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RECONCILING THE SEEMING CONFLICT IN SECTIONS 4 & 5 OF THE NIGERIAN ARBITRATION AND CONCILIATION ACT[*]

Abstract

The appropriate remedy for a breach of an arbitration agreement is not damages but specific performance. Also, a court before which an action which is subject of arbitration agreement is brought has the power to stay proceedings when a proper application is made by a party to the arbitration agreement. The enactment of sections 4 and 5 of the Nigerian Arbitration and Conciliation Act to govern both domestic and international arbitrations appears peculiar to Nigeria and this has drawn severe criticisms from learned scholars as to the exact scope and application of the two sections. This paper is a humble attempt to reconcile the seeming differences pointed out by earlier writers. This paper makes the important discovery that even though section 4 contemplates third party actions, the practical effect is that the respondent in an application for stay can always oppose an application brought under section 4 by insisting on the stiff conditions under section 5 where the action to be stayed was commenced by a party to an arbitration agreement.

1. Introduction

Where provision is made in an ordinary arbitration agreement and proceedings are brought in a law court in respect of a matter, which is the subject of the arbitration agreement, the proper remedy is an application for a stay of proceedings. A party to an arbitration agreement who has a right of reference is entitled within an appropriate time to enforce the arbitration agreement to stay any court action, which is the subject of an arbitration agreement.[1] Sections 4 and 5 of the Arbitration and Conciliation

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[1] We have demonstrated elsewhere that the appropriate remedy for a breach of anarbitrationagreement is no longer damages but its enforcement. See J. F. Olorunfemi, "What is the Appropriate Remedy for a Breach of an ArbitrationAgreement in Nigeria", *Uniuyo Journal of Commercial and Property Law*, Vol. 1, December 2010, pp. 148-162.

Act[2] provide for stay of proceedings but different interpretations on the scope and application of the sections have been the subject of controversy. We would examine the sections by paying particular attention to the peculiar words used by the draftsman. We would also evaluate the views of some commentators and make a comparative analysis of the sections with analogous provisions with a view to bring out the uniqueness of section 4 and also ascertain the true scope and application of the two sections under the Act.

2. The Scope of Sections 4 and 5.

Section 4 of the Act provides as follows:

(1) A court before which an action which is the subject of an arbitration agreement is brought shall, if any party so requests not later than when submitting his first statement on the substance of the dispute, order a stay of proceedings and refer the parties to arbitration. (2) Where an action referred to in subsection (1) of this section has been brought before a court, arbitral proceedings may nevertheless be commenced or continued and an award may be made by the arbitral tribunal while the matter is pending before the court.

And section 5 of the Act provides that:

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

(2) A court to which an application is made under sub-section (1) of this section may, if it is satisfied - (a) that there is no sufficient reason why the matter should not be referred to arbitration in accordance with the arbitration agreement, and that the applicant was at the time when the action was commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, make an order staying the proceedings.

Although the provisions of sections 4 and 5 appear seemingly incompatible, there is no doubt that the two sections govern stay of court proceedings. Section 4 when read alone applies to a third party action and an action brought by a party to an arbitration agreement. Section 4 can be regarded as a wider provision when

[2] Cap. A18., Laws of the Federation of Nigeria (LFN) 2004, hereinafter the "Act".

compared with section 5, which is restrictive. Section 4 also gives wider room for the applicant to move to stay the proceedings and it is mandatory for the court to grant the application when it is properly made.

Section 5 applies only to an action brought by a party to an arbitration agreement in respect of any matter, which is the subject of an arbitration agreement. Unlike section 4, the application of section 5 is limited in scope since it can be invoked by a party to an arbitration agreement only against an action instituted by another party to the arbitration agreement. The wide meaning ascribed to "taking steps in the proceedings" and the two conditions prescribed under section 5 (2) can put spanners in the wheel of an application for stay which can only be granted at the discretion of the court. The effect is that if a party to an arbitration agreement in breach of an arbitration agreement brings an action, the applicant can only effectively come under section 5. This is because even when the application is brought under section 4, the respondent may oppose the application under section 5 in order to deny the applicant of the easier conditions under section 4. Therefore, if we construe section 4 to apply only to an action brought by a party to an arbitration agreement contrary to the express words of that section, section 4 will be permanently rendered ineffective. In *M. V. Parnomos Bay v. Olam (Nig.) Plc.*[3] where the defendant/applicant applied for stay pursuant to sections 4(1) and 5(1), the Court of Appeal held that sections 2 and 4 of the Act are controlled and limited by section 5(2) of the Act.

One of the basic principles of interpretation of all constitutions and statutes is, of course, that the lawmaker will not be presumed to have given a right in one section and taken it away in another.[4] A meaningful interpretation of the two sections is that which preserves the potency of section 5 without disturbing the application of section 4. Since it is trite law that the court cannot in the guise of interpreting a statute annul or modify its provisions,[5] the need to bring the two sections into harmony is imperative. Where two sections exist side by side in respect of the

[3] (2004) 5 N.W.L.R. (Pt. 865)1 at 5. .See *also Nduka Ikeyi*, "The Courts and the Arbitral Process in Nigeria," *ADRLJ* (1997). 362-363.

[4] *Hillv. William (Park Lane) Ltd*.(1949) A.C. 330 at 546 quoted in *Osadebay v. A.G. Bendel State* (1991)1 N.W.L.R. (Pt. 169) 525 at 527.

[5] *Cooperative Bank v. Ogwuru* (1991) 1 N.W.L.R (Pt. 168) 458 at 462.

same subject matter, the specific provisions are by implication excluded from the general provisions.[6] Here, the specific provisions of section 5 exclude from the general provisions of section 4.

Consequently, it is humbly submitted that section 4 should be construed and applied to a third party action while section 5 is applicable only to an action brought by a party to an arbitration agreement.

3. Procedure for Application for Stay

An application for stay of proceedings under the Act will be supported with an affidavit exhibiting a copy of the arbitration agreement.[7] Where there is an agreement to refer the subject matter of a counter claim, the counter claim will be stayed on the application of the plaintiff.[8] Proceedings have also been stayed where the parties had agreed to submit disputes to a foreign court or foreign courts.[9] Under section 4, the action sought to be stayed may be a third party action and the third party action must be subject of the arbitration agreement sought to be enforced. The applicant must be a party to the arbitration agreement and the application must be made within the time stipulated under section 4(1). On the other hand, under section 5, the action sought to be stayed must be the subject of an arbitration agreement between the applicant and the respondent and the application must be made within the time stipulated under section 5(1). The court must also be satisfied that there is sufficient reason why the matter should be referred.

Where there is any doubt whether there is an effective arbitration agreement, the court should construe the agreement where necessary.[10] The burden to oppose the application for stay of proceedings is on the respondent.[11] The success of an application for stay is based on the circumstance of each case.[12]

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[6] See *Gov. of Kaduna v. Kagoma* (1982) All N.L.R. (Pt. 1) 150 S.C.

[7] As proof of the arbitration agreement.

[8] *Spartalia & Co v. Van Hoorn Bitt* (1884) Rep. in Chambers 216; W.N (1884) 32.

[9] *Law Garrett* (1878) 8 Ch. D 26; *The Cap Blanco* (1911–1913) All E.R Rep. 365.

[10] *Modern Building Wales Ltd. v. Limmer & Trinidad Co. Ltd.* (1975) 2 All E.R 549 C.A.

[11] *Hodson v. Railway Passengers Ass. Co.*(1882) 9 Q.B.D 188.

[12] *Lyon v. Johnson* 58 L.J; 40 Ch. D 579.

For example, in a case,[13] by a written agreement, the plaintiff undertook to manage a brewery of the defendant for five years; and there was a provision that any dispute should be referred to arbitration. Before the time expired, the defendant dismissed the plaintiff for misconduct, the plaintiff having brought an action for wrongful dismissal; it was held that this is a proper case for staying proceedings. In another case,[14] the defendant agreed to employ the plaintiff as his agent for carrying on his business in a specified district for fifteen years; and the agreement contained a clause for referring to arbitration any disputes on the construction of the agreement, or any payment, act or thing relating to or arising out of the agreement. Before the term expired, the defendant dismissed the plaintiff from his employment for alleged misconduct, and gave notice to refer the matters in dispute between them to arbitration, but among the matters in dispute, he did not specify the dismissal of the agent. Both parties appointed arbitrators, but before anything more was done, the plaintiff brought an action against the defendant to restrain him from dismissing him and from appointing another agent. The defendant moved to stay proceedings in the action on the ground of the agreement to refer all matters to arbitration. It was held that the defendant having taken upon himself the decisions of the matters in difference by arbitration, the court ought not to exercise their power of staying proceedings in the action and that it was too late after the commencement of the action for the defendant to withdraw his dismissal of the plaintiff in order that it might be included in the arbitration.

Where the stay succeeds and there is arbitration and award, the cause of action merges in the award.[15] A stay may be lifted to allow an application for summary judgement.[16] Where an action referred to in section 5 (1) had not been stayed, an award made in respect of the same subject matter under the arbitration agreement referred to under section 5 (1) is no bar to the action.[17] Under section 5, the court can make an order for stay but no word was said as to whether it could refer the parties to arbitration. The

[13] *Wickham v. Hardy* 28 L.J; Ex. 215.
[14] *Davis v. Starr* .Ch. 808; Ch.D 242; 60 L.T; W.R 481 C.A.
[15] *City Engineering Ltd. v. F.H.A*(1997) 9 N.W.L.R.(Pt. 502) 224. (S.C.).
[16] *Tustian v. Johnston* (1993) All E. R. 534.
[17] *Doleman& Sons v. Osset Corp*, (1912) 5 K,B, 257. C.f. s.4(2) of the Act.

court had in a case stayed the proceedings indefinitely.[18] At other occasions, the court usually stays the proceedings pending the determination of the arbitration.[19]

Where arbitration fails, may be, due to an irregular appointment of the arbitral tribunal and the award thereof is set aside, an action instituted thereafter in breach of the arbitration agreement may still be stayed.[20] This is because the fact that the plaintiff has refused to nominate an arbitrator even if the reference cannot proceed until he has nominated one would not be a ground for refusing a stay.[21] Judicial attitude to the stay of an action which is the subject of an arbitration agreement can be summarized in the decision of the Supreme Court in *Misr ((Nig.) Ltd. v. Salah El Assad*.[22] In that case, learned counsel for the plaintiff/respondent had argued that the arbitration clause was vague and therefore useless and the court therefore had a duty to resolve the impasse as an earlier arbitration conducted in respect of the clause had been set aside by the court. The Supreme Court held that it would be asking too much of any court to sanction an unwarranted departure from the terms of a contract into which two free and able parties entered unless such a contract or any part of it had been lawfully abrogated. The Supreme Court added that despite the observations of the trial judge on the clause, the clause still remained the contract of the parties and the ordinary rules relating to contract must apply. The Supreme Court therefore, could not accede to the argument of counsel for plaintiff/respondent that even though the clause remained in the contract, yet the court could treat the clause as un-enforceable and

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[18] *Misr (Nig.) Ltd. v. Salah El Assad 1 All N.L.R. 172. (S.C.).*

[19] *Obembe v. Wemabod Estates Ltd.* [1977] 5 SC 115 at 129.

[20] *Misr (Nig.) Ltd. v. Salah E1 Assad (supra*).

[21] *Manchester Ship Canal Co. Ltd. v. Pearson & Sons Ltd.* (1900) 2 Q.B. 606 C.A; It was held in *Succula Ltd. v. Harland & Wolff Ltd.* (1980) 2 Lloyd's Rep. 381 That the court should not intervene with an established reference unless convinced that it is the only right course to take. The failure of arbitration does not amount to revocation of the arbitration agreement. This is because an arbitration agreement can only be revoked either in writing by the parties or by the leave of the court upon the application of the party by virtue of section 2 of the Act. Another reason is that some arbitration agreement may make the delivery of an arbitral award a condition precedent to an action at law. See *Scott v. Avery*(1856) 5 H.L Cas 811. See generally Olorunfemi, *supra* note 1 at pp. 152-158.

[22] *Supra* note 18.

therefore discountenance it in the enforcement of rights under the contract. Finally, the Supreme Court allowed the appeal and stayed the action of the plaintiff indefinitely, according to it, "in accordance with section 5 of the Arbitration Act".[23]

4. Evaluation of Divergent Views of Commentators.

Respected and prolific learned writers have commented on sections 4 and 5 of the Act. Few of their comments include the following:

> Sections 4 and 5 of the Arbitration Act… provide for indirect enforcement of the arbitration agreement.[24] It is strange why these two sections dealing with the same issue should be drafted into the Act by the Legislature. The presence of these two similar but different-in-effect sections in the Act has generated a lot of legal comments.[25] The provisions of sections 4(2) and 5(1) of the Act pose some important legal questions.[26] In the same piece of legislative enactment, we have two conflicting sections, that is sections 4 and 5 on the same subject matter.[27] Any party applying for a stay would of course prefer to come under section 4 than section 5 where the court is allowed to exercise some initiative in granting or refusing a stay.[28] As between the two sections, section 5 is a better provision for the arbitral system. A situation in which every application for a stay must be granted may have an overwhelming effect on the arbitral process.[29] It is very clear that the two sections are

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[23] *C.f. Obembe v. Wemabod Estates Ltd., supra* note 19 where the action was stayed pending arbitration.

[24] Chukwuemeka E. Ibe, "An Overview of Alternate Dispute Resolution Methods," *Unizik Law Journal*, Vol. 4 No. 1. p. 24.

[25] Edwin Obimma Ezike, "The Validity of Section 34 of the Nigerian Arbitration and Conciliation Act" *The Nigeria Juridical Review*, Vol. 8, (2000-2001) 140.

[26] C.U. Mmuozoba, "The Law Courts and Arbitral Tribunals under the Arbitration and Conciliation Act, 1990", *NLPJ*, Vol. 6 No. 1 (March, 2002).pp. 101 – 103.

[27] Greg Chukwudi Nwako by & Felicia Anyogu, " Institutionalising Alternative Dispute Resolution Mechanism in the Nigerian Legal System", *Unizik Law Journal*, Vol. 4, No. 1. p. 157.

[28] Offornze D. Amucheazi, "Enforcing Arbitration Agreement in Nigeria", *Unizik Law Journal*, Vol. 4 No. 1, p. 95.

[29] .Gaius*E*zejiofor, *The Law of Arbitration in Nigeria,*(Ikeja, Lagos: Longman Nig. Plc., 1997) at pp. 42-43.

> contradictory and not in any way complimentary. Their concurrent presence in the Act without their respective scopes of operation being specified is a sad commentary to the federal legal drafting infrastructure. It is one of the embarrassing manifestations of the lack of consultation and avoidable hurry that sometimes attend legislative drafting in Nigeria, both of which are, in turn, part of the tragedy, that military rule has on the legal system. So long as the two sections are there, the courts have foisted upon them, the unenviable task of interpreting them in a way that will give life and validity to each section.[30] Although the applicant is not bound to come under both sections, where he comes under section 4, as is most likely, it may be possible for the respondent to raise section 5, thereby insisting that the conditions therein be satisfied before the stay may be granted. Whether the court of first instance regards section 5 as relevant in the circumstances, or if it does, whether it finds that conditions exist for the exercise of its discretion against the applicant are issues which could be litigated up to the Supreme Court.[31] This matter is dealt with by sections 4 and 5 of the Decree. Unfortunately, the two sections cannot be easily harmonized as they appear in some respects, to be in conflict.[32] Something should be done to clarify section 4 and its relationship with section 5.[33]

Some of the commentators argued further that the plaintiff whose action is to be stayed under section 4 must be a party to the arbitration agreement. The critics of section 4 have however left unanswered the question as to what remedy or action a party to an arbitration agreement can take to enforce it when his liability to a third party is arising from the subject matter of an arbitration agreement, especially where the proceeds thereof would help to settle the dispute between the third party and the defendant

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[30] Andrew Okekeifere, "Stay-of-Court Proceedings Pending Arbitration in Nigerian Law," 13 *J. Int'l. Arb.* (1996). 133.

[31] NdukaIkeyi," The Courts and the Arbitral Process in Nigeria" *ADRLJ,* (1997) pp. 362-363.

[32] Olakunle Orojo and Ayodele Ajomo, *The Law and Practice of Arbitration and Conciliation in Nigeria.* (Lagos: Mbeyi & Associate (Nig.) Ltd., 1997) 316.

[33] Amazu A. Asouzu, "The Arbitration and Conciliation Decree (Cap. 19) as a Legal Framework for Institutional Arbitration: Strengths and Pitfalls," a paper presented at the IBA: African Regional Conference, Lagos (February, 1995) (Unpublished). pp. 13-14

/applicant. We shall attempt to examine the veracity of these claims and humbly submit that the scope and application of the two sections are different. Section 4 contemplates a third party action while section 5 deals only with an action brought by a party to an arbitration agreement.

Ezejiofor argued that the person who may request for an order of stay must be a party to the arbitration agreement and the plaintiff whose action is to be stayed must be a party to the arbitration agreement.[34] It is true that the applicant under sections 4 and 5 of the Act must be a party to the arbitration agreement.[35] It is also a fact that the Court of Appeal held in *N.L.N.G Ltd. v. A.D.I.C Ltd.*[36] that "the first party referred to in section 5(1) of the … Act is a plaintiff in the action while the second party is a defendant." It is apparent from the decision that their lordships in the Court of Appeal were construing section 5 of the Act. The same construction cannot with due respect be extended to section 4 which is wider in scope. The relevant portion of section 4 reads, "A court before which an action which is the subject of an arbitration agreement is brought …"[37] while the corresponding portion of section 5 reads "If any party to an arbitration agreement commences any action in any court with respect to any matter which is the subject of an arbitration agreement…." The difference between the two sections is clear. The Supreme Court in *Osadebay v. A.G. Bendel State*[38] has held that where a statutory provision is clear, it cannot be construed and stretched beyond its context.

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[34] Gaius Ezejiofor, " Scope of Section 4 of The Nigerian Arbitration And Conciliation Act," 1997/98 an unpublished L.L.M Lecture Notes, delivered on September 21,1998 at Faculty of Law, University of Nigeria, Enugu Campus as a rejoinder to some of the views informally expressed by the current writer during the 1997/98 L.L.M. Course Work. The lecture was delivered after the publication of the book – Ezejiofor , above note 29.

[35] See *Alfred Mc Alpine Construction v. UNEX Corp*.(1994) NPC 16 CA.

[36] *N.L.N.G Ltd. v. A.D.I C. Ltd*. (1995) 8 NWLR. (Pt. 416) 683-687. C.A. as confirmed by the Supreme Court in (2000) 1W.R.N. 1.

[37] This is similar to s. 9(1) of the English Arbitration Act, 1996 which provides that "A party to an arbitration agreement against whom legal proceedings are brought … in respect of a matter which under the agreement is to be referred to arbitration …"

[38] *Supra* note 4 at 574.

If its language and legislative intent are apparent, a judge is not enclothed with authority to distort its meaning in order for it to conform to his own views of sound social justice. There is nothing in section 4 limiting its application to an action brought by a party to an arbitration agreement. The best we can concede with respect is that section 4 could be literally construed to apply to both third party action and an action brought by a party to the arbitration agreement. This would be so if we construe section 4 alone without regard to the provisions of section 5 but the two sections must be read together[39] since they both govern the stay of court proceedings. Therefore, while we agree that the applicant under section 4 must be a party to an arbitration agreement, the action which is the subject of arbitration agreement could have been brought by a third party.

It is also the view of Ezejiofor that the defendant can only request for a stay in respect of an action commenced by a party with whom he has entered into arbitration.[40] This proposition is with due respect most applicable to an application under section 5. In *RGE (Group Services) v. Cleveland Offshore*,[41] a third party action was stayed pursuant to section 4 of the English Arbitration Act, 1950. The court held that:

> Since the issues raised in the third party proceedings were issues which fell within the ambit of clause 27 and since they could not be determined by the court since the court had no power to open up, review and revise any certificate, the third party proceedings would be stayed.

The opinion of learned authors[42] on the question of arbitration and third parties was that:

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[39] See *Taylor v. Oldham Corp*(1876) 4 Ch.D. 395; *Gov. of Kaduna v. Kagoma*, above note 6.

[40] Ezejiofor, *1997/98 Lecture Notes, supra note 34.*

[41] (1986) 11 Con. L.R.77 where A contracts with B and B sub-contracts with C. C makes claims against B, which claims are bound up on B's ability to obtain payment from A. There was an arbitration clause between A and B but none in the sub-contract between B and C. C commences action in the court against B. B issues a third party notice against A, claiming to be indemnified against C's claim. The court stayed the third party's action.

[42]Micheal J., Sir Mustill & Stewart C. Boyd, *The Law and Practice of Commercial Arbitration in England*, 2nd ed..(London: Butterworths, 1989) at 136-140.

> Most arbitrations take place between persons who have from the onset been parties to the arbitration agreement, and to the substantive contract underlying that agreement. It occasionally happens, however, that the claim is made by or against someone who was not originally named as a party. In such circumstances, the question whether the claim can be and must be the subject of arbitration may give rise to considerable difficulty.

Other learned authors,[43] were more positive while commenting on sections 9 and 86 of the English Arbitration Act, 1996 when they said that:

> There is no longer any scope for the court refusing a stay of proceedings on the ground that third parties are involved and that it would be preferable for the dispute to be dealt with by one tribunal (i.e the court) in order to avoid the possibility of inconsistent decision.

On whether the court can compel a plaintiff/third party, Ezejiofor submitted that when the court orders a stay, it must refer the parties to arbitration and the parties must be those who had contracted to arbitrate and if the plaintiff is not a party to the arbitration agreement, the court cannot refer him to arbitration with respect to an arbitration agreement between the defendant and another person.[44] Under section 57(1) of the Act, the word "party" means, "a party to the arbitration agreement or to conciliation or any person claiming through or under him and parties shall be construed accordingly". Where in the course of construing any statute difficulty arises to its real import, due regard must be had to the scheme of the legislation. The object or policy of the legislation often affords the answer to problems arising from ambiguities or doubts which it contains or implies, for it is a canon of interpretation that all words, if they be general, and not precise, are to be restricted to their fitness to the particular matter to be construed.[45] So, where a statute has defined a particular word, a court of law is bound to use the particular definition. It has no business to go outside the definition in search

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[43] David St. .John Sutton, John Kendall & Judith Gill, *Russell on Arbitration,* (21st ed. 1997) at 7 – 014.

[44] Ezejiofor, *Lecture Notes, supra* note 34.

[45] *Obikoya v. Govt. of Lagos State* (1987) 1 N.W.L.R. (Pt.50) 385; *A.G Bendel v. Aideyan* (1989) 4 N.W.L.R (Pt.118) 645; *Okeke v. A.G. Anambra* (1992) 1 NWLR (Pt.215) 60 at 68.

of other meanings.[46] Therefore, it is not the third party/plaintiff that would be referred but the parties to the arbitration agreement.

It has been submitted that the words "unless it finds that the agreement is null and void, inoperative or incapable of being performed" ought to have been included in section 4 of the Decree for these are, in fact, the concluding words of Article 8.1 of the Model Law which the Nigerian Decree purports to copy.[47] A similar reason had been given to criticize the application of section 4 to both domestic and international arbitration simply because the Model Law purportedly copied in section 4 apply only to international arbitration.[48] It is doubtful with respect, if we can extend the same argument to every provision of the Model Law where the corresponding sections under the Act apply also to domestic arbitration. The Act has made adequate provisions for the attack of an arbitration agreement on any of those afore-stated grounds if any party so wishes.[49] For example, section 2 of the Act provides for the revocation of an arbitration agreement and a party can oppose an application under section 4 by proving that the arbitration agreement is null and void, inoperative or incapable of being performed. By deleting those words, the duty is no longer on the court to satisfy itself that those conditions did not exist before granting an application under section 4, but the burden is on the respondent to, in appropriate cases, oppose an application for stay under any of those heads. When an agreement is null and void, the only benefit the party opposing it will gain is a declaration to that effect. The law does not compel the impossible – *lex non cogitadimpossiblia.* The phrase is a compendious legal jargon that connotes a state of actual nullity and a state of legal non – existence.

Secondly, the arbitral tribunal has jurisdiction under section 12 to determine the validity of an arbitration agreement and the decision of the arbitral tribunal can invariably be set aside under section 30 of the Act. Fortunately, there is nothing restraining the Nigerian Legislature from adopting the Model Law in a modified fashion.

According to Orojo and Ajomo, the problem in our sections 4 and 5 is that the two have been enacted to apply to all

[46] *Onagoruwa v. State* (1993) 7 NWLR (Pt. 303) 49.
[47] *Orojo & Ajomo, supra* note 32 at 317.
[48] *Ibid*, at 321.
[49] See sections 2 and 12 of the Act.

types of arbitrations instead of section 4 applying only to international arbitration, as was the intendment in the Model Law. It is understandable that in international arbitration, stay of proceedings should be relatively mandatory, since it is highly desirable that parties should be made to keep their agreement to arbitrate rather than go to a domestic court for resolution of their dispute. Accordingly, it was strongly urged that the Act should be amended by transferring section 4 from Part I to Part III of the Act, which deals with international arbitration.[50] We foresee two situations arising if this submission is accepted. First, enforcement of domestic arbitration against a third party action under section 4 would be hampered while section 5 would continue to enjoy its application to international and domestic arbitration. Secondly, the new section 4 would apply to an action brought by a party to an international arbitration agreement as well as a third party action that is the subject of an international arbitration agreement. If section 5 is limited to domestic arbitration, the consequence is that the problem of conflicting actions will arise in relation to actions brought by a party to an international arbitration agreement because of the effect of section 4(2) since the proposed section 4 would apply also to an action brought by party to an arbitration agreement.[51] What we would therefore humbly recommend instead is the modification of section 5, to among other reasons, make it also suitable for international arbitration.

On the part of Nwakoby, section 4 is a challenge on the inherent discretion of the court to either grant or refuse an application made before it. It is a challenge in the jurisdiction of the court and is also unconstitutional. Section 5(1) is preferred. Section 4 should be replaced.[52] The word "shall" in section 4 (1) is traditionally mandatory. Is it then a matter of "must" such that when the arbitration agreement is null and void, inoperative or

[50] *Orojo&Ajomo, supra* note 32 at 321.

[51] See *Doleman & Sons v. Osset Corp*., *supra* note 17. See also *Northern Regional Health Authority v. Derek Crouch Construction Co. Ltd*. (1984) 2 A.C. 175.

[52] Greg Chukwudi Nwakoby, "The Courts And The Arbitral Process In Nigeria," *Unizik Law Journal*, 27 Vol. 4 No. 1: see also Gaius Ezejiofor, *The Law of Arbitration in Nigeria*, (Ikeja, Lagos: Longman Nig. Plc., 1997) 49 at pp. 42 – 43.

incapable of being performed, the court would still grant the order?

On an application for summary judgment in a case with an arbitration clause, if the defence depended on a point of law in which the plaintiff was clearly right, the court would give judgment for the plaintiff and would dismiss any cross-application for a stay since there would be no dispute to go to arbitration. If the plaintiff was not clearly right, the court would grant leave to defend and would stay the action, so as to refer the dispute to arbitration if the application for stay was properly made.[53]

The court must satisfy itself that there is a dispute that relates to the arbitration agreement as at the date of writ. It was held in *Lueng (Peter) Construction Co. v. Tai Poon*[54] that at the time of the issue of the writ, there was no dispute because the evidence showed that the issue raised by D in relation to the plumbing and drainage had not by then been raised with P and accordingly, the court had no jurisdiction to stay the proceedings. The Supreme Court[55] held that where the grant of a stay would spell injustice to the plaintiff, as where the action was already time-barred in the foreign court and denying the plaintiffs any redress, justice is better served by refusing a stay than by granting one. The court declared further that it does also seem that the court may refuse to order a stay of proceedings where the defendant establishes that he would suffer injustice if the case is stayed or that he cannot obtain justice from the arbitral tribunal or that the agreement between the parties is null and void, inoperative or incapable of being performed.

To Amucheazi, it is doubtful if an arbitral tribunal would commence or continue proceedings when an action is going on before a court. What purpose does the section serve? It appears to be in conflict with section 4(1). If it is allowed to continue, the whole essence of the application for stay would have been defeated.[56] The provision of section 4(2) may make the court's refusal to order a stay ineffective as the arbitral proceedings "may

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[53] See *S. I Sethia Liners v. State Trading Corp. of India* (1985) 1 W.L.R 1398 C.A where s. 1 of the English Arbitration Act, 1979 which was similar to section 4 of the Act as regards the word "shall" was similarly construed.

[54] (1985) 4 Con. L.R 299, H.K. C.A.

[55] In The Owners of the *M.V. Lupex v. Nigeria Overseas Chartering & Shipping Ltd*. (2003) 43 W.R.N. 123: (2003) 15 NWLR (Pt. 844) 469.

[56] Amucheazi, above, n. 28 at 96.

nevertheless be commenced or continued" and an award made by the arbitral tribunal may be binding on the party that has commenced an action in court.[57] Our humble view is that section 4(2) is only applicable to third party actions under section 4. Section 4(2) provides that where an action referred to in subsection (1) of section 4 has been brought before a court, arbitral proceedings may nevertheless be commenced or continued, and an award may be made by the arbitral tribunal while the matter is pending before the court. The application of section 4(2) is limited to section 4 and not applicable to section 5. This may be in recognition of the fact that the plaintiff to the action under section 4 might not be aware that the action is the subject of an arbitration agreement and where he is aware, he might still institute his claim since he is not a party to the arbitration agreement. When this happens, the arbitral tribunal may not have to discontinue its proceedings simply because the matter is pending in court and the tribunal may commence proceedings since the parties in court may not exactly be the same with those before the arbitral tribunal. For the defence of *estoppel per rem judicatam* to operate, the parties, the subject matter and the issue must be the same.[58]

Since an agreement to submit a dispute to arbitration does not oust the jurisdiction of the court, the defendant may choose not to make any application to stay the action between him and the third party but instead commence or continue arbitration with the other party to the arbitration agreement and an award made therein may be used to settle the third party. Section 4(2) therefore creates an additional facility to the defendant who is willing to arbitrate and an award arising there from would not be regarded as a usurpation of the judicial powers of the court on a pending action.

The legislative principle in section 4(2) is similar in a way to what may be referred to as judicial activism or judicial legislation by the English Court of Appeal in *W. Bruce Ltd v. J. Strong*[59] where their Lordships[60] held that where a defendant in an

[57] Ephraim Akpata, *The Nigerian Arbitration Law in Focus*, (West African Publishers, 1997) quoted in the Supreme Court case of *The Owners of M. V. Lupex v. Nigerian Overseas Chattering & Shipping Ltd., supra,* note 55.

[58] *Biariko v. Edeh-Ogwuile* (2001) 12 NWLR (Pt. 726) 235 at 241.

[59] (1951) 2 K.B. 447, (1951) 1 All E. R. 1021.

[60] Somervell L.J with Singleton L.J. & Denning, L.J.

action brings in a third party (another defendant), the latter is entitled to a stay if there is an arbitration clause in the contract between him and the defendant even though the same subject matter will be under consideration in both the action and the arbitration.

The effect of section 4(2) is also to, so far as it relates to section 4 of the Act, exclude the principle in *Doleman & Sons v. Osset Corporation*[61] to the effect that where an action has been brought contrary to an arbitration agreement and no application for a stay has been made, the matter before the court cannot be arbitrated unless the parties have, after the commencement of the proceedings, agreed *de novo* to refer the matter to arbitration.

5. **Privity of Contract and Arbitration Agreement**

There is no doubt that an arbitration agreement is based on contract. Some scholars may therefore argue as we have seen above that a third party can neither compel arbitration or be compelled to participate in arbitration. Others may even argue that a third party action cannot be stayed based on an arbitration agreement not signed by a third party based on the general principles of privity of contract. We must first point out that the general rule of privity of contract has exceptions based on statutory provisions, veil piercing, estoppel, trusts, restrictive covenants, collateral contracts, agency, assignment, negotiable

[61] *Supra note 17*. For contrary views, *See* Gaius Ezejiofor, "Enforcement Of Specific Performance Of An Agreement To Arbitrate: *Royal Exchange Assurance v. Bentworth Finance(Nig.) Ltd.* (1976) 6 U. I. L. R. 293" (*Unpublished)* at 7-8, where the learned author, while commenting on § 4(2) said that "arbitration will not be commenced or continued if the request for a stay is refused, because it was made out of time; otherwise a situation will be created in which two parallel proceedings on the same matter go on simultaneously, one before the arbitral tribunal and the other before a court. The result will be the production of an award and a judgment on the same dispute. It is indeed very unlikely that any arbitral tribunal will want to engage in arbitral proceedings while the same matter (is pending in court) particularly as it has a discretion as to whether or not to do so. If the decision of the court and the arbitral tribunal are conflicting, as they are indeed be, which of them prevails. It would certainly not have been the intention of the authors of the Act to deliberately introduce this confusion in the system. And in the expectation that the first of the two decisions would prevail over the other on the principle of *res judicata*, there would be an indecent competition between the court and the arbitral tribunal to be the first to rush down a decision".

instruments, unjust enrichment etc.[62] With the ever increasing complexity on contractual frameworks and corporate structures, Kunal Mimani and Ishan Jhingran submitted that one the of the common questions which both, arbitral tribunals and national courts face is whether a non-signatory can be held bound by an arbitration agreement.[63]

A range of legal theories have been developed to facilitate this determination either for or against including such non-signatories. Equitable estoppel prevents a party who knowingly accepts the benefits of a contract containing an arbitration agreement from avoiding the obligation to arbitrate. This theory has so far been recognized only in the United States and Canada, where two theories have been recognized for holding a party bound by an arbitration agreement under estoppel. The first theory is that a non-signatory who knowingly accepts the direct benefits of a contract containing an arbitration agreement can be compelled to arbitrate by a signatory. The second theory is that a non-signatory can compel arbitration with a signatory when the issues the non-signatory is seeking to resolve are inherently inseparable or inextricably intertwined with the agreement and the non-signatory is closely related to the signatory. Primary indicia of a third-party beneficiary interest will be whether the non-signatory files a claim against one of the signatory parties.

The strict rules of privity could be incrementally relaxed in order to conform to the commercial reality and justice. It has been suggested that lawyers engaged in drafting contracts which contain arbitration clauses must be sensitized to the fact that a non-signatory may be added to the arbitration. If this risk exists, then clients must be advised of this risk, and, language be added to the contract and, arbitration clause, to minimize the risk of a

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[62] See Chris Turner, *Contract Law* (London: Hodder & Stoughton Educational, 2008) at pp. 39-44; See also "Privity of Contract", Law Extension Committee Winter Course 2005 Contracts Lecture Notes Week Five available at Sydney.edu.au/lec/.../contracts/.../lecture% 20 week %205. D... accessed on November 20, 2012.

[63] Kunal Mimani and Ishan Jhingran, "Extension of Arbitration Agreements to Non-Signatories: An International Perspective," available at *http://indialawjournal.com/volume4/issue_3/references. html* last accessed, on November 20, 2012.

related non-signatory party being bound by the arbitrator's decision[64].

Where a party to an arbitration agreement sues a third party in court and the third party wishes to stay the court proceedings in view of intended arbitration proceedings between the parties to the arbitration agreement, the court will stay proceedings, perhaps on the basis that the resolution of certain issues in the arbitration will have the effect of determining the court proceedings[65].This was the situation faced by the Singapore High Court in the recent case of *Shanghai Construction (Group) General Co. Singapore Branch v Tan Poo Seng*[66]. The court was called upon by the defendant to exercise its inherent jurisdiction to stay the proceedings until an "*intended arbitration*" between Shanghai Construction and Top Zone (a related third party) was heard. The court agreed. The defendant was the director and shareholder of a company called Top Zone Construction & Engineering Pte Ltd ("**Top Zone**"). The plaintiff, Shanghai Construction, had subcontracted certain construction works to Top Zone under a subcontract agreement. That subcontract agreement contained an arbitration clause. Top Zone requested the plaintiff to make certain payments directly to one of its (Top Zone's) sub-contractors. The plaintiff did so and paid out a sum of $454,451.60. In return, the defendant issued a cheque for $450,000.00 in favour of the plaintiff. Subsequently, disputes arose between the plaintiff and Top Zone following which Top Zone stopped its works and withdrew from the site. There was no repayment of the sum of $454,451.60 and the plaintiff subsequently sought to present the defendant's cheque for payment. However, the cheque was dishonoured as payments had been stopped.

A court has "to manage its own business with due regard to the resources available to it and the interests of other litigants, as well as the interests of the immediate parties themselves."[67] However, the Singapore High Court also considered that the

[64] *Ibid.*

[65] Shaun Lee, **"**Court can exercise Inherent Powers to Stay Proceedings in support of Arbitration" available at *http://singaporeinternational arbitration.com,* last accessed on November 20, 2012.

[66] [2012] SGHCR 10.

[67] Citing *Reichhold Norway ASA & Anor v. Goldman Sachs International* [1999] CLC 486.

Reichhold cases stood for the proposition that the "justification for granting a stay pending arbitration pursuant to the inherent jurisdiction of the court has been extended beyond preventing the abuse of the court's process…to include the efficient resolution of disputes and management of cases".

6. Conclusion

In spite of the stiff conditions under section 5 such as "taking steps" and the two conditions under section 5(2)(b), the attitude of the court especially since the enactment of the Act is to decline to determine matters, which are the subject of an arbitration agreement. Except for few modifications, largely nomenclature, section 5 of the Act is an adopted version of section 4 of the English Arbitration Act, 1889. The 1889 Act had since undergone several changes that made it imperative for something to be done on section 5 to make it meet the growing phenomenon in Arbitration. Judicial decisions on applications brought under section 5 portray the spirit of Arbitration than the letters of that section. It is humbly submitted that section 5 of the Act be modified to accord with judicial attitude in order to enhance its suitability for international arbitration and bring it into conformity with the general intendment of the Act.

The National Committee on the Reform and Harmonisation of Nigerian's Arbitration and ADR laws has not only recommended the merging of sections 4 and 5 into one section, the Reforms Bill by virtue of section 5 thereof, retains the unique features of section 4 of the Nigeria Act on the power of the court to refer the parties to arbitration; the widening of its scope to third party actions and also provides that an arbitral proceedings may be commenced or continued and an award may be made by the arbitral tribunal while the matter is pending before the court.

This attempt has revealed that the Reforms Bill also seeks to introduce a new section 5(3) which provides that:

> Notwithstanding sub-section (1) of this section, any person carrying on business in Nigeria who is a consignee under, or holder of, any bill of lading, waybill or like document for the carriage of goods to a destination in Nigeria, whether for final discharge or for discharge for further carriage, may bring an action relating to the carriage of the said goods or any such bill of lading, waybill or document in a competent court in Nigeria and any arbitration clause which purports to limit or preclude this right shall be null and void.

The new section 5(1) of the Reforms Bill seeks to provide that:

> Except in the case mentioned in sub-section (3) of this section, where an action referred to in subsection (1) of this section has been brought before a court, arbitral proceedings may nevertheless be commenced or continued, and an award may be made by the arbitral tribunal while the matter is pending before the court.

We also found that the Reforms Bill seeks to adopt the legal jargon "the court shall grant a stay unless satisfied that the agreement is null and void, inoperative or incapable of being performed" contained in article 8.1, United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration and section 86 of the English Arbitration Act, 1996. In view of our earlier submission that the words represent a state of legal nullity, we recommend that the words be expunged from the proposed Bill.