CHALLENGES OF SECTION 20 OF THE ADMIRALTY JURISDICTION ACT TO INTERNATIONAL ARBITRATION AGREEMENTS

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ABSTRACT

Arbitration Agreements are agreements parties enter into for disputes arising in the course of their business to be resolved amicably by a neutral third party in a judicial manner. Such agreements are binding and enforceable. Courts have over the course of time, stayed proceedings for parties to resort to arbitration as stipulated in their agreements. Challenges have arisen with the interpretation, in some judicial decisions, of the provision of section 20 of the Admiralty Jurisdiction Act which renders null and void any maritime contract that contain provisions for parties to resort to arbitration in cases of disputes arising from their admiralty contract. Such contractual clauses were interpreted as 'ouster' clauses. This effectively restricts parties 'freedom of contract' rights. This article investigates these challenges and finds that such clauses should not be interpreted as ousting the jurisdiction of the court but rather allow parties to stipulate a procedure under which they may settle their differences.

INTRODUCTION

Arbitration is an alternative method of dispute resolution in which a neutral third party (arbitrator) hands down a decision after a hearing, of which both parties have an opportunity to be heard.[1] It is a fair resolution of disputes or differences between not less than two parties for determination in a judicial manner by person(s) other than a court.[2] The basis for arbitration as an alternative dispute resolution mechanism is hinged on the desire of the parties to have a less cumbersome, less expensive and informal way of settling their dispute without the technicality and rigidity associated with litigation in a shorter time.[3]

Based on the principles of *pacta sunt servanda,*[4] parties are generally free to enter into a contract and such a contract is enforceable by law provided such agreement is lawful and not contrary to public policy.[5] Thus, it is usual for parties in the course of their commercial transactions to insert arbitral clauses in the agreement in case of any dispute arising therefrom. This means that parties could agree that disputes in the course of their contract be submitted to an arbitrator whether national or foreign. Maritime arbitration mostly arises in contracts for the use of ship(s) (charter parties), carriage of cargo

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1. A.A. Daibu, 'The Lagos State Arbitration Law and the Doctrine of Covering the Field: A Review' (2015) 6(1) The Gravitas Review of Business and Property Law 44; A.A. Daibu, 'Application of the Rules of Natural Justice in Arbitral Proceedings in Nigeria' (2013) 1 Ife Juris Review 56; M.M. Akanbi, *Domestic Commercial Arbitration in Nigeria: Problems and Challenges* (Lambert Academic Publishing Germany, 2012) 47; T.A. Adewuyi, 'The Effect of Section 20 of the Admiralty Jurisdiction Act No 59 of 1991 on International Arbitration Clauses' (2006) 1 University of Ilorin law Journal 1; R. Bernstein et al., *Handbook of Arbitration Practice* (3rd edition, Sweet & Maxwell, London 1998) 13; *Black's Law Dictionary* 6th ed. (Centennial Edition) (US: West Group Publishing Co., 1990) 105
2. J.O. Olorunfemi, 'The Effect of Arbitration Agreement on The Jurisdiction of The Court in Nigeria'(2009) 2(1) Nigeria Journal of Public Law 310; Halsbury's Laws of England (Vol. 2, 3rd edn, London: Butterworths 1964) 256 para 501; F. Ajogwu, *Commercial Arbitration in Nigeria: Law and Practice* (Lagos: Mbeyi & Associates Nig. Ltd 2009) 5
3. J.O. Orojo and M.A. Ajomo, *Law and Practice of Arbitration and Conciliation in Nigeria* (Lagos: Mbeyi & Associates Nig. Ltd 1999) 42–46; Ajogwu, (n 2) 5. See also the case of *Ebokan v Ekwenibe & Sons Trading Co*. (2001) 2 NWLR (Pt 696) 32 at 43
4. Freedom of contract: It means that agreements of a party to a contract which are not fraudulent are to be observed. See *AG Nasarawa State v A G Plateau State* (2012) 10 NWLR (Pt 1309) 419 at 450
5. See *Northern Assurance Co. Ltd v Wuraola* (1969) NSCC 22; *United Bank of Nig. Ltd v Ozigi* (1991) 2 NWLR (Pt 176) 677; *Nika Fishing Co. Ltd v Lavina Cooperation* (2008) 16 NWLR (Pt 1114) 509 at 542 E; *Dragetanos Const. (Nig) Ltd v Fab Madis Ventures Ltd* (2011) 16 NWLR (Pt 1273) 308 at 353 D-F; *AG Nasarawa State v A G Plateau State* (n 4)

(bills of lading), for ship building and or sales and less commonly for insurance or repair of ships and it is a standard practice that maritime or shipping contracts will have an arbitral clause.[6] The Nigerian Arbitration and Conciliation Act hereinafter referred to as ACA[7] provides for a unified legal framework for the fair and efficient settlement of commercial disputes by arbitration and conciliation in Nigeria.[8] The Act empowers a court to stay proceedings in an action arising from a contract with arbitral clause pending the reference of the dispute to arbitration in accordance with their agreement or arbitral clause in the contract.[9]

Arbitration agreements like other contracts are generally binding and enforceable in Nigerian courts.[10] However, there are some difficulties with regard to enforcement of arbitration clauses contained in maritime agreements. Section 20 of the Admiralty Jurisdiction Act[11] renders null and void any agreement by any person or party to any cause, matter or action which seeks to oust the jurisdiction of the court in respect of any admiralty matter where any of the eight circumstances listed under the Act exist. The import of this provision is that courts will not stay proceedings for parties to resort to arbitration based on the provision of their maritime agreement as that will be interpreted to mean ousting the jurisdiction of the court. This provision was originally thought to apply only to foreign jurisdiction clause, that is, clauses in agreements requiring disputes to be settled in any foreign court other than Nigerian courts.[12] However, recent decisions of Nigerian courts have shown that it also applies to any admiralty or maritime matter which seeks to oust the jurisdiction of the Nigeria courts[13] in certain well defined circumstances elaborately provided by the AJA. The courts in the guise of guarding their jurisdiction jealously assumes jurisdiction albeit erroneously to the detriment of parties' arbitral clauses thereby defeating the essence of arbitration.[14] This development may have negative effect on maritime business and international commercial arbitration in Nigeria.

The article unlike similar efforts in this area[15] examines the effect of section 20 of the AJA on arbitration agreements particularly, international maritime arbitration agreements. It argues analytically, using case law, that section 20 of the AJA should not be interpreted as ousting the jurisdiction of the Nigerian courts. As such, parties are free to insert in their agreement arbitration clauses for resolution of their admiralty disputes by an arbitral tribunal within or outside Nigeria. This paper therefore considers certain paramount issues such as evaluation of admiralty jurisdiction as it relates to arbitration agreements, an

6. Adewuyi (n 1) 1-2
7. Cap. A18 *Laws of the Federation of Nigeria, 2004*
8. B.A Bukar, 'Mandatory and Other forms of Arbitration under Some Selected Oil, Gas and Investment Legislation in Nigeria' (2010) OGEL <https://www.ogel.org/article.asp?key=3074> accessed 28 June 2013; D. Okorie, 'Does the Regime of Statutory Arbitration of Investment Disputes in Nigeria Negate the Sanctity of Party Autonomy in relation to the Agreement of Parties to Arbitrate? <http://www.dundee.ac.uk/cepmlp/gateway/?news=31248> accessed 28 June 2013; M.M. Akanbi 'Challenge of Arbitration Practices under the Nigerian Arbitration and Conciliation Act of 1988: Some Practical Considerations' (2012) 78(4) Arbitration 325. See also the long title of ACA <http://www.nigeria-law.org/ArbitrationAndConciliationAct.htm> accessed 29 June 2013
9. Sections 4 and 5 of the ACA
10. See *Commerce Assurance Limited v Alli* (1992) 3 NWLR (Pt 232) 710, *Kano State Urban Development Board v Fanz Construction Co. Ltd* (1986) 5 NWLR (Pt 39) 74
11. Admiralty Jurisdiction Act Cap. A5, *Laws of the Federation of Nigeria 2004* (hereinafter referred to as AJA); the law was promulgated as Decree, No 59 of 1991 under the military regime and is deemed to be an Act of the National Assembly by virtue of s.315 of the 1999 constitution
12. F. Egede, 'Foreign Maritime Arbitration Clauses: Applicability and enforcement in Nigeria' http://www.businessdayonline.com/ARCHIVE/index.php?option=com_content&view=article&id=5611:foreign-maritime-arbitration-clauses-applicability-and-enforcement-in-nigeria-&catid=133:legal-indignity&Itemid=557 accessed 21 March 2012
13. Particularly the Federal High Court (FHC) because based on the provision of s 251 of the Constitution of the Federal Republic of Nigeria 1999 and also s 1 of the AJA, the Federal High Court has exclusive jurisdiction to the exclusion of any other court on Admiralty matters. There is however a controversy as to whether the exclusive jurisdiction of the FHC excludes every other court or tribunal including an arbitral tribunal. However, these arguments are not the subject of this as they have already been extensively dealt with elsewhere. See M.M. Akanbi, 'Examining the Concept of Arbitrability under Nigerian Domestic Arbitration Laws' (2005) 3(1) Nigerian Bar Journal
14. Olorunfemi (n 2) 311
15. Adewuyi (n 1)

examination of section 20 of the AJA and the effects of the section on arbitration agreements with a view to a few conclusions that can be drawn based on an x-ray of decided cases on the provision. The article thereafter makes some recommendations on the existing conflicts between Section 20 of AJA and international commercial arbitration which can serve as a spring board for necessary improvement of not only maritime arbitration but commercial arbitration generally in Nigeria.

Little literature exists in this area as efforts are still being made to understand the exact scope of section 20 of the AJA. Adewuyi[16] wrote on the effects of section 20 of the AJA on arbitration agreements. He contends that maritime arbitration is mostly an international commercial transaction as parties are rarely of the same nationality.[17] He examined the position of English courts on the enforcement of judgments and arbitral awards from United Kingdom and European Union[18] and argued that section 20 of AJA should not be taken as a derogation of the general principles of arbitration. However, his analysis did not consider the provision of section 10 of AJA and did not discuss the effects of the decisions of court which has brought about more clarity into interpretation of the said section. This paper has taken the research in this area a step further by discussing in detail the decisions of Nigerian courts supporting the arguments that the provision of section 20 of AJA is not an ouster clause but a proviso that affords parties the opportunity to explore arbitral process to resolve the disputes pursuant to their contract. This paper also argues that the courts are duty bound to interpret contracts in such a way that will give effect to the wishes of the parties. Hence, this work is an updated literature on the controversy surrounding section 20 of the AJA.

AN OVERVIEW OF ADMIRALTY JURISDICTION ACT AS IT RELATES TO ARBITRATION AGREEMENTS: SECTION 20 OF THE AJA IN PERSPECTIVE

The Black's Law Dictionary defines "admiralty" as the system of jurisprudence that has grown out of the practice of admiralty courts.[19] This definition may not be helpful having regard to the complex nature of Nigerian admiralty practice as it fails to give us a clear glimpse of what admiralty is all about. Nevertheless the definition has hinted us of the fact that admiralty is a system of law. The definition has also stated the court that administers admiralty matters in the United Kingdom which is the admiralty courts. For a clearer definition therefore, recourse will be made to judicial authorities. In the case of *I.T.P.P. v UBN PLC*,[20] admiralty was referred to as "the law of marine commerce and marine navigation. It entails the transport at sea of persons and property and marine affairs in general".[21] This definition in succinct terms explains that admiralty involve issues of marine commerce and marine affairs in general.[22] At common law, admiralty covers only maritime claims and maritime at common law involves matters connected with or related to the sea, sea navigation or commerce and sometimes extended to all sorts of navigable waters.[23]

The principal law regulating admiralty matters in Nigeria is the Admiralty Jurisdiction Act which vests the exclusive jurisdiction of admiralty matters in the Federal High Court. However, the provisions of the AJA as it relates to the jurisdiction of the Federal High Court must be read in conjunction with section 215 (1) (g) of the 1999 Constitution. The main objective of the AJA as stated in its preamble is "to provide for the extent of the jurisdiction of the Federal High Court in admiralty matters and other matters

16. ibid
17. Adewuyi (n 1) 2
18. ibid 5-7
19. *Black's Law Dictionary*, (n 1) 50
20. (2006) 12 NWLR (Pt 995) 483
21. ibid 507 para E-F. Per Niki Tobi JSC
22. This makes one wonder why AJA still went ahead to provide for aviation matters particularly in section 4 of the Act as regards aviation claims
23. *Black's Law Dictionary*, (n 1) 50 and 987- 988; D.I Efewevwerhan, *Principles of Civil Procedure in Nigeria* (Enugu: Chenglo Ltd 2007) 42-43

connected therewith". The provisions of AJA has extended admiralty in Nigeria beyond what is obtainable at common law;[24] for example, items such as claims for oil pollution damage, aviation matters, banking or letter of credit transaction involving the importation or exportation of goods notwithstanding that the transaction is between a bank and its customers, not considered and envisaged at common law are all deemed admiralty matters under the AJA.[25]

Arbitration agreements are agreements between two or more parties to resort to an arbitral tribunal to resolve their dispute where the situation arises.[26] To uphold the sanctity of arbitration, section 2 of the ACA provides that an arbitration agreement shall be irrevocable except by the parties or the court. Section 4 of the same law also provides that a court before which an arbitration agreement is brought shall if any of the parties so request order a stay of proceeding and refer the case to arbitration while section 5 gives the court discretion to act in that regard. The above sections show that arbitration agreements are enforceable by law in the Nigerian Courts. Hence, the fundamental question is the enforceability of maritime arbitration in the face of the express provision of section 20 of the AJA.

It is important to reproduce the provisions of section 20 of the AJA for the purpose of this discourse. Section 20 of the AJA provides that any agreement by any person or party to any cause, matter or action which seeks to oust the jurisdiction of the court shall be null and void, if it relates to any admiralty matter falling under this Act and if;

> (a) the place of performance, execution, delivery, act or default is or takes place in Nigeria; or
> (b) any of the parties resides or has resided in Nigeria; or
> (c) the payment under the agreement (implied or express) is made or is to be made in Nigeria; or
> (d) in any admiralty action or in the case of a maritime lien, the plaintiff submits to the jurisdiction of the Court and makes a declaration to that effect or the *res* is within Nigerian jurisdiction; or
> (e) it is a case in which the Federal Government or the Government of a State of the Federation is involved and the Federal Government or Government of the State submits to the jurisdiction of the Court; or
> (f) there is a financial consideration accruing in, derived from, brought into or received in Nigeria in respect of any matter under the admiralty jurisdiction of the Court; or
> (g) under any convention, for the time being in force to which Nigeria is a party, the national court of a contracting State is either mandated or has a discretion to assume jurisdiction; or
> (h) in the opinion of the Court, the cause, matter or action should be adjudicated upon in Nigeria.[27]

Arbitration agreements have been argued to be an ouster of the jurisdiction of courts because of the provision of the above section which has been said to alter the existing position in admiralty matters thereby modifying sections 2 and 4 of the ACA and limiting enforceable arbitration agreements to those having Nigeria as their forum.[28]

The above provision effectively means any agreement by parties contained in their maritime or admiralty contract that cases of disputes (listed out in the above provision) arising will be resolved by arbitration and not by recourse to the courts is an ouster clause; and such agreement is null and void and has no legal effect. This provision effectively contradicts the well-established principle of Nigerian arbitration practice and the practice of arbitration generally that courts will stay proceeding if parties decide that they want to resort to arbitration based on the provisions of their arbitration agreement.[29]

24. Efewevwerhan, (n 23) 42
25. See sections 1 and 4 AJA
26. Akanbi, (n 1) 47; Ajogwu, (n 2) 5; Adewuyi, (n 1) 1-2; Ronald Bernstein et al, (n 1) 13; *Halsbury's Laws of England,* (n 2) 256 para 501
27. Section 20 AJA
28. *M.V. Panormos Bay & Ors v Olam Nigeria Plc* (2004) 5 NWLR (Pt 865) 1; see also Ajogwu, (n 2) 104
29. Section 4 ACA

A proper approach to analyzing the effects of section 20 of the AJA on arbitration agreements is best done in the light of attitude of Nigerian courts in decided cases. The interpretation of section 20 of the AJA seems to be a battle between national and foreign jurisdiction on admiralty matters. The courts in Nigeria are always willing to guard jealously their jurisdiction and thus are most likely going to strike out an application seeking to stay proceedings in a Nigerian court for the purpose of resolution of the dispute in a foreign arbitration tribunal i.e. arbitration tribunal outside Nigeria. The courts usually interpret such category of agreements as an attempt to ouster their jurisdiction and this has serious effect on the arbitration agreement as the courts will declare such arbitration agreements null and void. The above proposition can be discerned in the case of *Lignes Aeriennes Congolese v Air Atlantic Nigeria Ltd*[30] where the Court of Appeal in Nigeria considered the effects of section 20 of the AJA on the enforceability of arbitration agreements in a foreign forum.

The brief facts of the case is that the appellant, Lignes Aeriennes Congolese (LAC) a commercial airline and national carrier of the Democratic Republic of Congo with its head office in Kinshasa entered into an Aircraft lease agreement with the respondent, Air Atlantic Nigeria Ltd (AAN) a Nigerian company with its head office in Lagos. By virtue of article 7 of the agreement, the parties agreed that the procedure for dispute settlement is arbitration and the applicable law to be Congolese Law. Article 7 of the agreement provides thus:

> The present agreement shall be governed by Congolese positive law. Any dispute relating to the execution, the interpretation and/or the termination of the present agreement shall be settled in a friendly way between the parties. If they fail to do so, the dispute shall be referred to arbitration by both Presidents of Kinshasa and Lagos Bars.

A dispute arose between the parties. AAN filed an action at the Federal High Court Lagos Nigeria. AAN's claim before the Federal High Court was for the sum of $169,794 being consideration for the lease of Cargo Aircrafts to LAC. AAN filed a motion against LAC's Boeing 737 seeking to prevent it from leaving jurisdiction as security for the sum. LAC filed a preliminary objection to the claim by the AAN on the basis that by the lease agreement the party had chosen the Congolese law to apply to their relationship and therefore the lower court lacked jurisdiction to entertain the suit. The learned trial judge disagreed with the defendant/appellant and held that it had jurisdiction to entertain the suit despite the provisions as to arbitration and governing law contained in the agreement. LAC appealed against the lower court's decision. LAC contended before the Court of Appeal that the trial court ought to have given effect to the agreement of the parties on arbitration.

The Court of Appeal dismissed the appeal. The court agreed that the lower court has and possesses the requisite statutory jurisdiction to entertain the respondent's suit. The court found that the real and combined effect of articles 7 and 8 of the Aircraft Lease Agreement entered into by the parties was and remains to oust the jurisdiction of the lower court in respect of disputes arising from the said agreement. The court found that the agreement of the parties was within the contemplation of the provisions of section 20 of the Admiralty Jurisdiction Act and was thereby rendered null and void.

Commenting on the above decision, Adedoyin Rhodes –Vivour[31] said the basis of the decision of the Court of Appeal was the provisions of section 20 of AJA. The Court of Appeal in accepting that the parties agreements fall under the purview of section 20 recognised that the suit relates to admiralty matter placing reliance on section 1 of the AJA, which provides that the admiralty jurisdiction of the court includes jurisdiction to hear and determine any question relating to a proprietary interest in a ship or aircraft or any maritime claim as specified in section 2 of the Act. Section 2 categorizes maritime claims into those of a proprietary or general nature.

30. (2005) 11 CLRN 55
31. A. Rhodes –Vivour, 'Maritime Jurisdiction In Nigeria*: Lignes Aeriennes Congolaises v Air Atlantic Nig Ltd'* (2007) 14(1) Journal of Maritime and Transport Law 2

In *M.V. Panormos Bay &Ors v Olam Nigeria Plc*[32] section 20 of Admiralty Jurisdiction Decree (now AJA) fell for consideration and it highlighted the clear difficulty its application will have on arbitration agreements. In the case, the respondent commenced an action against the appellant jointly and severally for the sum of $100,000 or its Naira equivalent being special and general damages for the loss of 4535 bags of rice covered by 3 bills of lading. Upon being served with the respondent's claim, the appellant applied for a stay of proceeding pending reference to arbitration based on clause 7 of the bill of lading which provides that: "Any dispute arising under the bill of lading shall be referred to arbitration in London. The unamended centrococon arbitration clause will apply."

In opposing the application, the respondent relied on section 20 of AJA. The trial court found that there was a provision for reference to arbitration but nevertheless refused the application. The appellants appealed to the Court of Appeal. One of the issues for determination was whether the provision of section 20 of the Admiralty Jurisdiction Act applies to the contract of carriage between the parties as to affect/modify the provisions of the arbitration clause. The Court of Appeal held that since the object of an arbitration clause in the bill of lading is to oust the jurisdiction of the court to exercise its admiralty jurisdiction over the case, it is null and void. Galadima, JCA[33] held as follows:

> Prior to coming into force of the Admiralty Jurisdiction Decree, 1991, sections 2 and 4 of the Arbitration and Conciliation Act applied in all contracts having arbitration clause, without any limitation, whatsoever. However, section 20 of the Admiralty Jurisdiction Decree has altered the hitherto existing position in admiralty matters thereby modifying sections 2 and 4 of the Arbitration and Conciliation Act, and limiting enforceable arbitration agreements to those having Nigeria as its forum.[34]

The learned justice further stated that:

> Indeed, the intention of the lawmakers as regards s 20 of the Admiralty Jurisdiction Decree is to derogate from the hitherto existing position found in s 4 of the Arbitration and Conciliation Act. In the instant case, since the object of the arbitration clause in the bill of lading is to oust the jurisdiction of the Nigerian court to exercise its admiralty jurisdiction over the case, the said clause is null and void.[35]

With outmost respect to the learned justice of the Court of Appeal, it is our humble opinion that he erred in law as his attention was not drawn to section 10 of the AJA, which empowers the court to order a stay of proceedings pending arbitration in appropriate cases, whether in Nigeria or elsewhere. Section 10 of the AJA provides that:

> (1) Without prejudice to any other power of the Court- (a) where it appears to the Court in which a proceeding commenced under this Act is pending that the proceeding should be stayed or dismissed on the ground that the claim concerned should be determined by arbitration (whether in Nigeria or elsewhere) or by a court of a foreign country;…the court may order that the proceeding be stayed…[36]

Though the use of the word "may" in the above provision implies that the court has discretion[37] as to whether or not to grant the stay, it is only logical that the court in the interpretation of the provisions of a

32. ibid (n 28)
33. (As He then was) at pages 12 to 13
34. ibid
35. ibid
36. Section10 of the AJA
37. *Katto v CBN* (1996) 10 NWLR (Pt 478) 360. Though in the case of *Ude v Nwara* (1993) 2 SCNJ 47, Nnaemeka-Agu said "May" should be construed as mandatory i.e. meaning 'shall' or 'must'

document should give express voice to the intention of the parties. In this instance, the express intention of the parties can be gathered from the provision of their bill of lading which stipulates in clause 7 that: "any dispute arising under the bill of lading shall be referred to arbitration". The learned justice attention was also not drawn to the Supreme Court's decision in *The Owners of The MV Lupex v Nigeria Overseas Chartering and Shipping Limited*[38] where it was held that where parties have chosen to determine for themselves that they would refer any of their disputes to arbitration instead of resorting to regular courts, a prima facie duty is cast upon the courts to act upon their agreement.[39] Though this particular Supreme Court decision did not consider the provisions of sections 10 and 20 of the AJA, it is relevant in this situation because it highlights the importance of freedom of the parties to choose the mode of determination of their dispute based on the principle of freedom of contract which is applicable in every civilized society. Secondly, the fact of the case shows that the matter is maritime and admiralty related which is within the purview of the Act.[40]

Quite unfortunately, the decision in *Parnamos Bay*[41] has become a convenient authority for mischievous parties to avoid foreign arbitration agreements otherwise voluntarily entered into by parties.[42] For example, in *MT Amor & Anor v Bronwen Energy Trading Limited*,[43] the learned trial judge dismissed the appellants application for stay of proceedings pending reference to arbitration on the grounds that an arbitration clause in the agreement amounted to an ouster of the jurisdiction and null and void. In several other cases, attempts to hold the plaintiffs to their agreement to arbitrate were refused based on the application of the principle in *Parnomos Bay v Olam*.[44]

It is contended that arbitral agreement does not in any way oust jurisdiction of courts in Nigeria;[45] it merely provides an avenue and procedure for parties to such agreement to explore amicable means of settling of their disputes through arbitration before resorting to litigation.[46] Therefore section 20 of AJA cannot be reasonably held to generate the heat of ouster of jurisdiction of the court.[47]

It is submitted that the court while construing documents in dispute is duty bound to carefully construe the content of a document or contract by discovering the intention and contemplation of the parties and not to import into a contract extraneous ideas that are not envisaged by the parties or potent on the face of the document.[48] Thus, the main duty of a court is to interpret a contract by giving effect to the wishes of the parties. In the case of *Nika Fishing Co. Ltd. v Lavina Corporation*[49] the Supreme Court Per Niki Tobi JSC noted that the refusal of stay of proceedings by the two lower courts cannot be supported by evidence on record and held as follows in granting the application for stay of proceedings albeit on jurisdictional clause contained in the agreement of the parties:

> It is the law that parties to an agreement retain the commercial freedom to determine their own terms. Not other person. Not even the court, can determine the terms of contract between parties thereto. The duty of the court is to strictly interpret the terms of the agreement on its clear wordings… What the two courts did was clearly not borne out from the record, it is clear to me from what the two court said in refusing the application for stay of proceedings that they allowed

38. (2003) 15 NWLR (Pt 844) 469
39. ibid Particularly at p 469
40. Sections 1 and 2 of the AJA
41. ibid (n 28)
42. Egede, (n 12)
43. FHC/L/CS/974/2007
44. Egede, (n 12)
45. Olorunfemi, (n 2) 317
46. ibid
47. ibid 320. See also Per Uwaifor JCA and Achike JCA (as they then were) in The owners of the *M. V. Lupex v Nigerian Overseas Chartering & Shipping Ltd* (1993-1995) NSC 182 at 374 & 386 respectively
48. *Amadi v Thomas Aplin and Co. Ltd* (1972) 7 NSCC 262; *Nika Fishing Co. Ltd v Lavina Cooperation* (2008) 16 NWLR (Pt 1114) 509 at 542
49. ibid 543- 544 B-A

> themselves to be governed by sentiments; and sentiments cannot be legal basis for refusing application for stay… It is a matter of legal principles and not one of sentiment or patriotism that the matter should be tried in Nigeria and not in Argentina.

Therefore, where a contract specifically provides for arbitration or venue of arbitration, courts are bound to give effect to the contract by construing it without ado or any form of sentiment.

Interestingly, in *Onward Enterprises Limited v M.V. Matrix & 2 Ors,*[50] the defendant/applicant, having secured the plaintiffs claim at the trial court, brought a motion under s 5 of the Arbitration and Conciliation Act for an order to stay further proceedings and referring the dispute to arbitration in London as agreed by the parties. The plaintiff contended, relying on *Sonnar v Nodwind* [51]that a stay would permanently deny him (the plaintiff) of any redress as the dispute was already time barred in London. Abdullahi Mustapha, CJ (as he then was) demonstrated a commendable knowledge of admiralty law.[52] He held that:

> To my mind the question of denying the plaintiff permanently of remedy in the instant case does not arise. As pointed out, this case is not a foreign jurisdiction case but an arbitration clause one. The defendants have conceded to the jurisdiction of this court and are not trying to oust it. If this case is stayed on the condition that the security posted by the defendants be retained to abide any order that the arbitrator may make, the plaintiff cannot be said to be permanently deprived of remedy.

Aggrieved, the appellant submitted the matter to the Court of Appeal for further consideration. In *Onward Enterprises Limited v M.V. Matrix & 2 Ors*[53] the sole issue before the Court of Appeal was whether the learned trial judge was right when he ordered a stay of proceedings at the trial court pending reference to arbitration in London. Happily, the respondent's counsel referred the court to section 20 of the AJA.[54] In resolving the issue, Adzira Gana Mshella, JCA who delivered the lead judgment of the Court of Appeal held after evaluating the decision in *M.V. Panormos* that the attention of the Court of Appeal was not called to the case of *M. V. Lupex v N. O. C & S Ltd* where the Supreme court upheld the right of parties for the enforcement of express agreement contained in their agreement to refer their dispute to arbitration and as such , "it behoves the court to lean towards ordering a stay of proceedings" for parties to resort to arbitration.[55]

By this decision, it is clear that stay of proceedings could be granted pending reference to arbitration in a foreign country in deserving cases. 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.

The Court in the above case[56] further observed, quite rightly, that section 20 of the AJA was not discussed in the *Lupex* case and acknowledged that, ordinarily, the Court of Appeal is bound by its earlier decision or is at best free to pick and choose between two conflicting decisions, the one that appears to it to be correct.[57] However, where a decision of the Court of Appeal, although, not expressly

50. (2010) 2 NWLR (Pt 1179) 530 at 551
51. 'Admiralty Jurisdiction, Beneficial Ownership of Vessels, Arrest of Vessels, Cabotage Act' (1987) Vol 3 Nigeria Shipping Cases, p 175. Contribution by Matrix solicitors in Legal Newsletter Overview (August 2003) <http://www.internationallawoffice.com/Newsletters/Shipping-Transport/Nigeria/Matrix-Solicitors-/Overview-August-2003> accessed 20 March 2012
52. Egede, (n 12)
53. ibid (n 50)
54. Now Admiralty Jurisdiction Act Cap A5, LFN 2004
55. ibid (n 50)
56. ibid
57. *NEPA v Onah* (1997) 1 NWLR (Pt 484) 680 at 689

overruled, cannot stand with a decision of the Supreme Court (as in this case) the lower court or a court of coordinate jurisdiction is entitled to refuse to follow the decision of the Court of Appeal.[58]

It is therefore expected that stakeholders in the field of admiralty and maritime arbitration will welcome the decision in the *M.V. Matrix* as timely and rebranding of our law relating to maritime transactions and agreements, which in their nature are mostly transnational.[59]

CONCLUSION AND RECOMMENDATIONS

The article examined the effect of s 20 of the AJA on arbitration agreements showing how Nigerian courts have held maritime arbitration agreements null and void merely because it contains arbitral clauses which according to them, tend to usurp their powers. The cases considered illustrates the dichotomy between the application of the principle of *pacta sunt servanda* and the application by state courts of legislation and principles pertaining to the enforcement of foreign arbitration clauses.[60] This, in our opinion, highlights the ultimate conflict between the jurisdictional and contractual perspective of arbitration. This article notes that there is an inadvertent effort to subject maritime arbitration totally to the control of the state based on the provision of s 20 AJA against the will of the parties and contrary to the principle of freedom to contract.

Maritime arbitrations are no doubt international and transnational in nature and they must therefore be recognized and given proper effect to in our courts since parties are bound by the conditions and terms in a contract they freely entered into.[61] Contractual agreements which have neither been fraudulently or illegally entered into by parties must in all respects be observed and enforced by the courts.[62] The general tendency is for our courts to "guard jealously" their jurisdiction and to refuse to accede to requests for stay of Nigerian proceedings in favour of foreign proceedings merely because foreign law or fora are chosen as the proper law of the arbitration agreement. This should not be so, where there is a contract regulating any arrangement between the parties, the main duty of the court is to interpret that contract and give effect to the wishes of the parties to the contract.[63]

Proper judicial interpretation is essential to ensure that the growth and sustainability of maritime arbitration is secured in Nigeria. Sections 2 and 4 of the ACA give parties the right to enter into arbitration agreement and sections 4 and 5 give them a right to apply to stay proceedings where there is dispute pending reference to arbitration. Section 20 of the AJA however nullifies any agreement by any person or party to any cause, matter or action which seeks to oust the jurisdiction of the Federal High Court if it relates to any admiralty matter falling under the Act, including matters falling under any convention to which Nigeria is a party. The provision of s 20 of AJA, in our humble opinion, negates the principle of freedom of contract. Parties to an agreement retain the freedom to determine their own terms. No other person or court can determine the terms of contract between or among the parties thereto. Therefore, it is recommended that s 20 of AJA must be read in conjunction with s 10 of the Act to have a clear intention of the legislature, especially when the law is that contents of a statute must be read and interpreted together by courts in the course of its interpretation.

The duty of the court is to strictly interpret the terms of the agreement in clear wordings.[64] It is submitted that it is not the function of a court of law or of statute under whatever guise to make agreements for the

58. *Disu v Ajilowura* (2001) 4 NWLR (Pt 702) 72 and 91; *Camptel Intl' SPA v Dexson Ltd* (1996) 7 NWLR (Pt 459) 170 at 184
59. Egede, (n 12)
60. Rhodes –Vivour, (n 31) 5
61. Oditan F, 'Emerging Trends in the Enforcement of Maritime Arbitration Awards and ADR Settlements' (Paper presented at the IMASA/MAA Seminar on Promoting Maritime Administration and Alternative Dispute Resolution in the West and Central African Sub-Region held at the Federal Palace Hotel, Victoria Island, Lagos, Nigeria on 28 April 2010) 13
62. *Nika Fishing Co. Ltd. v Lavina Cooperation* (n 48); *Dragetanos Const. (Nig) Ltd v Fab Madis Ventures Ltd* (n 5); *AG Nasarawa State v A G Plateau State*, (n 4)
63. *Oduye v Nigeria Airways Ltd* (1987) 2 NWLR (Pt 55) 126; *AG Nasarawa State v A G Plateau State*, (n 4)
64. *Nimanteks Associates v Marco Construction Company Limited* (1991) 2 NWLR (Pt 174) 411. See also *Dragetanos Const. (Nig) Ltd v Fab Madis Ventures Ltd*, (n 5)

parties or change the agreements as made by them.[65]

Obviously, dispute resolution and maritime arbitration raises important questions for countries' policy development in the maritime sector. Though there are no universal answers, international best practices in maritime law is preferred and recommended against dogmatic municipal policy, which is not based on considerations reasonably reflected in contractual international norms and expectations of parties.

The Federal High Court and the Court of Appeal's decisions in the case of *Onward Enterprises Limited v M.V. Matrix & 4 Ors.* are commendable and a welcome development in the sphere of maritime arbitration jurisprudence in Nigeria because it reflects the essence and binding nature of arbitral agreements between parties and the need for national courts to give effect to same in order to promote commercial transactions between parties to foreign or international arbitral agreements in Nigeria. On the whole, it is recommended that the courts should be guided by the decision when issues regarding conflicts between arbitration and admiralty arise.

65. *African Reinsurance Corporation v Fanteye* (1986) 1 NWLR (Pt 14) 113