation and prudent commercial parties have adopted ADR over the years for settling disputes due to its advantages over litigation which includes flexibility, confidentiality, party autonomy, freedom from technicalities, time saving and efficiency, lack of formalities, ability to preserve business relation through its win-win outcome, freedom from fear of national courts impediments by a foreign party, relatively cheap

[*]LL.B (Hons.) Calabar, LL.M (Ibadan), BL, Department of Private and Commercial Law, Faculty of Law, Bowen University, Iwo, Osun State, Nigeria. Email: david.eyongndi@yahoo.com or eyongndidavid@gmail.com Telephone: +2347033252212.

[**]LL.B (Hons.) Calabar, BL, Barrister and Solicitor of the Supreme Court of Nigeria of Counsel at L.O. Falode & Co., Osogbo, Osun State, Nigeria. Email: gladdave1@yahoo.com

[1] [1977] All NLR 130

cost and wider enforcement opportunities through its universal acceptance among others. Arbitration,[2] unarguably, ranks supreme amongst the ADRs mechanism usually adopted because of the advantage of its award being capable of enforcement under section 31 of ACA, universal acceptance, doctrines of separability and competence-competence and cross border enforceability[3]. Thus, parties to a commercial agreement usually insert as one of the clauses in the contract an arbitration clause (or upon the occurrence of the dispute execute a post dispute settlement agreement which is considered as part of the underlying contract from which the dispute has arisen. Yet, in law, both the arbitration clause and post dispute agreement are deemed separate, distinct, and independent from the main contract on the principle of separability.

In most instances, once a dispute occurs, it is common for a party to such a contract with an arbitration clause to approach the court in disregard of their expressed intention to arbitrate in settlement of the dispute. The other party has the choice of either waiving his right to arbitrate and litigate or apply to the court to stay the proceedings and refer parties to give effect to their intention to arbitrate as contained in their contract as provided for in section 5 of the Arbitration and Conciliation Act. The Nigerian courts have held in a plethora of cases[4] that, for a party to successfully urge the court to stay proceedings and order parties to proceed to arbitration, such an Applicant, to sway the court to exercise its discretion in his/her favour, (with the exception of entering appearance for the sole purpose of objecting to the jurisdiction of the court to entertain the matter) must have taken no steps in the proceedings. Taking a step in the proceedings under

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[2] Akpata, E O. I., *The Nigerian Arbitration Law in Focus, (*Lagos, West African Book Publishers Ltd, 1997,) page 1, in discussing the origin of Arbitration opined thus "Arbitration in one form or another has been with humankind from the beginning of time. One can say it has primordial origin. In relating everything in creation to primordial time, the author of Ecclesiastes put it thus: "what has been is what will be, and what has been done, is what will be done; and there is nothing new under the sun." Historically, mediation, conciliation and arbitration were the only known judicial processes used in resolving disputes. Mediation or Arbitration is not a new phenomenon in Nigeria, particularly with regards to the Ancient Benin Empire." See also Ogundele, L.O., "Customary Arbitration – A valuable Dispute Settlement Strategy in Nigerian Jurisprudence" Vol. 4, Fountain Quarterly Journal, (2006) Pages 30-42, at page 1, "… The arbitral process has roots deep in history. Resolving disputes by agreeing to be bound by the discretion of a third party trusted by the disputants existed long before law was established or courts were organized or judges had formulated principles of law", Karibi-Whyte JSC in *Agu v. Ikweibe* [1991] 3 NWLR *(*Pt. 180*)* 385 at 407 held: "it is well accepted that one of the many African Customary modes of settling disputes is to refer the dispute to the family head or an elder or elders of the community for a compromise bade upon the subsequent acceptance of both parties of the suggested award, which becomes binding only after such signification of its acceptance, and from which either party is free to resile at any stage of the proceedings up that point. … The arbitral court in Africa was an informal means of settling disputes through negotiations with or without the use of arbitrators. Usually such disputes were those within a family or its elder's issues apart from quarrels included the adjustment of property rights in land or cattle and the settlement of estates on death of members of the family group. Arbitration of this kind is universal in all Africa." See further the case of *Ohialeri v Akabeze* [1992] 2 NWLR (Pt. 221) 1 at P. 24. Going by this postulation one will wonder why the use of Alternative with reference to Arbitration, Mediation, Negotiation, or conciliation to litigation as it does appear that these dispute settlement mechanisms have an older historical antecedence when compared to litigation. One therefore would have thought that the case should be the other way around as litigation evolved to alternate these mechanisms and gained popularity and acceptance but due to its several limitations/difficulties particularly with regards to international commercial transactions, these seemingly abandoned mechanisms are now being revisited due to their inherent advantages over litigation. Thus, litigation should be the alternative to these mechanisms.

[3] See generally the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958; section 51 of Arbitration and Conciliation Act, 1988, Cap. A18, LFN, 2010.

[4] *K. SU.U.B v Fanz Construction Ltd* [1990] 4 NWLR (Pt. 142) 1, *M. V. Lupex v N. O. C.* [2003] 15 NWLR (Pt. 844) 469, Onward Enterprises Ltd v. MV Matrix & Ors. [2010] 2 NWLR (Pt. 1179) 530, *Obembe v. Wemabod Estates Ltd.* [1977] All NLR 130, *Fewehinmi Construction Ltd. v O. A. U.* [1998] 6 NWLR (Pt. 553).

Nigerian law extinguishes the expressed intention to arbitrate and bars a party from taking advantage of such expressed intention. The result is that such a party is constrained to litigate. The adoption of this 'must have taken no steps in the proceeding' conditionality is capable of and has indeed caused unjustifiable hardship by its frustration of the expressed intention of submitting the dispute to arbitration. Also, this is capable of militating against the desired growth and development of arbitration in Nigeria. The issues are, considering the fact that no two cases are totally the same thereby justifying a hook, line and sinker application of the reasoning of one case to another and the need to encourage the growth of arbitration in Nigeria as it is done in other developed jurisdictions, what step (s) if taken would amount to a party taking a step in the proceedings to qualify as a waiver of the right to arbitrate? What are (if any) the justifications for disallowing a party to revert to arbitration for the sole reason that, he has taken a step (s) in the proceedings. These issues form the fulcrum of this paper which is divided into three parts. Part one which includes this general introduction, contains the definition of terms and reasons for the emergence of Alternative Dispute Resolution as a complement to litigation as well as the preference of arbitration as a dispute resolution method over the other ADRs mechanisms. Part two reviews the foremost case of *Obembe v. Wemabod Estate Limited*[5] as the pivotal of "taken no steps in the proceedings principle," what is the meaning of taking any step in the proceedings to defeat an expressed intention to arbitrate? What steps can a party take that do not and should not amount to taking a step in the proceeding particularly when the *res* of the dispute is of a perishable nature thereby making time of the essence? It also examines the effects of not taking a step in the proceedings theory on the desired growth of arbitration in Nigeria. Part three contains recommendations on the need to review the legal framework on arbitration in Nigeria to ameliorate the hardship created by the blanket statement of the Nigeria Supreme Court in the Wemabod Estate Ltd. case as well as the conclusion.

Definition of Terms

Alternative Dispute Resolution (ADR)

According to Orojo and Agomo[6], the term "Alternative Dispute Resolution" is generally used to describe the methods and procedures used to resolve disputes either as alternatives to traditional disputes resolution mechanism of the court or in some cases as supplementary to such mechanisms. The best-known methods of ADR apart from Arbitration are Conciliation and Mediation, Mini-Trial (known in Britain as Executive Tribunal) and Med- Arb.[7] Borokini[8] states

[5] [1977] All NLR 130.

[6] Orojo, J. O., and Ajomo, M. A., *Law and Practice of Arbitration and Conciliation in Nigeria,* Lagos, Mbeyi & Associates (Nigeria) Limited, 1999, page 4. See also Akeredolu, E. A, *Mediation: What it is and How It Works,* Ibadan, Carenter Associates, 2011, Page 5.

[7] Abifarin, O., *Resolving Domestic Violence through Alternative Dispute Resolution in Nigeria,* Vol. 6, University of Ilorin Law Journal, 2010, pages 154 – 168 at 163-164. See *Alternative Dispute Resolution.* Available online at <www.sparc-nigeria.com/SJG1> Assessed on the 4th day of July 2016. "It is a non-adversarial way of resolving disputes that is being increasingly used in the public and private sectors, especially in developed countries. It helps parties resolve their differences without resorting to litigation. Instead, ADR looks at needs, interest, and solutions, unlike the conventional courts, it is designed to yield solutions that are adapted to the circumstances of individual cases, as it is about solving problems rather than imposing solutions through litigation."

[8] Borokini, A. A., "Is ADR the Death of Litigation" Vol. 4, No. 2, Fountain Quarterly Law Journal, 2006, page 43-55, at page 43. "ADR is to supplement the available resources for justice by providing enhanced, more timely, cost effective and use-friendly access to justice, … the courts of this country should not be places where the resolution of disputes begins. They should be the place where disputes end-after all means of resolving disputes have been

that the ADR is the method and procedure used to resolve disputes either as alternative to the traditional dispute resolution mechanism or as supplement to the traditional mechanism.

ADR as the name implies, are forms of disputes settlement mechanisms which have evolved as a result of business exigencies and the short comings of litigation coupled with the demands of modern commercial and socio-political agitations such as the need for preservation of relationships at the end of dispute settlement, confidentiality, informality, avoidance of technicalities, the desire for expeditious disputes settlement, party autonomy, the need to minimize cost, unwillingness of a disputant to submit himself to the rules and laws of a forum other than his. These mechanisms include but not limited to the following mediation, negotiation, min trial, early neutral evaluation, mini judge, arbitration, and conciliation. ADR like the doctrine of equity to common law, is not a warlord that goes about pouring water on the fire of litigation but is a system of dispute resolution that has evolved and mixed with litigation as a complement and supplement this admixture is for the attainment of speedy and less rancorous disputes resolution particularly amongst business men and entities whose parts are bound to cross after the dispute. Generally, the inadequacies of traditional litigation as a foremost dispute resolution mechanism, paved way for the emergence of ADR.[9]

Arbitration

Arbitration is a procedure for settlement of disputes under which the parties agree to be bound by the decision of an arbitrator whose decision is final and legally binding on both parties.[10] The

considered." See also Dada, T.O. *General Principle of Law*, 3rd Ed., Lagos, Manure-Joe Production Ent., 2013, Page 528.

[9] Litigation as a method of dispute resolution is characterized by technicality, formality, win or loss outcome, lack of parties' input in the outcome, time and financial resources consuming as adjournment and the court not sitting for one reason or the other are characteristics of the court particularly in a legal clime like Nigeria. Also, the formal setting of a court room with the legal regalia of both the judge and lawyers couple with the technical language spoken during court proceedings removes the disputants from the dispute settlement process. See Shalagh Massingham, "Alternative Dispute Resolution – Qatari Perspective" Vol. 10, N0. 2, Business Law International, (2009) 183-189 at 183, Akeredolu, E. A, *Mediation: What it is and How it Works*, Ibadan, Carenter Associates, 2011, page 15.

[10] Idornigie, P. O., and Adewopo, A., "Arbitrating Intellectual Property Disputes: Issues and Perspectives" Vol. 7, No. 1, *The Gravitas Review of Business and Property Law Journal*, (2016) pp. 1-19 at P. 1 posits thus "in modern commercial environment, arbitration is no longer a new system of dispute resolution. Arbitration understandably provides a special procedure by agreement, where parties agree to submit their dispute to a neutral arbitral tribunal for a binding decision. While court proceedings are usually held in public, parties in arbitration have chosen a procedure that is private and confidential for determining their commercial disputes... with notably for fundamental features, arbitration continues to complement litigation as a dispute settlement mechanism: it is a private mechanism for dispute resolution; It is an alternative to national courts; it is selected and controlled by the parties (principle of party autonomy); and it is the final and binding determination by an impartial tribunal of parties rights and obligations. Arbitration is also anchored on three other fundamental principles: principle of separability (the arbitration clause in a contract is separate and independent of the main contract); the competence of the arbitral tribunal to rule on its own jurisdiction (*kompetenz-kompetenz*); and the principle of judicial non or minimal intervention." See also Borokini, A.A., "Is ADR the Death of Litigation" Vol. 4, No. 2, Fountain Quarterly Law Journal, 2006, page 43-55, at page 44 "This is a procedure for the settlement of disputes by which the parties agree to be bound by the decision of an arbitrator whose decision shall be binding on the parties. Arbitration is a product of a contract between the parties." Ade-Ojo, L, "Arbitration Law and Practice in Settlement of Industrial Disputes" Vol. 5, January, *Igbinedion University Law Journal*, 2007, pages 193-206 at 193 & 194, "Arbitration is a quasi-judicial process in which the parties agree to submit an unresolved dispute to a neutral third party for binding settlement. The parties submit their propositions and the arbitrators decides which party is entitled to what types of

process derives its force principally from the agreement of the parties and from the state as supervisor and enforcer of the legal process. Arbitration is the reference of a dispute or difference between not less than two parties for determination, after hearing both sides in judicial manner, by a person or persons other than a court of competent jurisdiction.[11] Arbitration, which maybe institutional or ad-hoc is usually the referral of a dispute between at least two parties to a person or group of persons, chosen by them to consider the dispute between them in an adjudicatory manner.[12]

In a nutshell, arbitration is a quasi-adversarial alternative dispute resolution mechanism wherein parties to a contract inserts a clause as one of the clauses of the contract (or upon occurrence of a dispute from the contract consummate a post dispute settlement agreement) to the effect that, should any dispute arise from their contract, such a dispute will be referred for settlement by an individual known as an arbitrator (or two or more such arbitrators known as an arbitral panel) which will seat at a particular place and time mutually agreed upon by the parties and apply a chosen law or rules which it will be guided by in the just and efficient determination of the dispute between the parties upon the presentation of their case either by themselves or through their representatives or chosen legal practitioners which at the end, there will be delivering of a decision known as an award which is binding and final and enforceable as a court judgment.[13]

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reliefs." Adenipekun, A., "Arbitration" Vol. 2, *Journal of the Law Students' Society, University of Ibadan,* 2008, page 11-28, at p. 11. "the reference of a dispute or difference between two or more persons for determination by an umpire in a judicial manner..." Nicholas Gould, "The Mediation of Construction Dispute: Recent Research" Vol. 3, N0. 2, *The Journal of the Dispute Resolution Section of International Bar Association,* (2009) 185 – 197 at 185.

[11]Halsbury's laws of England, 4th ed., Vol. 2, page 256, para. 501. See also Dada, T.O. *General Principles of Law,* 2nd ed. (Lagos, T.O. Dada & Co., 1998) P. 342. See also Rosen, J. A., "Arbitration under Private International Law: The Doctrines of Separability and Comp´etence de la Comp´etence" Vol. 6, Issue 3, Article 6, *Fordham International Law Journal,* (1993) page 567. Available online at <http://ir.lawnet.fordham.edu/ilj> Accessed on 12th June, 2016; *N.N.P.C v Lutin Investment Ltd.* [2006] All FWLR (Pt. 301) 1760 at 1788 G-H.

[12]Onigbinde, A., and Adesiyan, F., The Practice of Arbitration and Allied Alternative Dispute Resolution Mechanisms in Nigeria being a paper presented at the Christian Lawyers Fellowship of Nigeria, (CLASFON) (DIRECTORATE OF TRIAL AND ADVOCACY) on the 23rd day of May 2015 at Reiz Continental Hotel, Abuja. See also Bone, Shella, Osborne Concise Law Dictionary, 9th ed., London, Sweet & Maxwell, Pg. 35. See also Abimbola, A. O., "Prospects in Arbitration: An Overvie" *Diverse Issues In Nigerian Law, Essays in Honour of Hon. Justice Okanola* Akintunde Boade, Olatunbosun, A. I., and Laoye, L., (Eds.) (Ibadan, Zenith Publishers, 2013) page 25-26 "Arbitration can be said to be dispute resolution process in which the disputing parties present their case to a third party intermediary (*or a panel of intermediaries, called arbitrators*) who examine all the evidence and then imposes a decision (*which is called an Award*) that is enforceable and legally binding on the parties. Like court-based adjudication, arbitration is somewhat adversarial. The presentations by the disputing parties are made to prove one side right and the other wrong. Thus, the parties assume they are working against each other and not cooperatively like mediation. Arbitration is however not generally formal as court adjudication and its governing rules can be altered to some extent by the agreement of the parties to suit their needs. The courts will therefore enforce any award by an arbitrator pursuant to such an agreed process"

[13] Akpata, E. O. I., op. cit. pg. 11 argued thus "parties to take to arbitration because, (a) proceedings are expected to be shorn of the in-built complexities and technicalities associated with court proceedings and they are expect their dispute resolved as quick as possible without the acrimony attendant to litigation, (b) there is the added advantage that arbitration is a private and confidential process for the resolution of private civil disputes, (in consonance with party autonomy, parties choose their judges (arbitrators), the procedure and place of arbitration devoid of the formality and rigidity of the courtroom. These are the advantages of which parties should derive from arbitration.

Arbitration Clause/Agreement

The Arbitration clause[14] is the very foundation on which an arbitration or arbitral proceeding is built. t 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.[15] Without an arbitration agreement, there can be no arbitration.[16] The Supreme Court in the case of *M. V. Lupex v. N .O. C. & S Ltd.*[17]defined arbitration clause 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 in which it is made". In the case of *Sino-Afric Agricultural & Industry Company Limited & Ors. v. Ministry of Finance Incorporation & Anor*[18] it was observed that "an arbitration clause is intended to save both parties the time and expense of a lawsuit. It is for the parties to endeavour to settle the dispute that could arise from the agreement or any other agreement relating thereto outside the four walls of the court than resorting to litigation." The arbitration agreement is irrevocable unless one or more of these three things are obtainable namely:

(a) the parties provide for revocability from the outset;
(b) the parties subsequently agree to revoke it, or
(c) a Court or Judge grants leave for it to be revoked[19]

From the above, it is trite that, as jurisdiction is to the court, so is the arbitration clause to the arbitral proceedings. Without an arbitration clause/agreement, there cannot be arbitration as the arbitration clause/agreement *inter alia* provides for the *lex arbitri* of the arbitration, the number of the arbitrators, the seat of the arbitration, the scope and power of the arbitrators (especially when it is a post dispute submission agreement), the duration of the arbitration and other matters

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[14] The Supreme Court in the case of *Obi Obembe v Wemabod Estate Ltd.* [197] All NLR 130 at 139 held *"*Arbitration clause, speaking generally falls into two classes. *One class* is where the provision for arbitration is a mere matter of procedure for ascertaining the rights of the parties with nothing in it to exclude a right of action on the contract itself but leaving it to the party against whom an action may be brought to apply to the discretionary power of the court to stay proceedings in the action in order that the parties may resort to that procedure to which they have agreed. *The other class* is where the arbitration followed by an award is a condition precedent to any other proceedings being taken, any further proceedings then being, strictly speaking, not upon the original contract but upon the award made under the arbitration clause, such provisions in an agreement are sometimes termed "*Scot v. Avery*" clauses, so named after the decision in *Scott v. Avery* (1856) 5 H.L. Cas. 811. The Court of Appeal, in *BCC Tropical Nigeria Ltd. v. The Government of Yobe State & Anor.* [2011] LPELR-9230 (CA) on what an arbitration clause is held thus "An arbitration clause is a clause inserted in a contract providing for compulsory arbitration in case of dispute as to rights and liabilities under such contract. The purpose of that clause is to avoid having to litigate disputes that might arise."

[15] Except in cases of statutory arbitration.

[16]Akpata, O., *Arbitration Clause,* A presentation delivered 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.

[17] [2003] 15 NWLR (Pt. 844) 469 at 487, paras. A-B.

[18] [2014] 10 NWLR (Pt. 1416) 515 at pp. 535-536 on the reason for arbitration the court held "the notable reasons for arbitration are: (a) it may reduce the risk of punitive damages awards; (b) it may decrease exposure to class actions or other forms of aggregate litigation; (c) it may result in more accurate outcomes because of the arbitrator's expertise and incentives; (it may better protect confidential information from disclosure; (e) it enhances the ability of the parties to have their dispute resolved using trade rules; (f) it may enable parties better preserve their relationship; and (g) it may provide a neutral forum, arbitration is usually encouraged because arbitration clause reduce the burden on court system to resolve disputes."

[19] Section 2 Arbitration and Conciliation Act, 1988, Cap. A18, LFN, 2010. See also Akpata, E.O.I, *The Nigerian Arbitration Law in Focus,* (Lagos, West African Book Publishers Ltd, 1997), P. 18.

ancillary thereto.[20] So where two or more persons agree that a dispute or potential dispute between them shall be decided in a legally binding way by one or more impartial persons of their choice in a judicial manner, the agreement is called an arbitration agreement.[21]

The Preference of Arbitration as an ADR Mechanism

There is no gainsaying, that arbitration as an ADR mechanism is specially opted for in commercial transaction by parties as the means of settlement of their disputes. The peculiarities of arbitration give it an edge over and above the other mechanisms.[22] World over, arbitration has been accepted as a suitable method of commercial disputes settlement as almost every nation and some international organizations have laws and rules[23] regulating its practice. This feature of having a universal legal framework makes arbitration more attractive to disputants than other methods of dispute resolution. Arbitration awards unlike the decision of a mediator or the outcome of negotiation, is final and legally binding on the parties thereto and can only be set aside by an order of the court on grounds laid down in the Arbitration and Conciliation Act. Thus, whenever parties opt for arbitration, they do so knowing that the time and resources

[20] Sino-Afric case supra at page 533, Para. C on the effect of an arbitration clause in an agreement, it was held "any agreement containing an arbitration clause indicates that the contract requires the parties to resolve their disputes through an arbitration process. Where a party goes straight to court instead of complying with an arbitration clause in an agreement, the defendant has a remedy. The remedy by way of stay of proceedings pending the determination of arbitration", in *Celtel Nigeria BV v. Econet Wireless Ltd & Ors* [2014] LPELR-22430 (CA) on the essence of arbitration clause in a written contract, the court stated thus "An arbitration clause in a written contract is quite distinct from the other clauses. Whereas the other clauses in a written contract set out obligations which the parties undertake towards each other, the arbitration clause merely embodies the agreement of both parties that if any dispute should occur regarding the obligations which the other party has undertaken to the other, such dispute should be settled by a tribunal of their own constitution and choice. The appropriate remedy therefore for a breach of a submission is not damages but its enforcement."

[21] Chukwuemerie, I. A., "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, Page 100-118 at P. 102 "Arbitration is of two main types, consensual and statutory. Statutory arbitration does not depend on the choice of or will the parties (party autonomy) but holds by reason of compulsion of law as it were. A labour dispute arbitration conducted by the Industrial Arbitration Panel under ss. 9-10 of the Trade Disputes Act runs strictly on the dictates of law not parties' choice or programming. On the other hand, consensual arbitration is based purely on the will and agreement of the parties. The agreement, and nothing else, forms the foundation for the arbitration and the arbitrators' jurisdiction or competence. Consensual arbitration is much more popular than the other variant". See also Abimbola Oluseun, "Prospects in Arbitration: An Overview" *Diverse Issues in Nigerian Law, Essays in Honour of Hon. Justice Okanola Akintunde Boade*, Olatunbosun, A. I., and Laoye, L., (Eds.) Ibadan, Zenith Publishers, 2013, page 26. "Arbitration can either be voluntary or mandatory (*although mandatory arbitration can only come from a statute or from a contract that was voluntarily entered into , where the parties agree to refer all existing or future disputes to arbitration, without necessarily knowing, specifically, what or if disputes will ever occur*) and can be either binding or –binding. Non-binding arbitration is like mediation in that a decision from such referral by agreement cannot be imposed on the parties. However, generally, arbitration is binding and enforceable under the applicable rules."

[22] Abimbola, A. O., Op. Cit. Page 27 "There are a number of reasons that parties to international contract elect to have their disputes resolved through arbitration. These includes, the desire to avoid the uncertainties and local practices associated with litigation in national courts, the desire to obtain quicker, more efficient decision, the relative enforceability of arbitration agreements and arbitral awards (*as contrast with forum selection clauses and national courts judgments*), the commercial expertise of arbitrators, the parties freedom to select and design the arbitral procedures, confidentiality and other benefits."

[23] For example, in Nigeria at the federal level, the Arbitration and Conciliation Act, 1988, Cap. A18 LFN, 2010 as well as the various Arbitration Laws of the various States regulates Arbitration in Nigeria.

expended on the whole process will not be rendered nugatory or of no effect and at the end of the proceedings, they are guaranteed of an enforceable award.

The rendering of a binding and enforceable award informs prudent businesspeople preference for arbitration. Also, the fact that arbitral awards once delivered, in accordance with global best practices enjoy universal recognition and enforcement under both national laws and international statutes and treaties make arbitration more preferred than other alternative dispute resolution mechanisms. Thus, where a party obtains an arbitral award in a forum where such an award cannot be enforced due to lack of goods or sufficient goods to satisfy the award, the successful party can take the award and register it as a judgment of the court of the forum where the defendant has goods and same will be executed there though it was not originally delivered there. Arbitration has developed in contemporary times to the extent that it has been argued that, it has acquired a distinct status as a dispute resolution mechanism independent of Alternative Dispute Resolution. This argument, have made legal pundits to classify disputes settlement mechanisms into, Litigation, Arbitration and ADRs.[24] In order to ensure the growth of arbitration in Nigeria, it is necessary for the courts to give effect to the intention of the parties (i.e. the intention to arbitrate any dispute that might ensue between them which is expressed through the insertion or making of an arbitration clause/agreement) and where a party goes to court instead of arbitration; to refer the parties back to arbitration by granting stay of proceedings.

The Principle of Taking a Step in the Proceedings

Section 5 (1) of the Arbitration and Conciliation Act[25]provides as follows,

> *If any party to an arbitration agreement commences any 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 pleadings or taking any 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) 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 ready and willing to do all things necessary to the proper conduct of the arbitration, make an order staying the proceedings.*

The interpretation of the above statutory provision as to what amount to taking a step in the proceedings in the determination of an application for stay of proceedings is unclear and ambiguous and this has caused applicants to suffer hardship in some cases. The first time the

[24] Chukwuemerie, I. A., Op. Cit. Page 100 posits "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."

[25] 1988 Cap. A18 LFN, 2004.

court will have the opportunity to interpret the section was in the case of *Obi Obembe v. Wemabod Estate Limited*[26]

The case of *Obembe v. Wemabod Estate Ltd*[27] as Genesis of the Principle of Taking No Steps in the Proceedings

The Appellant in this, case a consulting engineering firm, was appointed by the Respondent as a consulting engineer for the building known as Unity House. The conditions of engagement of the Appellant were as laid down in a booklet published by the Association of Consulting Engineers of London (Exhibit 3). Soon after the commencement of the building, the parties had a disagreement and the Appellant's contract was terminated. The Appellant as claimant claimed at the High Court payment based on the work done. The Defendant defended the suit all through; though clause 17 in part 11 of Exhibit 3 contained an arbitration clause. The Appellant did not file a motion for stay of proceedings pending arbitration. At the close of the case, the trial judge dismissed the Appellant's case on the ground that he has not shown by evidence how he is entitled to the amount claimed. The trial judge then remarked *obiter* that "had I been in a position on the facts to find any of the plaintiff's claims proved I would have been unable to enter judgment in his favour in view of the Arbitration Clauses 17 of Exh. 3 at page 37 which the parties had agreed would govern their contract." It was against this judgment that the appellant appealed to the Supreme Court. The Supreme Court granted the Appellant's claims in part and held that the trial judge was wrong in making the observation with regards to the arbitration clause. In the judgment of the Supreme Court, Fatai William, Chief Justice of Nigeria (CJN), made the statement that has caused several controversies and unsettled the law on the scope, import and purport of section 5 (1) of the Arbitration and Conciliation Act (ACA). The CJN stated that, *no stay was asked for by the defendants/respondents after they were served with the writ of summons, they accepted service of the statement of claim, filed their own statement of defence, testified in their defence, and took part in the proceedings until judgment was delivered. In order to get a stay, a party to a submission must have taken no steps in the proceedings. A party who makes an application whatsoever to the court, even though it be merely an application for extension of time, takes a step in the proceedings.*

Therefore, the dictum of Fatai Williams CJN above particularly the part where he stated that "*a party who makes an application whatsoever to the court, even though it be merely an application for extension of time, takes a step in the proceedings*" became the judicial genesis of the 'must have taken no step' in the proceedings principle with regards to its meaning and scope. Thus, it is required that, an applicant for a stay of proceedings pending arbitration to successfully urge the court to stay its proceedings and order parties to give effect to the arbitration clause through an order of stay of proceedings; must have taken no step (s) in the proceedings. The pertinent questions that arise from this blanket dictum are, how suitable is the decision in Obembe's case as an authority on the principle of "must have taken no steps in the proceedings"? What does it mean and what step (s) amounts to taking a step (s) in the proceedings to amount to waiver of the right to arbitration which will justify the court from refusing to grant stay of proceedings? What are the effects of taking no steps in the proceedings principle on the desired growth of arbitration in Nigeria?

[26] (1977) All NLR 130
[27] Ibid

It is worthy to reiterate that the part of the judgment of the trial court appealed against from which Fatai Williams CJN made the statement was an *orbiter dictum* and not the *ratio decidendi* of the case. The law is settled that, an *obiter dictum* cannot constitute a ground of appeal, hence, the Supreme Court ought to have struck out the ground of appeal on consideration of the *ratio decidendi* statement of the learned trial judge and not go all the whole hog like it did.[28] Thus, on the authority of Obembe's case, filing of a Memorandum of Appearance and a defence thereafter by a defendant will constitute taking of steps that will sufficiently signify that a defendant has waived the right to apply for stay of proceedings in order for parties to proceed to arbitration as contained in the arbitration clause. It is apposite to state that, the facts, and circumstances of the Obembe's case justified the non-referral of the suit to arbitration. The reason is that all through the court proceedings, from the conduct of the Defendant, it was obvious that it had no disagreement with the continuation of the suit by the learned trial judge. It filed no motion for stay of proceedings contending that the parties proceed to arbitration in accordance with clause 17 in part 11 of Exhibit 3 nor did the defendant enter appearance under protest by virtue of the arbitration clause. In fact, the defendant never challenged the jurisdiction of the court pursuant to the said clause 17 in part 11 of Exhibit 3, hence, it would have amounted to granting to a party a relief which he has not sought from the court if the learned trial judge had *suo motu* stayed the proceedings and ordered parties to proceed to arbitration in compliance with clause 17 part 11 of Exhibit 3.[29] Thus, an unrestrained application of the 'must have taken no steps' in the proceedings as enunciated by Fatai Williams CJN in Obembe's case is in our opinion not advisable because it fails to take cognizance of steps that are preservatory which have to be taken not for the purpose of acceding to litigation but to preserve the *res* while parties proceed on arbitration. Therefore, the Supreme Court in subsequent cases has attempted to streamline the blanket proposition it stated in Obembe's case. It has taken into cognizance the fact that, in law, no two cases are identical necessitating the application of the same rules hook, line and sinker. The Supreme Court in these subsequent cases appreciated the peculiarities thereof and distinguished them from the Obembe's case.[30] This distinguishing which is judicially desirable, in as much as possible has to an extent put into perspective the blanket proposition of Fatai

[28] In the case of *Odunukwe v. Ofomata* [2010] 18 NWLR (Pt. 1225) 404 at page 446, Paras. B-E on what amounts to an *obiter dictum* and whether appealable the Supreme Court held "An *obiter dictum* is a statement made in passing which does not reflect the *ratio decidendi*, that is, the reasoning or ground upon which a case is decided. An appeal is usually against a *ratio decidendi* and generally not against an *obiter dictum.*" See also *U.T.C. Nigeria Ltd. V. Pamotei* [1989] 2 NWLR (Pt. 103) 244, *Saude v. Abdulullahi* [1989] 4 NWLR (Pt. 116) 387, *Ede v. Omeke* [1992] 5 NWLR (Pt. 242) 428, *Dakur v. Dapal* [1998] 6 NWLR (Pt. 660) 228, In the case of *Prince (Dr.) B.A. Onafowokan v. Wema Bank Plc & Ors.* [2011] LPELR-2668 (SC) the Supreme Court reiterated that "where an opinion is expressed obiter, such an opinion is not appealable. An appeal is fought on the basis of the decision of the court and is not taken against mere obiter. It is not every pronouncement made by a judge that can be made the subject of an appeal. Where an opinion is expressed obiter, such an opinion, remarks or observation is baseless and a mere obiter dictum which is not appealable."

[29] This, if had been done, would have made the court to have acted like a father Christmas who give gifts even when he has not been asked despite the fact that, courts are not father Christmas and even father Christmas only give gifts on Christmas day and the day the learned trial judge gave the judgment was not Christmas as courts in Nigeria do not sit on Christmas day being a universally celebrated public holiday which falls within the usual annual judicial break period.

[30] See for instance the cases of *Fawehinmi Construction Co. Ltd v. O.A.U.* (1998) 6 NWLR (Pt. 553) 171, *Kano State Urban Development Board v. Fanz Construction Ltd.* [1990] 4 NWLR (Pt. 142) 1, the Supreme Court held that "a party who makes any application whatsoever to the court, even though it be merely an application for time, takes a step in the proceedings. An Application for an order for pleadings to be filed constitutes a step in the proceedings within the provisions of section 5 of the Arbitration Law."

Williams CJN. This effort of the Supreme Court notwithstanding, the state of the law has been left indistinct and predisposed to unpredictable interpretations of the blanket statement of the CJN in the Obembe's case.[31] This is the unfortunate consequence of the somewhat unnecessary over-generalization in the case on the desired development of arbitration in Nigeria.

The Court of Appeal Distinction of the Obembe's Case

The Court of Appeal in a proactive manner has appreciated the need to determine the scope and meaning of not taking a step in the proceedings. It has therefore made a distinction between three kinds of steps. These are steps that if taken will amount to a waiver of the right to submit the dispute to arbitration as expressed by the parties through the insertion of the arbitration clause in their contract; steps that though may seem to give an impression that a defendant has waived his right to urge the court to grant stay of proceedings but from the peculiarities of the case, if not taken as time is of the essence, the subject matter would have been radically altered by the time parties go to the arbitration and thirdly, steps that should not by any stretch of imagination amounts to an outright waiver but are steps merely taking in furtherance of the defendant's right to impugn the jurisdiction of the court and pray for stay of proceedings pending arbitration. The Court of Appeal therefore restrained itself from probable confusion that a blanket espousal of the pronouncement of Fatai Williams CJN in Obembe's case will occasion as seen in the case of *Nisan (Nig.) Ltd v. Yaganathan*.[32]

In the case of *Sino-Afric Agricultural and Industrial Company Limited & 2 Ors. V. Ministry of Finance & Incorporation & Anor.*[33] in dealing on when an application can be made to the court for stay of proceedings pending arbitration and when the courts shall make an order of stay of proceedings pending arbitration, the Court of Appeal held that by virtue of section 5(2) (a) & (b) of the Arbitration and Conciliation Act, 1990, a court to which an application is made to, may make an order staying proceedings if satisfied that: (a) there is no sufficient reason why the matter should not be referred to arbitration in accordance with the arbitration agreement; and (b) the applicant was at the time when the action was commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration. By the provision of section 5 (1) of the Arbitration and Conciliation Act, 1990, if any party to an arbitration agreement commences any action in any court with respect to any matter which is the subject of an

[31] *Fawehinmi v. O.A.U.* [1998] 6 NWLR (Pt. 553) 1 at 183, Paras. E-F.

[32] [2010] 4 NWLR (Pt. 1183) 135 P. 156 and 157.

[33] [2014] 10 NWLR (Pt. 1416) 515, P. 537, Paras. B-D. See also *Enyelike v. Ogoloma* [2008] 14 NWLR (Pt. 1107) 247, *Williams v. Williams & 3 Ors.* [2013] CLRN 114, *Nissan Nigeria Ltd. V Yoganathan & Anor* [2012] 4 NWLR (Pt. 1183) 135, 1, *MV Panormos Bay v. Olam (Nig.) Plc.* [2004] 5 NWLR (Pt. 865), *Confidence Insurance Ltd. V. Trustees of O.S.C.E* [1999] 2 NWLR (591) 373, the Court of Appeal held at page 388, Paras. A-D on what constitute steps in the proceedings thus, "Section 5 (1) of the Arbitration and Conciliation Act makes it clear that the right to evoke the arbitration provision must be asserted before a party takes any step in the proceedings. While certain acts done by a party may or may not constitute steps in the proceedings, nevertheless some acts will surely be construed to mean taking steps in the proceedings. For example, the following cannot ordinarily amount to taking of other steps in the proceedings as to defeat a party's right to rely on the arbitration provision, viz: (a) exchange of correspondence between parties or their counsel after entering appearance; or (b) effort made out of court to settle the matter in controversy between the parties; or (c) moving the court to seek a party's desire that the matter be placed before the arbitration panel. But where… the appellant delivered his pleadings and in it, raised the need to utilise and exhaust the arbitration in the trust deed without specifically applying to the court to stay the proceedings, that would amount to taking step in the proceedings, after entering of appearance sufficient to defeat the appellant's right to rely on the arbitration provision."

arbitration agreement, any party to the arbitration agreement may at any time after appearance and before delivering any pleading or taking any other steps in the proceedings, apply to the court to stay the proceedings. I must however stress that the most important and major qualification here is that the defendant must have not delivered any pleadings or taken any steps in the proceedings beyond entering a formal appearance. Thus, the Court of Appeal in this case states the conditions that should guide a court in determining whether or not to grant a stay of proceedings for parties to arbitrate which are absence of sufficient reason why parties should not be directed to arbitrate in accordance with the arbitration agreement and willingness of the Applicant at all times material to do all that is necessary for the conduct of the arbitration. Also, delivery of pleadings with regards to not taking a step in the proceedings qualifies as a step that will justify a refusal for stay of proceedings and a formal appearance without more does not qualify as a step taken that will foreclose the option of arbitration.

Furthermore, in the case of *Onward Enterprises Limited v. MV Matrix & Anor.*[34] the Court of Appeal dealing with the issue of what constitutes "taking steps" in a proceeding stated that in order to get a stay of proceedings pending arbitration, a party to a submission must have taken no step in the proceedings. A party who makes any application for extension of time[35] takes a step in the proceedings. Delivery of a statement of defence is also a step in the proceedings. The court went further to state that however, mere entering an appearance; be it conditional or unconditional, is neither controlling nor relevant to the party's right to rely on arbitration clause. It is what happens after a party has entered an appearance that matters in determining whether or not such a party can still take advantage of the aforesaid arbitration clause. Finally, the court held that "steps" in the proceedings which will result to the refusal of stay of proceedings includes (a) the filing of an affidavit in opposition to the summons for summary judgment, (b) service of a defence, (c) an application to the court for leave to serve interrogatories, or for a stay of proceedings pending the giving of security or cost, (d) or for an extension of time to serve a defence, (e) or for an order for discovery, or for an order for further and better particulars. It is only acts done in furtherance of the prosecution of the defence that could be said to amount to steps taken in the proceedings to foreclose the grant of stay of proceedings for parties to arbitrate.[36]

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[34] [2010] 2 NWLR (Pt. 1179) 530, P. 551, Paras, A-E. See also *Fawehinmi v. O.A.U.* [1998] 6 NWLR (Pt. 553) 1 at 183, Paras. E-F, on whether application for stay of proceedings pending arbitration amounts to taking step in the proceedings, the Supreme Court held "when parties enter into an agreement and there is an arbitration clause whereby the parties must first go for arbitration before trail in court, it is natural for the defendant, in a case where the other party has filed a suit, to ask for stay of proceedings pending arbitration. That does not amount to submission to trail. In the case where such an application is refused the next step is to invoke a statutory right where it exists if that right will make the suit incompetent"

[35] The question which may be asked from the position that an application for extension of time amounts to taking a step in the proceedings which bars an applicant's application for stay of proceedings pending arbitration is, in a situation where the defendant is out time within which to enter an appearance and an appearance entered out time amounts to no appearance, will an application for extension of time within which to file a memorandum of appearance in order to enter a valid and proper appearance amounts to a step to sequestrate the applicant's right to apply for stay of proceedings pending application. The blanket statement that an application for extension of time without defining the purpose for the extension of time leaves the issue hazy and subject to superiority of argument. It is desirable that the court of Appeal state in clear and unambiguous terms the nature of the extension of time that will amount to waiver of the right to give effect to the arbitration clause/agreement.

[36] In the case of *Nisan (Nig.) Ltd v. Yaganathan* [2010] 4 NWLR (Pt. 1183) 135 P. 156 and 157, on the attitude of Nigerian courts to arbitration agreements and the duty on litigants to respect arbitration agreements the Court of Appeal stated as follows "Nigerian courts respect arbitration agreements and would decline jurisdiction where

Thus, the case of Obembe cannot be said to be an authority for determining when a party can be said to have taken a step in the proceedings to foreclose an application for stay of proceedings. There could be situations which would justify a party to a contract with an arbitration agreement to take certain substantial steps though without the intention of waiving his right to apply for stay of proceedings. For instance, an applicant for a mareva injunction where the claimant is likely to remove from the jurisdiction of both the court and the seat of arbitration goods that may be used to satisfy the outcome of a successful arbitration or is already doing so. If such a party is not prevented from removing the goods or subject matter of the dispute from the territorial jurisdiction of the Court,[37] by the time the court will grant a stay of proceedings and the arbitral proceedings commenced wherein the Defendant can move the arbitrator or arbitral panel to grant such an injunctive relief pending the determination of the arbitration, the act would have been completed and this will expose the party to avoided hardship. It is common knowledge that, the process of constituting an arbitral tribunal especially in *ad hoc* arbitration which is most favoured for commercial disputes is not done overnight. Hence, there may be need for a party who feels the need; to seek an injunctive relief as a matter of utmost urgency to prevent irreparable damage. We are inclined to argue that, as a general rule, applications for injunction particularly interim injunction which are characterized by the presence of imminent danger and the need to avert irreparable damage should not amount to a step taking in the proceedings to foreclose a party from applying for stay of proceedings pending arbitration. This approach if adopted particularly where such an injunctive application is accompanied by the application for stay of proceedings, will encourage the growth of arbitration in Nigeria. This will give foreign investors' confidence to select Nigeria as the seat of their arbitration and Nigerian law as the *lex arbitri.* Where a party files a counterclaim or an application such as an inter pleader summons or a third-party proceeding, it clearly demonstrates that party's willingness and readiness to forgo the arbitration clause/agreement and continue with the court proceedings, hence, such steps, will rightly qualify as a step taking in the proceedings that forecloses the option of arbitration.

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necessary and refer matters to arbitration. Litigants who commit to arbitration in their contractual agreements should respect such" in *Enyelike v. Ogoloma* [2008] 14 NWLR (Pt. 1107) 247, Pages 258-259, Paras. G-A, the Court of Appeal held thus, "when a party jumps the gun of arbitration and files an action in a court of law, the defendant has the right to stay the proceedings. The court shall stay the proceedings if it is satisfied that there is no cogent reason the matter should not be referred to arbitration in accordance with the provisions of section 4(1 and 5) (1) of the Arbitration and Conciliation Act. Thus, where a party, as in the instant case, takes any step beyond the formal appearance, he would be deemed to have waived his right to go to arbitration and by implication also waived his right to challenge the competence or jurisdiction of the court see *Karubo v. Zach-Motison (Nig.) Ltd* [1992] 5 NWLR (Pt. 239) 102." Also, the reasoning that the defendant must not file a defence before applying for a stay of proceedings makes in necessary for one to ask, whether or not application for stay of proceedings for court to order parties to arbitrate is an exception to the rule against demurrer which is provided in all the rules of court of the various High Courts and have been given judicial approval. From the tenor of the decisions referred to above, it seems logical for one to conclude that demurrer is inapplicable where a party intends to move the court to stay proceedings pursuant to an arbitration clause. Though the Court of Appeal have made no pronouncement on this, this much is the position of the law as gleaned from the case of *Fawehinmi v. O.A.U.* [1998] 6 NWLR (Pt. 553) 1 at 183, Paras. G-H where the Supreme Court held thus, "waiver is not all that simple. Appearance by way of demurrer is not enough to amount to waiver" also, where a defendant files a statement of defence but with indication that there is a preliminary objection on the competency of the court to be seized of the suit because the arbitration clause, notwithstanding that he has filed a defence, the presence of the preliminary object does not allow the defence to concretized into taking a step in the proceedings to amount to waiver.

[37] The fact that an arbitration award can be registered and enforced as the judgment of a foreign state will not be a reason for a party who can mitigate his hardship through a mareva injunction to fold his arms and wait till the end of arbitration. The cost of foreign enforcement and all the pains associated can be avoided through injunctive relief.

Conclusion

A party to a contract with an arbitration clause under the Nigerian arbitration law is at liberty, where a dispute has arisen and the other party or parties in disregard to the arbitration clause, commence proceedings in the court, to apply to the court for an order staying the proceedings while ordering parties to arbitrate. For an Applicant who seeks to exploit this option, the law is that, he must have taken no steps in the proceedings which would have amounted to a waiver of this right. This position of the law howbeit *per incuriam* was first espoused by the Supreme Court of Nigeria in the case of *Obi Obembe v. Wemabod Estate Ltd*.[38] per Fatai-Williams, CJN and his dictum have been a subject of uncertainty as to what steps constitute a step taking in the proceedings to foreclose the right to arbitration as the CJN did not define what steps if taken would amount to a bar of arbitration. However, the Court of Appeal has defined to an appreciable extent the statement of Fatai Williams, CJN to the effect that, for a step to constitute a step taken in the proceedings to defeat the right to apply for referral to arbitration, such a step must be positive, fundamental and inconsistent with the right to apply for stay of proceedings and not just mere steps which may seem substantial but on a closer look, were actually taken in furtherance of the right to apply for stay of proceedings while parties are referred to arbitration. An amendment of section 5 (1) of the ACA to bring it to terms with the position of the law as enunciated by the Court of Appeal in the cases discussed above[39] with regards to taking a step in the proceedings is pertinent and recommended.

Way Forward

From the above, it is recommended due to the confusion and the attendant hardship created by the sweeping pronouncement of Fatia Williams CJN in the Wemabod case, it becomes expedient for the legislature to revisit section 5 of the Arbitration and Conciliation Act to specify though not in a conclusively manner, steps such as those specified by the Court of Appeal that if taken in the proceedings will amount to steps that will defeat a party's right to apply to the court for a stay of proceedings pending arbitration. This will serve as a guide to the court in their act of judicial interpretation and legislation and not to give the courts free hands to legislate a meaning to the section above mentioned as this can lead to inconsistency of interpretation which is counterproductive in the development of arbitration in Nigeria.

Also, the courts should be more inclined to granting stay of proceedings pending arbitration than refusing it in keeping with the informality and flexibility of arbitration proceedings. The courts are generally keen to uphold the validity of arbitration clauses even when they lack the usual formal language in which legal contracts are usually couched.[40] The mere fact that, the parties have voluntarily opted for arbitration as the first resort for the settlement of their disputes should weigh heavily in the mind of the court to avail them this opportunity in the event of a dispute. The reasons for refusing a stay of proceedings pending arbitration should be very gripping and

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[38] Op cit

[39] *Enyelike v. Ogoloma* [2008] 14 NWLR (Pt. 1107) 247, *Williams v. Williams & 3 Ors.* (2013) CLRN 114, *Nissan Nigeria Ltd. V Yoganathan & Anor* [2012] 4 NWLR (Pt. 1183) 135, 1, *MV Panormos Bay v. Olam (Nig.) Plc.* (2004) 5 NWLR (Pt. 865), *Confidence Insurance Ltd. V. Trustees of O.S.C.E* [1999] 2 NWLR (Pt. 591) 373.

[40] *M.V. Lupex v N.O.C. & S. Ltd*. [2003]15 NWLR (Pt. 844) 469 at 491, paras. G-H "the mere fact a dispute is of a nature eminently suitable for trail in a court is not a sufficient ground for refusing to give effect to what the parties have, by 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."

the onus should be on the party who is opposed to its grant and not the applicant and unless there are apparent conditions that will prejudice a party thereof unjustly, such as where the dispute is not arbitrable,[41] where the defendant sufficiently proves that he cannot obtain justice from the arbitral proceedings or that the agreement between the parties is null and void, inoperative and incapable of being performed therefore of no effect whatsoever, the courts should be inclined to granting a stay of proceedings.[42]

Furthermore, for any step to amount to a step taken in the proceedings to sequestrate the right to give effect to the arbitration agreement, such a step must be fundamental. For example. service of a substantive defence by the defendant without more on the plaintiff in response to the suit.

[41] May be due to public policy consideration.

[42] *M.V. Lupex v N.O.C. & S. Ltd*. [200])15 NWLR (Pt. 844) 469 at 490, paras. C-F "where parties to a contract have under the terms thereof agreed to submit to arbitration, if there is a dispute arising from the contract between them, a defendant who has not taken any step in the proceedings commenced by the other party may apply to the court for a stay of proceedings of the action to enable the parties to go to arbitration as contracted. The [power of the court to stay such a proceeding is exercisable under and by virtue of section of the Arbitration and Conciliation Act and the court is bound to stay the proceedings unless it is satisfied that there is sufficient reason to justify the refusal to refer the dispute to arbitration. The court may refuse to order a stay of proceedings where the defendant has established that he would suffer injustice if the case is stayed or that he cannot obtain justice from the arbitration tribunal or that the agreement between the parties is null and void, inoperative and incapable of being performed." See also *Niger Progress Ltd. V. North East Line Incorporation* [1989] 3 NWLR (Pt. 107) 68.