
CONTINENTAL SALES LIMITED v. R. SHIPPING INC

COURT OF APPEAL
(LAGOS DIVISION)

5

CA/L/807/2010
THURSDAY 26TH APRIL, 2012

(OGUNWUMIJU; OKORO; DANJUMA, JJ.CA)

10 *ARBITRATION – Mode of Service – Effective service occurs where the notice given achieves the result of communicating the fact that the arbitration proceedings have been initiated.*

15 *ARBITRATION – Mode of Service – Any mode of service previously accepted by parties remains an effective means of service of any subsequent notice of arbitration proceedings.*

20 *ARBITRATION – Recognition or Enforcement of Award – A court will refuse an application to set aside an arbitral award for lack of fair hearing if it is shown that the applicant did not avail himself of the opportunity to be heard.*

ARBITRATION – Mode of Service – The law is not ignorant of modern business methods and may in appropriate circumstances uphold electronic service of notice.

25

Facts:

30 The appellant entered into a charter party agreement with the respondent that provided that the relations between the parties should be determined in accordance with the Laws of England and disputes referred to arbitration in London in accordance with the Arbitration Act 1996. By a further agreement, the appellant admitted that it was in breach of the charter agreement and acknowledged the lawful termination of the charter and the respondent's entitlement to recover damages as stipulated in the said agreement. The agreement also incorporated

35 the arbitral provision as contained in the original charter agreement between the parties. US\$729,000.00 (Seven Hundred and Twenty-Nine Thousand United States Dollars) was the agreed amount recoverable in damages and costs. When the appellant failed to pay the admitted damages, the respondent referred the matter to arbitration as stipulated in the charter agreement.

40

The appellant was given notice of arbitration via e-mail sent by the respondent and invited to nominate its own arbitrator. The appellant acknowledged the invitation but did not participate. As a result, the arbitrator appointed by the respondent, accepted to act as the Sole Arbitrator and invited the parties to make submissions.

45

The sole arbitrator subsequently found in favour of the respondent and awarded damages to the respondent in the sum of US\$729,000.00 (as agreed in the Agreement) together with interest at the rate of 2.5% from the date of the award until payment and US\$2,070 (Two Thousand and Seventy United States Dollars) as costs of the arbitration plus interest at the rate of 4% per annum.

The respondent, through its counsel, filed an ex parte motion at the Federal High Court to register the arbitral award. The court granted an interim application ex parte to register the award but gave the appellant time within which to apply to set aside the registration. Pursuant to the court's order, the respondent filed an undertaking as to damages and service of the court processes was effected on the appellant thereafter.

The appellant brought an application to set aside the order of registration by the trial court, on the basis that it was not notified of the London arbitration proceedings.

The trial court dismissed the appellant's application to set aside registration of the aforesaid arbitral award, and confirmed the earlier order for registration.

The appellant appealed to the Court of Appeal against the confirmation of the registration of the Arbitral award.

Held (Unanimously dismissing the appeal):

[1] Arbitration – Mode of Service – Effective service occurs where the email message achieves the result of communicating the fact that the arbitration proceeding has been initiated.

That fact cannot be denied since the record is replete with evidence of the fact that the notices were received and reactions thereon elicited from the appellant. "Effective" is defined in Blacks Dictionary 9th Edition page .as "achieving a result." In the Oxford Advanced Learner's Dictionary page 469 in 7th Edition the word "effective" is defined as "producing the result that is wanted or -intended". Since the intention of the email messages and correspondence from the respondent, the solicitor Phillip A. Bush and the Arbitrator Mr. David Aikman to the appellant was to achieve the result of communicating the fact that the arbitration proceedings had been initiated, and the various stages of the process, I am of the view that there has been effective service of the whole arbitration process on the appellant. The spurious argument that the service of notice was not in writing cannot fly. Email is a form of communication that is set down in writing. It is not oral. The fact that it is electronic is immaterial. It is not in thin air. It can be downloaded and as real as a hard copy of the letter or mail in your hand. (P. 148 lines 21 - 34)

[2] Arbitration – Mode of Service – Any mode of service previously accepted by parties remains an effective means of service of any subsequent notice of arbitration proceedings.

5 In *Bernuth Lines Ltd v. High Seas Shipping Ltd* cited supra by both counsels, (it is a Lloyds Report), Clark J. in considering whether notice of arbitration by email was properly served held as follows at page 541:

10 “I do not regard the provisions of CPR part 6 as an appropriate benchmark by which to judge whether or not service by e-mail is effective in the context of an arbitration. The Civil Procedure Rules cater for litigants of all kinds from major corporations represented by the most accomplished firms of solicitors to individuals represented by more modest firms and those who are not represented at all. By contrast Arbitrations are usually conducted by businessmen represented by, or with ready access to lawyers. Section 76 (3), when providing that a notice could be served on a person by any effective means was, in my judgment, purposely wide. It contemplates that any means of service will suffice provided that it is a recognized means of communication effective to deliver the document to the party to whom it is sent at his address for the purpose of that means of communication (e.g. post, fax or e-mail). There is no reason why, in this context, delivery of a document by e-mail - a method habitually used by businessmen, Lawyers and civil servants - should be regarded as essentially different from communication by post, fax or telex.”

30 I am entitled to be persuaded by the dictum set out above and I hold myself so persuaded. It only stands to reason that any previous accepted and acceptable means of communication among the parties would remain an effective means of service of any subsequent notice of arbitration proceedings.

35 The spurious argument that the service of notice was not in writing cannot fly. Email is a form of communication that is set down in writing. It is not oral. The fact that it is electronic is immaterial. It is not in thin air. It can be downloaded and as real as a hard copy of the letter or mail in your hand. (P. 149 lines 21 - 45; P. 150 line 1 - 2; P. 148 lines 31 - 34)

40
45 **[3] Arbitration – Recognition or Enforcement of Award – A court will refuse an application to set aside an arbitral award for lack of fair hearing if it is shown that the applicant did not avail himself of the opportunity to be heard.**

5 Learned appellant's counsel made much ado about the issue of what he
claimed to be lack of fair hearing. That flag will not fly. It is very clear to
me that at no time in the process was there a breach of the rules of
natural justice and none of its pillars had been damaged. The rule of
audi alteram partem (Hear the other side) had not been breached by
the Arbitrator. A careful reading of all the exhibits attached to the
respondent's counter affidavit which were not controverted at all, shows
that the appellant was effectively appraised of all the stages of the
arbitration process and was availed every opportunity to be heard if he
10 wanted to state his own side of the issue, but refused and neglected to
do so. A litigant who refused to avail himself of the opportunity to be
heard does so at his own peril. See *Newswatch v. Attah* (2006) 4 SCNJ
232.

15 I am of the view that the Arbitrator did not run foul of section 52 of the
Arbitration and Conciliation Act Cap 19 laws of the Federation 1990.

Section 52 of the ACA provides as follows:

20 **"The court where recognition or enforcement of an award is sought
or where application for refusal of recognition or enforcement thereof
is brought may, irrespective of the country in which the award is
made, refuse to recognize or enforce an award –**

25 **(a) If the party against whom it is invoked furnishes the court
proof -**

30 **(iii) That he was not given proper notice of the appointment of
an arbitrator or of the arbitral proceedings or was otherwise
not able to present his case"**

I cannot in the circumstances find as I have been urged to do that the
arbitrator is guilty of misconduct to warrant a refusal to register the
award. (P. 150 lines 25 - 45; P. 151 lines 1 - 9)

35 [4] **Arbitration – Mode of Service – The law is not ignorant of modern
business methods and may in appropriate circumstances uphold
electronic service of notice.**

40 It is obvious from the record that all communication between the parties
including the signing of agreements etc were performed electronically.

45 It is in my view unconscionable for the appellant to turn around to say
that that form of communication has not been effective. In *Trade Bank
Plc v. Chami* (2003) 13 NWLR (Pt. 836) Pg. 158 at 216 - 217 Salami JCA

(as he them was) held as follows:

5 **“Although the law does not talk of “computer” and computer prints out” it is not oblivious to or ignorant of modern business world and the technological advancement of the modern jet age. As far back as 1969, the Supreme Court in the case of *Esso West Africa Inc. v. T. Oyegbola* (1969) NMLR 194, 198 envisaged the need to extend the horizon of the section to include or cover computer which was virtually not in existence or at a very rudimentary stage at that time when the court said -**

10 *“The Law cannot be and is not ignorant of modern business methods and must not shut its eyes to the mysteries of the computer.”*

15

It is obvious from the record that all communication between the parties including the signing of agreements etc were performed electronically.

20 At page 138 of *Bernuth Lines Ltd v. High Seas Shipping Ltd* the court held thus:

25 **“a. Where a party is to be served by “electronic means the party who is to be served or his legal representative must previously have expressly indicated in writing to the party serving that he is willing to accept service by electronic means.**

30 **Where a party seeks to serve a document by electronic means he should first seek to clarify with the party who is to be served whether there are any limitations to the recipient’s agreement to accept service by such means including the format in which documents are to be sent and the maximum size of attachments that may be received.”**

35 There is no doubt that the previous dealings between the parties has shown that the parties have not indicated any limitation to their customary communication by email to warrant an elaborate agreement as to the format etc of sending such e-mails. There is a justifiably implied consensus (sic) that all communications between the parties may be concluded electronically.

40 **(P. 148 line 45; P. 149 lines 1 - 42; P. 150 lines 19 - 23)**

45 **OGUNWUMIJU, JCA (Delivering the lead Judgment):** This is an appeal against the ruling of Honourable Justice A. O. Ajakaiye of the Federal High Court sitting in Lagos delivered on 12th, July 2010. The undisputed facts that led to this appeal are as follows:

The appellant entered into a time-charter agreement with the respondent dated the 10th July 2009. The charter provided that the relations between the parties should be determined in accordance with the Laws of England and disputes referred to arbitration in London in accordance with the Arbitration Act 1996. By
5 a further agreement dated the 11th August 2009, the appellant admitted that it was in breach of the charter agreement and acknowledged the lawful termination of the charter and the respondent's entitlement to recover damages as stipulated in the said agreement. The agreement of 11th August 2009 also incorporated the
10 arbitral provision as contained in the original charter party agreement between the parties. The agreed recoverable damages was US\$729,000.00 together with costs. When the appellant failed to pay the admitted damages, the respondent referred the matter to arbitration as stipulated in the charter agreement.

The appellant was given notice of arbitration by an e-mail dated the 31st August
15 2009 sent by the respondent and invited to nominate its own arbitrator. It acknowledged the invitation but did not participate. The arbitrator appointed by the respondent, David Aikman Esq. having accepted to act as the Sole Arbitrator invited the parties to make submissions. The sole Arbitrator- subsequently found
20 in favour of the respondent and awarded damages to the respondent in the sum of US\$729,000.00 (as agreed in the Agreement of the 11th, August 2009) together with interest at the rate of 2.5% from 24th August 2009 until payment and US\$2,070 as costs of the arbitration plus interest at the rate of 4% per annum.

The respondent, through its counsel, applied ex parte to the Federal High Court
25 on the 15th December 2009 to register the arbitral award. On the 15th, January 2010, the court granted an interim application ex parte to register the award but gave the appellant time within which to apply to set aside the registration. Pursuant to the court's order, the respondent filed an undertaking as to damages on the
30 21st January 2010 and service of the court processes was effected on the appellant thereafter.

The appellant brought an application to set aside the order of registration by the trial court, on the basis that it was not notified of the London Arbitration Proceedings.
35

In his ruling delivered on the 12th July 2010, Ajakaiye J. dismissed the appellant's application to set aside registration of the aforesaid arbitral award, and confirmed his earlier order for registration.

40 The appellant has appealed against the confirmation of the registration of the Arbitral award.

Learned appellant's counsel filed brief dated and filed on 17th September 2010. The learned respondent's counsel filed brief dated 13th October 2010 and filed
45 on 15th October 2010.

The appellant identified two issues for determination as follows:

- 5 a. **Whether the lower court (Federal High Court Lagos) was right in recognizing and registering in Nigeria, the Arbitral award dated 20th, November 2009 delivered by the respondent's Arbitrator David Aikman Esq. in London, United Kingdom.**
- 10 b. **Whether the learned trial judge's ruling of 12th July 2010 is in compliance and conformity with section 52 (2) (a) (iii) of the Arbitration Act of Nigeria 1990.**

The respondent identified a sole issue for determination as follows:

- 15 ***"Whether notice of arbitration given by e-mail correspondence accords with English Law."***

20 I will adopt the appellant's issues since they are more comprehensive of the questions in dispute while the sole issue as couched by respondent's counsel has put such a simplistic and mundane spin to the legal questions in controversy. I will crystallize the two issues identified by the appellant's counsel into a sole issue to avoid repetition and unnecessary verbosity. It is to wit: "Whether the trial court was right in registering the award dated 20th November 2009 inspite of the assertion by the appellant that it had no proper notice of appointment of an arbitrator or of the arbitral proceedings contrary to the English Arbitration Act 1996."

25

ISSUE ONE

- 30 The appellant in the brief settled by Emeka Okwuosa argued in paragraph 4.2 - 4.5 of the brief as follows:

- 35 "4.2 The appellant and the respondent entered into a charter party agreement vide fixture note dated 10th, July 2010. We refer your lordships to pages 10 to 20 of record.
- 40 4.3. That the contractual agreement (charter party) between the appellant and the respondent vide 10th July 2009 specifically fixture note dated states that the transaction be governed by English law and all disputes arising there under or in connection with it be referred to Arbitration in London, United Kingdom.
- 45 4.4. That the fixture note vide charter party agreement between the appellant and the respondent did not specify and/or prescribe the mode of service of Arbitration notices and/or service of the

said notices by electronic communication (e-mail)

5 4.5 That in the absence of the relevant and prescribed mode of service of notice in the fixture note dated 10th July 2009, parties have to have recourse to the English Arbitration Act. 1996 for necessary and requisite guidance since the fixture note is silent in respect of same.”

10 Learned counsel then referred this court to section 14 (4) of the English Arbitration Act 1996 and section 76 (1) (2) (3) (4) (a) and (b) of the English Arbitration Act 1996. Counsel further argued that on 23rd September 2009, the respondent without the necessary/requisite written notices to the appellant commenced an Arbitration proceeding in London, United Kingdom against the appellant and that
15 the respondent did not serve the appellant with any formal written notice notifying her of the arbitration proceedings in London, United Kingdom as prescribed by section 76 (4) (b) of the English Arbitration Act 1996.

20 Counsel insisted that the respondent appointed its Arbitrator - David Aikman Esq. without prior proper written notification to the appellant as required by the English Arbitration Act 1996.

25 Since the appellant and respondent did not agree to any mode of service of notices of arbitration proceedings and/or service of same by e-mail/electronic means.

30 Counsel maintained that all through the arbitration proceedings, the appellant was not served with any written notices and/or was duly informed of the arbitration proceedings in London, United Kingdom as prescribed by 1996 and that the Arbitration proceedings was the English Arbitration Act solely and unilaterally commenced, conducted and concluded on 2011, November 2009 by the
35 respondent’s Arbitrator David Aikman against the appellant without the necessary/requisite written notices and/or legal representation of the appellant at the said arbitration wherein an arbitral award was solely and unilaterally delivered by the respondent’s arbitrator David Aikman against the appellant.

40 Counsel referred to the definition of misconduct by an Arbitrator which may ground a setting aside of the award to include where the arbitrator failed to give the parties notice of the time and place of meeting and failure to hear one of the parties. Counsel cited Olakunle J. Orojo in his book *Nigeria Commercial Law and Practice* Vol. 1 at Pg. 249; *Taylor Woodrow Nig Ltd v.S.E. GMBH* (1993) 4 NWLR (Pt. 286) Pg. 127 at 130 - 132; *Kano State Urban Development Board v. Fanz Construction Co. Ltd* (1986) 5 NWLR (Pt. 39) Pg. 77; *Chevron Nig Ltd v. Max Miller International Ltd* (2009) 3 CLRN Pg. 347.

45 Learned appellant’s counsel argued that the Arbitrator violated the principles of

fair hearing *audi alteram partem*. He submitted that arbitration proceedings are not devoid of the principle of natural justice, the arbitrator ought to have taken into consideration, the principle of fair hearing by giving the appellant the opportunity to be heard at the arbitration held in London United Kingdom.

5

He further cited *Ika L.G.A. v. Mbo* (2007) 12 NWLR (Pt.1049) Pg. 676; *Adigun v. A.G. Oyo* (1987) 1 NWLR (Pt. 53) Pg. 678; *Agbakiaka v. FBN* (2007) 6 NWLR (Pt. 1029) Pg. 25 at 31; *Alsthom S. A. v. Saraki* (2005) 3 NWLR (Pt. 911) Pg. 206; *BON v. Abiola* (2007) 1 NWLR (Pt. 1014) Pg. 23 at 26. Counsel submitted that the case of *Bernuth Lines Ltd v. High Seas Shipping Ltd* (the Eastern Navigator) 2006 1 LLR Pg. 537 only confirms that ordinarily, email service constitutes proper notice when properly used and mutually agreed to by parties in arbitral proceedings and does not benefit the position of the respondent.

10

Appellant's counsel's contention in the instant suit is that in the absence of any agreement by parties (i.e. appellant and respondent) as to the prescribed mode of service of arbitration notice, section 76 (1), (2), (3) and (4) (a) (b) of the English Arbitration Act 1996 makes it a mandatory provision that parties must be served by written notice and delivered by post to the corporate headquarters and/or principal/registered office of the appellant i.e. 35A Adetokunbo Ademola Street, Victoria Island, Lagos. And that this was not done by the respondent and/or its arbitrator.

20

Counsel then urged the court to hold that the email correspondences to the appellant are irregular notice under the purview of section 76 (1), 2 (3) and (4) (a)(b) of the English Arbitration Act 1996.

25

Learned counsel then posited that section 52 of the Arbitration and Conciliation Act Chapter 19 Laws of the Federation of Nigeria 1990 gives the court the discretionary powers to refuse recognition, registration, and enforcement of foreign arbitral awards vide the grounds contained therein. Learned appellant's counsel concluded that the respondent did not discharge the onus of proof that proper and effective service of notices in respect of arbitration proceedings was served in accordance with the English Arbitration Act 1996.

30

35

Learned respondent's counsel Louis Mbanefo SAN on the contrary referred the court to the decision of Clark J. in *Bernuth Lines Ltd v. High Seas Shipping Ltd (The Eastern-Navigator)* supra which he claimed to be evidence of the interpretation of the English Law relating to service by email by an English court. He postulated that in this type of situation in determining whether a foreign arbitration was properly conducted in the foreign venue in accordance with foreign law, a Nigerian court cannot apply Nigerian Law.

40

Learned senior counsel drew the attention of this court to the copies of the emails exchanged between the appellant and the respondent which are to be

45

found on page 87 - 109 of the records. Senior counsel also drew the attention of the court to the averments in the affidavit in support of the respondent application for registration of the award which is on page 7 - 8 of the records and stated emphatically that the appellant's contention that it was not served with notice of the arbitral proceedings is a blatant falsehood. Counsel then concluded that it is unfortunate that a party who deliberately fails to avail himself of the opportunity of participating in arbitration proceedings should endeavour to use technicalities and the courts to frustrate the arbitral process.

Let me first say that in the determination of the issue in controversy even though we are required to interpret English Law as relates to service we cannot wholly divorce ourselves from the principles inherent in the philosophy of the jurisprudence of our legal system.

The main issue of fact submitted to this court for determination is whether or not the respondent effected proper notice of the initiation of Arbitral proceedings including date, time and venue of said proceedings on the appellant. Let me reiterate that the facts of the initial agreement between the parties and its subsequent termination upon mutual agreement is undisputed. The learned trial judge held as follows on page 173 - 175 of the record :

"I have carefully gone through the motion paper. I have particularly considered the affidavit, counter-affidavit and further affidavit exchanged by the parties. I have also perused and considered the written addresses of the learned counsel to the parties. It is clear that the main reason Why the respondent wants the Order registering the arbitration award set aside is that it was not notified of the arbitration proceeding. I am unable to agree with the said respondent having regard to the averments in paragraphs 5 to 16 of the Petitioner's counter-affidavit to the effect that the respondent was duly and fully notified. Those averments have not been negative even with the averments in the further affidavit of the respondent. The exhibits annexed to the counter-affidavit of the Petitioner clearly show that the respondent got full notice and was well aware of the arbitration proceedings but chose not to participate. See particularly exhibits B01, B02, B03, B05, B06, B07, B08. Also exhibit MN3 annexed to the affidavit in support of the Petitioner's motion ex-parte supports the view that the respondent was duly notified. The document contains the arbitral award and the orders made by the Arbitrator.

In paragraph 4 of the award, the Arbitrator states as follows:

"The charterers failed to appoint an Arbitrator and also failed to respond to the 7 days written notice which was serviced

Ogunwumiju, JCA

5 upon them by the owners, pursuant to section 17 (2) of the Arbitration Act 1996 of their intention to request me to accept the reference in the capacity of a Sole Arbitrator. On 23rd September, I acceded to the owners' request and notified the parties that I agree to accept the reference in the capacity of a Sole Arbitrator on LMAA Terms 2006 and they apply to this reference."

10 ***"In view of those overwhelming evidence, it cannot be said, as canvassed by the respondent, that it got no notice of the arbitration proceeding or that it was not duly served. On the contrary, I hold that it was duly and fully notified. As to the ground that the Petitioner did not give undertaking for damages as ordered by the court, this also fails as the undertaking given by the Petitioner was duly filed and it is in the court's record."***

15

20 At page 4.25 of the appellant's brief the appellant reiterated its position at the lower court which can be gleaned from page 151 -152 of the record to the effect that it is not challenging the validity or otherwise of email service/notice in arbitral proceedings in general but is quarrelling with the fact that there was no mutual agreement to use that method by the parties in this case. Let me re-emphasize some facts.

25 After the interim order of the registration of the award was made, the respondent filed a motion to set aside the award. In the respondent's (also present respondent in this appeal) counter affidavit to set aside the award, the respondent attached various email correspondence between the parties which spanned pages 87 to 109 of the record. The relevant portion of the respondent's counter affidavit to the motion to set aside the registration is on page 77 - 80 of the record - for clarity paragraphs 4 - 17 are set out below.

30

35 "4. That the allegation in the foresaid affidavit that the respondent/ applicant was not served with notice of reference to arbitration is a travesty of the truth.

40 5. That prior to the Arbitral Award the subject matter of the petition herein, there were series of correspondence passing between the parties as well as the learned Arbitrator by e-mailed correspondence. Copies of the said emails are annexed hereto and marked exhibit B.O.1 - 19

45 6. That amongst the foresaid emails are emails from the Petitioner's Solicitor, Philip Bush aforesaid to the respondent dated August and September 2009 informing it that the Petitioner had appointed David Aikman Esq. as arbitrator and requesting the respondent/

applicant to appoint an Arbitrator within 14 days of the date of notice.

- 5 7. That on the 1st September 2009, the respondent applicant through its Chief Executive Officer one Chief S. C. Moore Obioha replied acknowledging receipt of the aforesaid e-mail and requested for extension of time within which to make payment to the Petitioner.
- 10 8. That a further e-mail was sent by the Petition's solicitor on the 15th, September 2009 asking the respondent/applicant to appoint an Arbitrator within 7 days, on failure of which the Petitioner would invite its Arbitrator David Aikman Esq. to act as Sole Arbitrator.
- 15 9. That the respondent did not respond to the Petitioner's solicitor's aforesaid e-mail of 15th September 2009.
- 20 10. That on the 23rd September 2009, the Petitioner, through its Solicitor Philip Bush sent another notice to the respondent/applicant informing it of David Aikman's appointment as Sole Arbitrator in accordance with Arbitration Act 1996.
- 25 11. That on the same date, 23rd September 2009, David Aikman Esq. acceded to the request to act as Sole Arbitrator and notified the parties accordingly. He ordered the respondent/applicant to submit its defence and/or counter-claim to the Petitioner's claims.
- 30 12. That on the 5th and 21st October 2009 respectively, the Petitioner still sent a reminder of the London arbitration to the respondent/applicant and the need for the respondent/applicant to submit its defence.
- 35 13. That by an e-mail dated 28th October 2009, the Sole Arbitrator ordered the respondent/applicant to submit its defence or counter-claim to the tribunal.
- 40 14. That on the 13th November, 2009 the Arbitrator sent a final notice to the respondent/applicant requesting it to submit its defence and that on failure to do so, the tribunal would proceed to make its award based on the submissions properly before it.
- 45 15. That the respondent/applicant by e-mails dated the 2nd October 2009, the 16th November 2009 and the 18th November 2009 sent to the Petitioner's lawyer aforesaid, made it abundantly clear that it was aware of the arbitration proceedings in London.

Nevertheless, having been served with several notices it failed neglected or refused to appoint an Arbitrator or submit its defence.

5 16. That the respondent/applicant, through its correspondence aforesaid with the Petitioner was proposing payment plans instead of submitting to the arbitration proceedings.

10 17. That the Arbitrator David Aikman Esq. based on the written submission of the Petitioner made a final award on the 20th November 2009 in the sum of US\$729,000.00 as damages together with interest at the rate of 2.5% per annum compounded at three monthly intervals from 24th August, 2009 until the date of payment. As well as cost of arbitration in the sum of N2,070
15 with interest at the rate of 4% per annum.

I looked closely at all the emails exhibited by the respondent. Where needed they contained the relevant address of the Arbitrator and other persons concerned. For example, the email sent by Phillip A. Bush on 31st August 2009 to the appellant
20 contained detailed contact details of the Arbitrator including fax, mobile lines and office address in the U.K. During the course of correspondence and negotiation while the arbitration proceeding was going on, the appellant sent the letter set out below at page 103 of the record.

25 *"From: Continental Sales Limited (mailto: continentalsales@yahoo.com*

Sent: Monday, November 16, 2009 6:27PM
To: Igor Respov

30 *CC: WORKD SEA TRADE SA; DGlass 6796@ aol.com; jvanhoff@yahoo.com*

Subject: Re. PROPOSAL FOR SETTLEMENT

35 *Dear Igor,*

Further to our discussions, we are making below proposal, for your due consideration.

40 1) *We are ready to pay the fixed sum of USD69,000.00 (pursuant to our agreement dated 10th July 2009), representing the agreed expenses suffered by time charter owners of M/T AINAZI, the latest by 4th of December 2009.*

45 2) *Above payment is conditional of time owners prior acceptance*

Ogunwumiju, JCA

to cease the arbitration proceedings in London, upon receipt of above amount into their account. Until then the proceeding would not cease.

5 3) *Upon receipt of above amount from time charter owners and cease of arbitration proceedings, time charter owners to bind themselves in writing that they will offer to charterers suitable tonnage (about 10.000-20.000 dwt) on period charter for the exclusive needs of charterers.*

10 *Terms of potential fixture to be negotiated between the parties. A new agreement is to be drafted and agreed between charterers and time charter owners, comprising above terms.*

15 *Thanks and best regards.*
Chief Obioha
Continental Sales Ltd

20 As I said earlier, the main thrust of the appellant's argument is that in the absence of the relevant and prescribed mode of service of notice of commencement of arbitral proceedings in the fixture note/agreement, parties must have recourse to the English Arbitration Act 1996 which requires that there must be service of notice of Arbitration in writing and which practice was violated by the respondent in this case. Now, how are arbitral proceedings begun? Section 14 (4) of the
25 English Arbitration Act 1996 provides as follows:

30 **"Where the arbitrator or arbitrators are to be appointed by the parties, arbitral proceedings are commenced in respect of a matter when one party serves on the other party or parties notice in writing requiring him or them to appoint an arbitrator or to agree to the appointment of an arbitrator in respect of that matter."**

35 In relation to service of notices to a party to an arbitration, sections 76 (1),(2), (3), (4) (a) and (b) of the English Arbitration Act 1996 referred to by the appellant's counsel are most apt for our consideration. The relevant sections are set out below:

Section 76 (1), (2), (3), (4), (a) and (b) of the English Arbitration Act 1996 state thus:

40 **76(1) The parties are free to agree on the manner of service of any notice or other document required or authorized to be given or served in pursuance of the arbitration agreement or for the purposes of the arbitral proceedings.**

45 **(2) If or to the extent that there is no such agreement the following**

provisions apply.

(3) **A notice or other document may be served on a person by any effective means.**

(4) **If a notice or other document is addressed, pre-paid and delivered by post.**

(a) **to the addressee's last known principal residence or, if he is or has been carrying on a trade, profession or business, his last known principal business address, or**

(b) **where the addressee is a body corporate, to the body's registered or principal office, it shall be treated as effectively served.** (Underlining mine)

I have underlined the provision that notice or other documents may be served on any party by any "effective means". The appellant has not in a way denied that service of the notice of Arbitration etc has been made on it.

That fact cannot be denied since the record is replete with evidence of the fact that the notices were received and reactions thereon elicited from the appellant. "Effective" is defined in Blacks Dictionary 9th Edition page . as "achieving a result." In the Oxford Advanced Learner's Dictionary page 469 in 7th Edition the word "effective" is defined as "producing the result that is wanted or -intended". Since the intention of the email messages and correspondence from the respondent, the solicitor Phillip A. Bush and the Arbitrator Mr. David Aikman to the appellant was to achieve the result of communicating the fact that the arbitration proceedings had been initiated, and the various stages of the process, I am of the view that there has been effective service of the whole arbitration process on the appellant. The spurious argument that the service of notice was not in writing cannot fly. Email is a form of communication that is set down in writing. It is not oral. The fact that it is electronic is immaterial. It is not in thin air. It can be downloaded and as real as a hard copy of the letter or mail in your hand.

Section 76(4) makes a distinction between personally delivered notices and other forms of communication by stating that where the notice is addressed, prepaid and delivered by land post which is the traditional method, then it must be to the addressee's last known principal residence etc or where a body corporate to the body's registered or principal office. In my humble view, section 76(3) is a general provision under which a party must operate to the extent that there must be proof that the service of notice has been effective. Whereas 76(4) relates only to where there has been service by land post.

It is obvious from the record that all communication between the parties including

the signing of agreements etc were performed electronically.

It is in my view unconscionable for the appellant to turn around to say that that form of communication has not been effective. In *Trade Bank Plc v. Chami*
5 (2003) 13 NWLR (Pt. 836) Pg. 158 at 216 - 217 Salami JCA (as he then was) held as follows:

10 **“Although the law does not talk of “computer” and computer prints out” it is not oblivious to or ignorant of modern business world and the technological advancement of the modern jet age. As far back as 1969, the Supreme Court in the case of *Esso West Africa Inc. v. T. Oyegbola* (1969) NMLR 194, 198 envisaged the need to extend the horizon of the section to include or cover computer which was virtually not in existence or at a very rudimentary stage at that time when the court said -**

15 *“The Law cannot be and is not ignorant of modern business methods and must not shut its eyes to the mysteries of the computer.”*

20 In *Bernuth Lines Ltd v. High Seas Shipping Ltd* cited supra by both counsels, (it is a Lloyds Report), Clark J. in considering whether notice of arbitration by email was properly served held as follows at page 541:

25 **“I do not regard the provisions of CPR part 6 as an appropriate benchmark by which to judge whether or not service by e-mail is effective in the context of an arbitration. The Civil Procedure Rules cater for litigants of all kinds from major corporations represented by the most accomplished firms of solicitors to individuals represented by more modest firms and those who are not represented at all. By contrast Arbitrations are usually conducted by businessmen represented by, or with ready access to lawyers. Section 76(3), when providing that a notice could be served on a person by any effective means was, in my judgment, purposely wide. It contemplates that any means of service will suffice provided that it is a recognized means of communication effective to deliver the document to the party to whom it is sent at his address for the purpose of that means of communication (e.g. post, fax or e-mail). There is no reason why, in this context, delivery of a document by e-mail - a method habitually used by businessmen, Lawyers and civil servants - should be regarded as essentially different from communication by post, fax or telex.”**

45 I am entitled to be persuaded by the dictum set out above and I hold myself so persuaded. It only stands to reason that any previous accepted and acceptable

means of communication among, the parties would remain an effective means of service of any subsequent notice of arbitration proceedings.

At page 138 of *Bernuth Lines Ltd v. High Seas Shipping Ltd* the court held thus:

5

“a. Where a party is to be served by “electronic means the party who is to be served or his legal representative must previously have expressly indicated in writing to the party serving that he is willing to accept service by electronic means.

10

15

Where a party seeks to serve a document by electronic means he should first seek to clarify with the party who is to be served whether there are any limitations to the recipient’s agreement to accept service by such means including the format in which documents are to be sent and the maximum size of attachments that may be received.”

20 There is no doubt that the previous dealings between the parties has shown that the parties have not indicated any limitation to their customary communication by email to warrant an elaborate agreement as to the format etc of sending such e-mails. There is a justifiably implied consensus (sic) that all communications between the parties may be concluded electronically.

25 Learned appellant’s counsel made much ado about the issue of what he claimed to be lack of fair hearing. That flag will not fly. It is very clear to me that at no time in the process was there a breach of the rules of natural justice and none of its pillars had been damaged. The rule of *audi alteram partem* (Hear the other side) had not been breached by the Arbitrator. A careful reading of all the exhibits
30 attached to the respondent’s counter affidavit which were not controverted at all, shows that the appellant was effectively appraised of all the stages of the arbitration process and was availed every opportunity to be heard if he wanted to state his own side of the issue, but refused and neglected to do so. A litigant who refused to avail himself of the opportunity to be heard does so at his own peril. See
35 *Newswatch v. Attah* (2006) 4 SCNJ 232

I am of the view that the Arbitrator did not run foul of section 52 of the Arbitration and Conciliation Act Cap 19 laws of the Federation 1990.

40 Section 52 of the ACA provides as follows:

**“The court where recognition or enforcement of an award is sought or where application for refusal of recognition or enforcement thereof is brought may, irrespective of the country in which the award is
45 made, refuse to recognize or enforce an award –**

(a) If the party against whom it is invoked furnishes the court proof -

5 (iii) That he was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise not able to present his case”

I cannot in the circumstances find as I have been urged to do that the arbitrator is guilty of misconduct to warrant a refusal to register the award.

10

In the circumstances, I affirm the judgment of the trial court registering the arbitration award. I find this appeal wholly without merit and it is hereby dismissed. I award ₦50,000.00 costs to the respondent against the appellant.

15 **OKORO, JCA:** I read before now the lead judgment of my learned brother, Ogunwumiju, JCA and I agree with him that this appeal lacks merit and ought to be dismissed.

20 My learned brother has effectively dealt with the salient issues submitted for the determination of this appeal. I adopt both her reasoning and conclusion as mine. I abide by all the consequential orders made in the lead judgment, that relating to costs, inclusive.

25 **DANJUMA, JCA:** I had before now perused the lead judgment of my Lord Helen Moronkeji Ogunwumiju, JCA just delivered, and agree that the appeal is without merit and should be dismissed. For want of any more useful thing to add to the lead judgment, I adopt same, concur and abide by it wholly.

Cases cited in the judgment

- 30 *Adigun v. A.G. Oyo* (1987) 1 NWLR (Pt. 53) Pg. 678
Agbakiaka v. FBN (2007) 6 NWLR (Pt. 1029) Pg. 25
Alsthom S. A. v. Saraki (2005) 3 NWLR (Pt. 911) Pg. 206
BON v. Abiola (2007) 1 NWLR (Pt. 1014) Pg. 23
Chevron Nig Ltd v. Max Miller International Ltd (2009) 3 CLRN Pg. 347
35 *Esso West Africa Inc. v. T. Oyegbola* (1969) NMLR 194, 198
Ika L.G.A. v. Mbo (2007) 12 NWLR (Pt. 1049) Pg. 676
Kano State Urban Development Board v. Fanz Construction Co. Ltd (1986) 5 NWLR (Pt. 39) Pg. 77
Newswatch v. Attah (2006) 4 SCNJ 232
40 *Taylor Woodrow Nig Ltd v. S.E. GMBH* (1993) 4 NWLR (Pt. 286) Pg. 127
Trade Bank Plc v. Chams (2003) 13 NWLR (Pt. 836) Pg. 158

Foreign cases cited in the judgment

- 45 *Bernuth Lines Ltd v. High Seas Shipping Ltd* (the Eastern Navigator) 2006 1 LLR Pg. 537

Statutes cited in the judgment

Sections 14 (4), 17 (2), 76 (1), (2), (3), (4), (a) and (b) of the English Arbitration Act 1996

- 5 Section 52 (2) (a) (iii) of the Arbitration and Conciliation Act Chapter 19 Laws of the Federation of Nigeria 1990

Books referred to in the judgment

Black's Law Dictionary 9th Edition

Nigeria Commercial Law and Practice Vol. 1 by Olakunle J. Orojo

- 10 Oxford Advanced Learner's Dictionary 7th Edition

History:**HIGH COURT**

- 15 Federal High Court (Lagos State)
A.O. Ajakaiye, J

COURT OF APPEAL (Lagos Division)

Helen Moronkeji Ogunwumiju, JCA (*Presided and read the lead judgment*)

- 20 John Inyang Okoro, JCA
Mohammed Ambi-Usi Danjuma, JCA

Counsel:

Emeka Okwuosa with him Ifeanyi Eze and Edozie Uka for the appellant

- 25 B. Orekyeli Megagu (Mrs) for the respondent

30

35

40

45