THE CONDITION FOR THE GRANT OF STAY OF PROCEEDINGS PENDING ARBITRATION UNDER NIGERIA LAW:

REVISITING MEKWUNYE V LOTUS CAPITAL LTD

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Introduction

This paper examines the controversy surrounding the condition(s) for the grant of stay of proceedings pending arbitration under Nigerian law. In particular, this paper scrutinises the Court of Appeal's decision in the case of *Mekwunye v. Lotus Capital Ltd*[1] where the Court considered previous decisions on the point and purported to overrule them. In the final analysis, the paper will highlight what we believe is the error in the Court of Appeal's decision and propose a better view that accords with extant applicable law.

Background to the Controversy

Owing to well documented benefits of arbitration as a dispute resolution mechanism, countries have increasingly come to compete through legislation and court decisions to have their jurisdictions perceived as arbitration friendly. In Nigeria, the former Chief Justice of Nigeria, Walter Nkanu Onnoghen, issued a direction at the 2017 annual arbitration conference of the Nigerian Institute of Chartered Arbitrators, calling on judges to resist the temptation of assuming jurisdiction over commercial disputes arising from contracts with arbitration clauses and instead, to stay such proceedings in favour of arbitration as required by law.

Despite this clear judicial policy in favour of a stay of proceedings pending arbitration, one recurring controversy in this area of the law, has been the issue of the condition(s) to be fulfilled before the grant of an application for stay pending arbitration, and the related question of who bears the burden of proof in such applications. The Court of Appeal had cause to consider this issue in *Mekwunye v. Lotus Capital Ltd* where the Court departed from its previous decisions and held that the burden of proof lies on the plaintiff to demonstrate why the application should not be granted. Understandably, the decision was warmly received by the Nigerian arbitration community welcoming the decision as indicative of Nigeria's favourable disposition towards arbitration.[2] It is against the foregoing backdrop that we have decided to revisit and interrogate the decision.

Stay of Proceedings pending Arbitration

Sections 4 & 5 of the Arbitration and Conciliation Act 1988 ("the Act") outline the circumstances under which the courts can stay their proceedings pending arbitration. The sections mandate the courts to stay proceedings on the application of a party, with respect to a matter, subject of an arbitration agreement. Section 5 in particular provides the twin circumstances that must coexist for a court to grant a stay of proceedings pending arbitration, as follows: (i) that there is no sufficient reason why the matter should not be referred to arbitration in accordance with the arbitration agreement; and (ii) 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.

The leading Nigerian authority on the grant of stay of proceedings pending arbitration is *The Owners of MV Lupex v. Nigerian Overseas Chartering & Shipping Ltd (MV Lupex)*[3] where the Supreme Court enunciated the principle on the subject in the following words:

> *"[w]here parties have chosen to determine for themselves that they would refer any of their dispute to arbitration instead of resorting to regular courts a prima facie duty is cast upon the courts to act upon their agreement."*

The Supreme Court was however silent on the specific point of the condition(s) a party must fulfil before a court can grant an application to stay proceedings pending arbitration, but nevertheless held that the decision on whether to grant a stay is discretionary; which discretion should be exercised in favour of granting the stay unless there is a compelling reason for not doing so; and that the burden of proving such compelling reason is on the plaintiff. Two decisions of the Court of Appeal ignited the controversy regarding this issue.

In *MV Panormos Bay v. Olam*[4], the Court of Appeal held that by virtue of Section 5 of the Act, it is not enough for a party applying for a stay of proceedings pending arbitration to merely depose in his affidavit that he is ready and willing to do all things necessary for causing the matter to be decided by arbitration; such party must show in his affidavit, documentary evidence of the steps he took or intends to take for the proper conduct of the arbitration. The same court in *United Bank for Africa v. Trident Consulting Ltd*[5] took it a step further by stating that:

> *"before a stay may be granted pending arbitration, the party applying for a stay must demonstrate unequivocally by documentary evidence and/or other visible means that he is willing to arbitrate. He does it satisfactorily by (1) notifying the other party in writing of his intention of referring the matter to arbitration and (2) by proposing in writing an arbitrator or arbitrators for the arbitration".*

These two decisions ostensibly impose additional requirements beyond those contained in the Act and led to allegations that the courts were inhibiting the drive for Nigeria to be perceived as arbitration friendly. Some commentators went as far as characterising the decisions as "aberrational" and notorious examples of courts betraying a grudging attitude to arbitration through an approach of jealously guarding the court's jurisdiction.[6]

It is instructive to note that before the *Mekwunye* decision, not all courts in Nigeria followed the *MV Panormos Bay* and *Trident* line of cases to impose on the requirement of adducing documentary evidence of the applicant's willingness to arbitrate, as a condition for the grant of applications for stay pending arbitration. Notable cases on the other side of the spectrum include *Sino-Afric Agricultural & Industrial Co Ltd v Ministry of Finance Incorp & Anor*[7] and *Onward Enterprises Ltd v. MV Matrix*[8]. With the situation delicately poised, the Court of Appeal in *Mekwunye* was presented with an opportunity to bring some needed clarity to this tangled area of the law.

The Court of Appeal's decision

It must be said that the Court of Appeal in *Mekwunye* made a valiant effort to harmonise its previous positions and held, firstly, that *MV Panormos Bay* does not represent the position of Nigerian law because the reasoning is inconsistent with the Supreme Court's decision in *MV Lupex* and, secondly, that the decision in *Trident* which placed on an applicant, the burden of presenting documentary evidence to support an application for stay, constitutes a departure from the plain provisions of Section 5(2) of the Act, particularly in cases where the Applicant has deposed to facts in that regard. As widely applauded as the above decision is, there are good grounds to suggest that the

Court of Appeal ultimately went too far in stating that imposing the burden of presenting documentary evidence to support an application for stay of proceedings pending arbitration constitutes a departure from the provisions of Section 5(2) of the Act and/or that *MV Panormos Bay* does not accord with the Supreme Court's decision in *MV Lupex*.

A critique of the Court of Appeal decision

For the avoidance of doubt, while we agree that the Court of Appeal went too far in *MV Panormos Bay* and *Trident* to the extent that they laid down a blanket rule that an applicant for a stay of proceedings must bring documentary evidence that he has commenced arbitration, we do not also believe that the attempt to correct itself in *Mekwunye* was ultimately successful.

It is not correct practice to require an applicant for a stay of proceedings to show that he has initiated arbitration proceedings or that either party has actually initiated arbitration proceedings.[9] There are indeed situations where the applicant is merely a defendant to a claim advanced by the claimant and has no claim of his own. In such a case, it would be plainly wrong to require the applicant to demonstrate that he has commenced arbitration against the claimant before he would be entitled to the grant of a stay. In our view, there is no reason why evidence [oral or documentary] from the applicant showing that he has invited the claimant to commence arbitration or a written undertaking expressing a commitment to arbitrate in good faith should not be deemed as having duly satisfied the condition stipulated under section 5(2)(b) of the Act. The courts were therefore ultimately wrong to have refused to stay the proceedings in favour of arbitration on that score.

On the other hand, to understand where the Court also got it wrong in *Mekwunye*, the starting point is to appreciate that the decision on whether to grant a stay of proceedings - either generally or pending arbitration - is a matter of discretion and a party seeking the exercise of a court's discretion has the duty to place sufficient material before the court to enable the court exercise such discretion in his favour.[10] It is up to court before whom an application for stay is brought, to determine the evidence that can satisfy it that such applicant is ready and willing to arbitrate in good faith.

Thus, in the same way that the court in *Mekwunye* held that nothing in the text of Sections 4 or 5 of the Act imposes the requirements of documentary evidence on a party to demonstrate a willingness to proceed to arbitration, there is also nothing in the Act that either prescribes the type of material evidence that must be placed before a court [in order for it to be satisfied that the conditions for the exercise its discretion have been met] or precludes a court from requesting documentary evidence of the applicant's willingness to take part in arbitration proceedings.

The second point is the aspect of the Court of Appeal's decision that its earlier reasoning in *MV Panormos Bay* on the question of who bears the burden of proof, does not accord with the Supreme Court's decision in *MV Lupex*. In so holding, the Court of Appeal in *Mekwunye* undoubtedly conflated the two interrelated but nonetheless distinct conditions in Section 5 of the Act. As already stated, there are two conditions that must be satisfied before a court will stay its proceedings pending arbitration - (a) there is no sufficient reason why the matter should not be referred to arbitration; 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.

When the Supreme Court held in *MV Lupex* that the burden of showing why a stay should not be granted and the matter should not be referred to arbitration, is on the plaintiff, the Supreme Court was clearly referring to the first limb in Section 5(2) of the Act. On the contrary, when the Court of Appeal in *MV Panormos Bay* held that it is the applicant (i.e. the defendant) asking for a stay of proceedings that has the duty to demonstrate his willingness to arbitrate, the Court of Appeal was undoubtedly referring to the second limb of the conditions in Section 5(2) of the Act. Thus, contrary to the decision of the Court of Appeal in *Mekwunye*, the decisions in *MV Lupex* and *MV Panormos Bay* are not at variance with each other.

Further, we do not consider the distinction drawn by the Court of Appeal in *Mekwunye* between challenged and unchallenged affidavit evidence as it relates to presenting documentary evidence showing the applicant's willingness to arbitrate as being dispositive of the question of whether the conditions for the grant of stay have been fulfilled. Lastly, we do not accept the definitive views expressed by Abbas and Igwe that the decisions in *MV Panormos Bay* and *Trident* are no longer tenable or have been partly overruled in view of the latter decision of the Court of Appeal in *Onward v. MV Matrix*[11] as representing the position of the law.[12] Our views would have been different if we were faced with two conflicting decisions of the Supreme Court.[13]

Conclusion

Nigeria is increasingly being viewed as an arbitration friendly jurisdiction, but this must not outweigh the need for clarity and certainty in the law which is a fundamental duty that the court system owes business and the economy. In this regard, *Mekwunye* has possibly not resolved the controversy surrounding the question of the conditions to be fulfilled for the grant of stay pending arbitration.

The courts have a duty to uphold an arbitration agreement and should stay proceedings brought in breach of that agreement. To be entitled to a stay, the applicant must demonstrate to the reasonable satisfaction of the court that he is willing to arbitrate in good faith, and the nature of evidence necessary to satisfy the court is of fact-specific determination and must depend on the circumstances of each individual case. This is however subject to the right of the claimant to demonstrate by compelling evidence the circumstances [where present] under which the court should refuse the stay and proceed to determine the case.

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End Notes

[1] (2018) LPELR-45546 (CA).

[2] See for instance Igwe, V. C. 'In Defence of Arbitration: A Review of the Court of Appeal's Landmark Decision in Mekwunye v. Lotus Capital Limited & Ors.' Africa Arbitration. Available at In Defence of Arbitration: A Review of the Court of Appeal's Landmark Decision in Mekwunye V Lotus Capital Limited & Ors. by Victor C. Igwe – Africa Arbitration Accessed on 5 February 2021; Uzodinma, C. (2018) 'Case Review: Dr. Charles D. Mekwunye v. Lotus Capital Limited & Ors' Lexology. Available at Case Review: Dr. Charles D. Mekwunye v. Lotus Capital Limited & Ors - Lexology Accessed on 5 February 2021.

[3] (2003) 15 NWLR (pt. 844) 469.

[4] (2004) 5 NWLR (Pt 865) 1 at 15 paras F-H.

[5] (2013) 4 CLRN 119.

[6] Bamodu, G. (2018) 'Judicial Support for Arbitration in Nigeria: On Interpretation of Aspects of Nigeria's Arbitration and Conciliation Act' Journal of African Law, 62 SOAS, University of London 255–279; Abbas, F. 'Stay of Proceedings Pending Arbitration: A Critique of the decision of the Court of Appeal in UBA v Trident Consulting Ltd' Available at Abdu-Salaam Abbas & Co (abdu-salaamabbasandco.com) Accessed on 5 February 2021.

[7] [2014] 10 NWLR (Pt 1416) 515 at 538.

[8] [2010] 2 NWLR (Pt 1179) 530.

[9] Bamodu, G. note 7 above.

[10] See DG, DICN & Anor v. Dinwabor & Ors (2016) LPELR-41316(CA); Khalifa v. Onotu & ANOR (2016) LPELR-41163(CA); Alamieyeseigha v. Federal Republic of Nigeria (2006) 16 NWLR (Pt 1004) 1; Adesanya Vs Lawal (2007) 7 NWLR (Pt 1032) 54; SCOA (Nig) Plc v. Omatshola (2009) 11 NWLR (Pt 1151) 106.

[11] Abbas, F. note 7 above; Igwe, V. C. note 3 above.

[12] See Usman v Umaru (1992) 7 NWLR (PT 254) 377 where it was held that where there are conflicting decisions of the Court of Appeal, the Court of Appeal is itself entitled to decide which to follow.

[13] See Obiuweubi v. C.B.N. (2011) 7 NWLR (Pt. 1247) 465.