

ENFORCEABILITY OF ARBITRATION AGREEMENTS – THE INTERPLAY BETWEEN SECTIONS 4 AND 5 OF NIGERIA’S ARBITRATION AND CONCILIATION ACT, 2004

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1. INTRODUCTION

A precursor to arbitration is an arbitration agreement. It may be in the form of a clause in a contract, treaty or other legal instrument or a separate agreement not forming part of any contract.¹ Just like litigation, arbitration cannot commence until a dispute within the parties’ contemplation arises and one of the parties thereto, particularly but not exclusively the injured party, refers the dispute to arbitration by issuing a notice of arbitration in accordance with the parties’ agreement, the applicable rules or law, and serving the notice on the other party.² Notice of arbitration is a condition precedent to exercise of jurisdiction by arbitral tribunal.³

The question of enforcing an arbitration agreement will not arise if the party who alleges that his right thereby is breached commences arbitration upon an accrual of a cause of action in the context of the agreement but rather if the party commences a suit in court in breach of the agreement. There is no remedy in terms of monetary damages for breach of an arbitration agreement by litigation but rather a party to the agreement who intends to arbitrate can, promptly and without taking any step

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¹ J.N.M. Mbadugha, *Principles and Practice of Commercial Arbitration*, University of Lagos Press, Lagos 2015, p. 2 and 19, and the opinion, literature, and courts decisions therein referred.

² First schedule, Arbitration Rules, article 3(1), Arbitration and Conciliation Act CAP A.18 Laws of Federation of Nigeria 2004; Judgement of the Supreme Court of Nigeria of 25th June 1999, *City Engineering Nigeria Ltd. v. Nigerian Airports Authority*. SC. 36/1993, [1999] 1 NWLR (Pt.625) 76.

³ Judgement of Nigeria’s Court of Appeal of 20th May 2020, *Indorama Eleme Petrochemicals Ltd. v. Cutra International Ltd.* CA/A/115/2019.LOR (20/05/2020) CA.

in proceedings, apply to the court before which the suit is pending for a stay of proceedings and reference to arbitration.

The scope of this article is limited to discussing the interplay between **sections 4 and 5 of the Arbitration and Conciliation Act**⁴ in enforcing arbitration agreements through stay of proceedings and whether one is an alternative to the other. What constitutes a step in proceedings or not is not within the scope of this article.

2. ENFORCEABILITY OF AN ARBITRATION AGREEMENT

An arbitration agreement is enforced when the contemplated dispute is referred to arbitration. However, a party to an arbitration agreement may decide to litigate the dispute and may as a result commence proceedings in court. Where this happens, if the other party wishes to arbitrate or have the dispute resolved by arbitration, the only remedy available to it, under Nigerian law, is to apply to the court in which the action is pending to stay proceedings in reference to arbitration; and the court may stay proceedings if the party meets the applicable requirements in respect thereof,⁵ provided the dispute is arbitrable and the arbitration agreement is valid.

3. INTERPLAY BETWEEN SECTIONS 4 AND 5 OF ACA

A mechanism for enforcement of an arbitration agreement in the context of its breach by litigation is stay of proceedings in favour of arbitration. Courts are statutorily cloaked with the power to stay proceedings commenced in breach of arbitration agreements provided that the arbitration agreement is valid, or not null and void, and a party to the agreement promptly applies to the court for a stay of proceedings and the party meets the requirement for such stay.

In Nigeria, the statutory power of the court to stay proceedings and refer the parties to arbitration in a suit commenced in breach of an arbitration agreement is sections 4 and 5 of the Arbitration and Conciliation Act.⁶ The existence of both **sections** has raised the question of whether one is an alternative to the other or supersedes or controls the other. While **sections 4(1) and (2) of the Act** provide that: (1) A court before which an action which is the subject of an arbitration agreement is brought shall, if any party so request 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.

⁴ Laws of the Federation of Nigeria, CAP A.18, 2004.

⁵ J.N.M. Mbadugha, *Principles and Practice of Commercial Arbitration...*, p. 74; Judgement of the Supreme Court of Nigeria of 20th May 1977, *Obi Obembe v. Wemabod Estates Ltd.* SC.466/1975.[1977] 5 S.C (Reprint Edition) 70 at 79–8, lines 20–15; Judgement of the Supreme Court of Nigeria of 15th June 1990, *K.S.U.D.B. v. Fanz Construction Co. Ltd.* SC.45/1988 [1990] 4 NWLR (Pt.142) 1 at 28 paras C–D.

⁶ CAP. A18, Laws of the Federation of Nigeria, 2004.

- (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;

sections 5(1) and (2) of the same Act provide 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 subsection (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
 - (b) that the applicant was at the time when the action was commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, make an order staying the proceedings.

3.1 SECTION 5 SUPERSEDES SECTION 4

Sections 4 and 5 of ACA provide for the same type of remedy – stay of proceedings – to the same problem, breach of an arbitration agreement by litigation. It is fundamental to the construction of the provisions of any statute that if the subject matter construed concerns other sections of the same statute all the related provisions must be read considered and construed together as forming a composite whole.⁷ Considering and construing **sections 4 and 5 of ACA** together as forming a composite whole since they deal with the same subject matter shows that:

- a. while **section 4(1)** provides that “a court... 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...”, **section 5(1)** provides that “...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...” and “a court may...” The word “shall” in **section 4(1)** means it is mandatory⁸ while **section 5** by its use of the word “may” means its discretionary. Again, section 5 provides for taking any other step in proceedings while section 4 did not provide for this;
- b. both **sections** provide in their respective **sub-sections 1** two distinct times or period within which a party could apply for stay of proceedings. While **section 4(1)** provides for “not later than when submitting his first statement on sub-

⁷ Judgement of the Supreme Court of Nigeria of 7th April 2000, Mobil Oil (Nigeria) PLC v. IAL 36, SC.106/1999. [2000] 6 NWLR (Pt.659) 146 at 168 paras D–E.

⁸ The word “shall” as used in section 4(1) of ACA has been judicially interpreted by the Nigerian Courts to mean mandatory: Judgement of the Supreme Court of Nigeria of 22nd January 2010, Agip Nigeria Ltd. v. Agip Petroleum International. SC.351/2002.[2010]5 NWLR (Pt.1187) 348; Judgement of Nigeria’s Court of Appeal of 12th July 2013, Statoil (Nig) Ltd. v. NNPC. CA/L/758/2012. [2013]14 NWLR (Pt.1373) 1 at 29 paras D–G.

stance of the dispute”, **section 5(1)** provides for “after appearance and before delivering any pleadings or taking any other steps in proceedings”;

- c. **section 4(2) of the Act** which has no equivalent in its **section 5** provides that if any matter subject to arbitration is litigated, that arbitral proceedings may nonetheless be commenced or continued and an award may be rendered by the tribunal while the matter is pending before the court whilst **sections 5(2)(a) and (b) of the Act** contain provisions which are not provided in its **section 4**.

The above analysis demonstrates that there is a conflict between **sections 4(1) and 5(1) of the ACA**. Thus, the question of whether both **sections** could be applied alternatively or harmonized is not an option. The solution, therefore, lies in the accepted canon of construction that where there is a conflict between two provisions of any Act the later provision prevails over the former,⁹ or put differently, in **Nigeria**, it is trite law that where there is a conflict between two provisions of any Act the later provision prevails over the former. Thus, in **Afolayan v. Bamidele**,¹⁰ the Nigerian Court of Appeal held that:

What is more since schedule 4 is predicated on section 56 of the Decree and section 84 of the Decree comes later, in case of conflict between both sections of the Decree, by canon of interpretation ... the latter section prevails over the former.¹¹

It follows that in the circumstance **section 5(1) of ACA** prevails over and supercedes its **section 4(1)** and as a result **section 4(1)** is inapplicable. The Nigerian Court of Appeal confirmed this position in **Mbeledogu v Aneto**.¹² There, in considering and construing **sections 4(1) and 5(1) of ACA** together the Court of Appeal held that:

Sections 4(1) and 5(1) of the Arbitration and Conciliation Act 1990 do not prevent a party to an arbitration agreement from instituting an action in the court while the arbitration clause was yet to be enforced. All that is required is for the other party to the agreement to apply to the court under Section 5(1) of the Act for the action to be stayed by the court while the dispute is referred to the arbitration committee for settlement. Such application must be made to the court “any time after appearance and before delivering any pleadings or taking any other steps in the proceedings.” There is definitely a time limit within which the request for a stay of the proceedings must be made... When the respondent eventually commenced the present action against him, he did not avail himself of his right under Section 5(1) of the Arbitration

⁹ J.N.M. Mbadugha, *Principles and Practice of Commercial Arbitration...*, p. 82, paragraph 1.

¹⁰ Judgement of Nigeria’s Court of Appeal of 15th March 1999, CC/IL/EPA/1999.[1993]3 NWLR (Pt.595) 454.

¹¹ Judgement of Nigeria’s Court of Appeal of 15th March 1999, *Afolayan v. Bamidele*. CC/IL/EPA/1999.[1999] 3 NWLR (Pt.595) 454 at 463 para C.

¹² Judgement of Nigeria’s Court of Appeal of 7th June 1995. CA/E/171/91.[1996] 2 NWLR (Pt.429) 157.

and Conciliation Act 1990 by applying to the court as specified by that Act for the case to be stayed pending reference of their dispute to the arbitration committee.¹³

3.2. SECTION 5 OF ACA CONTROLS AND LIMITS SECTION 4

In communal reading, interpretation and application of all the sections of an enactment dealing with a subject matter it may be discovered that the meaning of a section may be controlled or limited by other individual **sections** or **sub-sections** in the same act.¹⁴ **Section 4 of ACA** hasn't any provision equivalent to **section 5(2) of the ACA**. In construing and considering **sections 4 and 5 of the ACA** together in **M.V. Panormos Bay v. Olam (Nig) PLC**,¹⁵ the Nigerian Court of Appeal held that **section 4 of the ACA** is controlled and limited by **section 5(2)** of the same **ACA**. In that case, the Appellant applied, inter alia, under **section 4 of ACA** for stay of proceedings and reference to arbitration in London. In dismissing the appeal and affirming the trial court's decision refusing to grant a stay of proceeding, the Court of Appeal held that:

then a finding by the learned trial judge that there is a valid, subsisting binding and irrevocable arbitration agreement between the parties and that the defendant had not taken any steps in the proceedings could not in any case have entitled the trial judge to order the parties herein to go for arbitration outside the jurisdiction of this country since sections 2 and 4 of the Arbitration and Conciliation Act are controlled and limited by S.5 (2) of the same Act.¹⁶ [emphasis added]

Therefore, **section 5(2) of the ACA** limits and controls **section 4** and its provisions must be met in any application, before a Nigerian Court, for a stay of proceedings and reference to arbitration.

3.3. VOID FOR BEING INCONSISTENT WITH SECTIONS 6(1) AND 6(6)(A) OF THE CONSTITUTION

The grant or otherwise of stay of proceedings pending arbitration is an exercise of courts' discretionary power.¹⁷ **Section 4(1) of ACA** provision that "a court ... **shall**, if any party so request not later than when submitting his first statement on the substance of the dispute, order a stay of proceedings and refer the parties to

¹³ Judgement of Nigeria's Court of Appeal of 7th June 1995, Mbeledogu v. Aneto. CA/E/171/91. [1996]2 NWLR(Pt.429) 157 at 168–169 paras H–A.

¹⁴ Judgement of the Supreme Court of Nigeria of 7th April 2000, Mobil Oil (Nigeria) PLC v. IAL 36 INC. SC.106/1999.[2000] LPELR – 1883 (SC) 1 at 24 para F.

¹⁵ Judgement of Nigeria's Court of Appeal of 2nd July 2003, CA/L/243/2000.[2004] 5 NWLR (Pt.865) 1.

¹⁶ Judgement of Nigeria's Court of Appeal of 2nd July 2003, M.V. Panormos Bay v. Olam Nig PLC.CA/L/243/2000.[2004] 5 NWLR (Pt.865) 1 at 14 para G.

¹⁷ Judgement of Nigeria's Court of Appeal of 10th May 2021, Innoson Technical & Industrial Co. Ltd. v. Federal Radio Corporation of Nigeria. CA/E/129/2015. [2021]LPELR – 54620 (CA) 1 at 30 para B.

arbitration” means that it is mandatory by reason of the word “shall” therein.¹⁸ It does not allow the court to exercise its discretion thereunder. It fails to recognize inherent discretion of a court to grant or refuse an application made before it.¹⁹ Thus, it fetters the court’s judicial discretion.

Judicial discretion is a term applied to the unrestricted power of a court or a judge and means discretion bound by the rules and principles of law and not arbitrary, capricious or unrestrained. It is not the indulgence of judicial whim, but the exercise of judicial judgment based on facts and guided by law or the equitable decision of what is just and proper under the circumstances.²⁰

In making any pronouncement in the course of or after adjudication the judex or court is displaying nothing other than the power which every legal authority must of necessity have to decide controversies between subjects or between the government and subjects,²¹ and this power is judicial power.²² Thus, judicial discretion is one of the most important elements of judicial power,²³ and it is to this extent a judicial power or a form of or a part of judicial power. **Section 6(1) of the 1999 Constitution of the Federal Republic of Nigeria** (as amended) vested the judicial powers of the Federation in the courts to which the section relates, being courts establishment for the Federation. By fettering the court’s judicial discretion which is one of the most important elements of judicial power **section 4(1) of ACA** contradicts or is inconsistent with **section 6(1) of the 1999 Constitution**.

Also, **section 6(6) (a) of the 1999 Constitution of the Federal Republic of Nigeria** (as amended) provides that judicial powers vested in accordance with its provisions shall extend, notwithstanding anything to the contrary in the Constitution, to all inherent powers and sanctions of a court of law. An inherent power has to be inherent in the sense that it forms an essential and intrinsic element in the whole process of adjudication. It is innate in a court, and is not a subject of a specific grant by the Constitution or by legislation. As soon as a court is established, all its inherent powers adhere and attach to it. Inherent powers of the court are therefore those powers reasonably necessary for the administration of justice in the court.²⁴

It is that power which is itself essential to the very existence of the court as an institution and to its ability to function as an institution – namely an institution charged with the dispensation of justice such as the power to grant an adjourn-

¹⁸ Ibidem, No.8.

¹⁹ Prof. G.C. Nwakoby, *Arbitration and Conciliation Act CAP A18 Laws of The Federation of Nigeria – Call for Amendment*, “Nnamdi Azikiwe University Journal of International Law and Jurisprudence” 2010, p. 2.

²⁰ Judgement of Nigeria’s Court of Appeal of 2nd December 1999, *Oladejo v. Adeyemi*. CA/I/193/95. [2000]. 3 NWLR (Pt.647) 25 at 41 paras F–G.

²¹ Judgement of the Supreme Court of Nigeria of 6th February 2009, *Tanko v. State*. SC.53/2008. [2009] 4 NWLR (Pt.1131) 430 at 457 paras E–G.

²² Judgement of the Supreme Court of Nigeria of 20th July 2018, *Centre for Oil Pollution Watch v. NNPC*. SC.319/2013. [2019]5 NWLR (Pt.1666) SC 518 at 564 paras D–G.

²³ F.G. McKean, *Some Aspects of Judicial Discretion*, “Dickson Law Review” October 1935 to May 1936, No. 40, p. 168.

²⁴ Judgement of the Court of Appeal of Nigeria of 29th April 1999, *Ogwuegbu v. Agomuo* CA/PH/EP/68/1999. [1999] 7 NWLR (Pt.609) 144 at 180 paras G–H.

ment, and so on, in the interest of justice.²⁵ Power to grant an adjournment being a discretionary power²⁶ is a testament that exercise of inherent power is ultimately an exercise of a court's discretion. The inherent power of courts is an almost pure expression of a court's exercise of discretion in that it gives courts the ability to do all things reasonably necessary for the administration of justice.²⁷

Given that exercise of inherent power is an exercise of judicial discretion and **section 6(6) (a) of the 1999 Constitution** extended judicial powers of the court to all inherent powers of the court, judicial discretion is, again, to this extent a judicial power or a part of judicial power. As a result, in this wise also, in fettering judicial discretion **section 4(1) of ACA** also whittles, limits and fetters the court's judicial power in respect thereof.

With respect to **section 4 (2) of the ACA**, in Nigeria, existence of an arbitration agreement does not oust the jurisdiction of Nigerian Courts to entertain a dispute subject to arbitration. To this extent, a court can grant or refuse to grant a stay of proceedings in favour of arbitration. If a court refuses to grant a stay of proceedings in reference to arbitration or no application is made to it in that regard, then that court has the jurisdiction to, and will, determine the dispute to finality and render its judgment therein.²⁸ Refusal to stay proceedings means that the right to arbitrate is lost and the arbitration agreement is brought to an end or may mean that an intended arbitration is ended in consequence whereof the court will determine the dispute as if there was no arbitration agreement *ab inito* between the parties,²⁹ except an appellate court reverses the decision.

Courts do not take up matters by themselves but rather parties refer matters to the courts. Judicial powers, though vested in the courts by the Constitution, are activated when parties refer their matters to the Court provided the subject matter is within the court's jurisdiction. Once the jurisdiction and judicial powers³⁰ of the court are activated, the provision of **section 4(2) of ACA** that an arbitral proceedings

²⁵ *Ibidem*, at 180 para F.

²⁶ Judgement of the Supreme Court of Nigeria of 7th June 1971, *Odusote v.Odusote*. SC.318/1970.[1971] All N.L.R 219at 223; Judgement of the Supreme Court of Nigeria of 25th January 1985, *University of Lagos v. Aigoro*. SC.32/1984.[1985]1 NWLR (Pt.1) 143 at 151, 156.

²⁷ J.C. Dobbins, *The Inherent and Supervisory Power*, "Georgia Law Review" 2019–2020, Vol. 54, p. 411 and 448.

²⁸ Judgement of the Supreme Court of Nigeria of 20th May 1977, *Obi Obembe v. Wemabod Estates Ltd*. SC.466/1975. [1977] 5 S.C (Reprint Edition) 70 at 79–80 lines 20–15.

²⁹ Judgement of Nigeria's Court of Appeal of 24th May 2013, *R.C. O & S Ltd v. Rainbow Ltd*.CA/OW/110/2010.[2014] 5 NWLR (Pt.1401) 516.

³⁰ Judicial power is the authority vested in courts and judges, by statute, to hear and decide cases, including the power to construe and apply the law when controversies arise over what has been done or not done, and to make binding judgments on them. See: A.G. Bryan, *Black's Law Dictionary*, 7th Edition [1999], West Group, p. 851. It has been judicially defined as "the power of the court to decide and pronounce a judgment and carry it into effect between persons or parties who bring a case before it for decision. It is therefore invested in the court for the purpose of determining cases and controversies before it": Judgement of the Supreme Court of Nigeria of 20th July 2018, *Centre for Oil Pollution Watch v. N.N.P.C*. SC.319/2013. [2019]5 NWLR (Pt.1666) SC 518 at 564 paras D–G.

may be continued and an award may be rendered by the arbitral tribunal while the matter is pending in court – particularly where there is no stay of proceedings – amounts to limiting or whittling the judicial powers of the Nigerian Courts or conferring judicial powers on arbitral tribunals which it may exercise *pari passu* with or share with Nigerian Courts in a circumstance within the section’s purview, and thus inconsistent with **sections 6(1) and 6(6)(a) of the 1999 Constitution**.

By virtue of **section 1(1)(3) of 1999 Constitution**,³¹ the Nigerian Constitution is supreme and its provisions have binding force on all authorities and persons throughout the Federal Republic of Nigeria; and if any other law is inconsistent with the provision of the Constitution, the Constitution prevails and that other law shall to the extent of the inconsistency be void. Therefore, **sections 4(1) and (2) of ACA** are void for being inconsistent with **sections 6(1) and 6(6)(a) of the 1999 Constitution**.

Nigerian Courts would disregard any statute that seeks to regulate and obliterate the judicial powers conferred on them by the express provisions of the Constitution. In **Njikonye v. MTN Nig Communication Ltd.**,³² the Nigerian Court of Appeal held that:

The courts would disregard any statute that seeks to regulate and obliterate their judicial powers conferred on them by the express provisions of the Constitution, the Supreme and grund norm of Nigeria. By virtue of the provisions of section 6 of the 1999 Constitution, the judicial powers vested in the various courts created by the Constitution are constantly unassailable. An enactment will therefore be considered opposed to the Constitutional provisions vesting judicial powers in a court if: it has provided for sharing the judicial powers with any other body other than the courts in which it is vested by the Constitution, purported to remove judicial powers vested in the court or redefined it in a way as to whittle it or limit the extent of the power vested or conferred on the court by the Constitution.³³

Therefore, **section 4(2) of ACA** may have intended a situation where the court granted a stay of proceedings, otherwise, any notion that **s. 4(2) of ACA** intends a parallel and simultaneous proceedings between Nigerian Courts and an arbitral tribunal in respect of the same subject matter and the same parties is grossly erroneous; and such interpretation makes **s.4(2) of ACA** inconsistent with **sections 6(1) and 6(6)(a) and (b) of the 1999 Constitution** and thus null and void by reason of **section1(1)(3)** of the same **Constitution**.

Again, **section 4(2) of ACA** means that the court would share its jurisdiction with an arbitral tribunal. Nigerian courts are enjoined once they assume jurisdiction to jeal-

³¹ Constitution of the Federal Republic of Nigeria, 1999 (as amended) CAP. C23, Laws of the Federation of Nigeria, 2010.

³² Judgement of Court of Appeal of Nigeria of 10th May 2007, CA/A/123/2004.[2008] 9 NWLR (Pt.1092) 339 at 369 paras E–G.

³³ Judgement of Nigeria’s Court of Appeal of 10th May 2007, Njikonye v. MTN Nig Communication Ltd. CA/A/123/2004. [2008] 9 NWLR (Pt.1092) 339 at 369 paras E–G.

ously guard their jurisdiction and the Constitution of the Federal Republic of Nigeria.³⁴ In the context, to commence and continue with an arbitration while a suit is pending before a court in respect of the same subject matter and the same parties will amount to foisting a *fait accompli* on the court and as well an act of misconduct on the part of the arbitrator particularly if the arbitrator is aware of the pending suit. Thus, in **Indorama Eleme Petrochemicals Ltd. v. Cutra International Ltd.**,³⁵ the Nigerian Court of Appeal held that:

This clearly shows that both the arbitrator and the respondent were surely aware of the proceeding at the High Court challenging the arbitral proceeding. No party to any proceeding of a competent court is permitted under our law to treat the court with disdain and sabotage the due administration of justice. The arbitrator and the respondent being aware of the suit against them before the High Court are obligated to respect the court. This is apt because when there is an ongoing litigation, nothing, I mean nothing, must be done by the parties to foist a *fait accompli* on the court. From the foregoing therefore, it is my considered view and conclusion that the arbitrator's failure to defer to the court on the issue of jurisdiction... is a misconduct which has vitiated the arbitral award of 20th December, 2016.³⁶

It follows that **section 4 of the ACA** is not an alternative to **section 5** and **section 5** prevails over and supersedes it given that **section 4** is in conflict with **section 5**; it is controlled and limited by **section 5(2)**; its **sub-sections 1 and 2** – that is, **sections 4(1) and (2)** – are inconsistent with **sections 6(1) and 6(6)(a) of the 1999 Constitution of the Federal Republic of Nigeria** (as amended) and are to the extent of the inconsistency null and void by reason of **section 1(1)(3)** of the same **Constitution**. Therefore, where there is an arbitration agreement, **section 4 of ACA** does not provide an alternative means by which a party can apply for a stay from Nigerian courts. Thus, under Nigerian law, **section 4 of the ACA** is inapplicable; a party to a suit which its subject matter is subject to arbitration must, if it still wants to arbitrate, apply for a stay under **section 5 of ACA** and meet the requirements imposed by that section.

4. PROCEDURAL STEPS FOR ENFORCEMENT UNDER SECTION 5 OF ACA

As is shown above, stay of proceedings pending arbitration in Nigeria is governed by **section 5 of the ACA** despite the existence of section 4 of the **ACA**. Grant of stay of proceedings under **section 5 of ACA** is not as a matter of course. In order to

³⁴ Judgement of the Supreme Court of Nigeria of 24th January 2014, Okorochoa v. PDP. SC.445/2012. [2014] 57 NSCQR 272.

³⁵ Judgement of Nigeria's Court of Appeal of 20th May 2020, CA/A/115/2019.LOR (20/05/2020) CA.

³⁶ Judgement of Nigeria's Court of Appeal of 20th May 2020, Indorama Eleme Petrochemicals Ltd v. Cutra International Ltd.CA/A/115/2019. LOR (20/05/2020) CA.

be successful, a party seeking to enforce an arbitration agreement under **section 5 of ACA** should take the following procedural steps:

- a. promptly, at an early stage of the proceedings, file a motion for stay of proceedings and reference to arbitration – any delay in making the application amounts to waiving the right to arbitrate³⁷;
- b. the party must not make any other application whatsoever or take any step in proceedings³⁸;
- c. the party must show by its affidavit evidence that it was at the time when the action was commenced and still remains ready and willing to do all things necessary for the proper conduct of the arbitration.³⁹ This will suffice if the party deposes to this in its affidavit in support of the application except this deposition is challenged or controverted through a counter affidavit by the Respondent(s). In this connection, in **Mekwunye v. Lotus Capital Ltd. & Ors**,⁴⁰ the Court of Appeal held thus:

In the instant case, just as in **UBA v. Trident Consulting Limited** (supra), at page 259 of the record of appeal, the Applicant/1st Respondent herein deposed at paragraph 8 of its application for stay as follows:

“The 1st Defendant/Applicant confirms its willingness to participate in arbitration proceedings in respect of any alleged dispute arising out of or pursuant to the **Telecoms Private Equity Investment Agreement**.” The above deposition was not countered by the Appellant in his Counter Affidavit found at pages 309 to 311 of the record of appeal. By the reasoning expressed in **UBA v. Trident Consulting Limited** (supra), the above deposition is not enough, the 1st Respondent is still required to present documentary evidence in support. Considering the circumstances of the instant case, I am unable to subscribe to the reasoning in the light of the express provisions of Section 5(2) of the Act. Contrariwise, it is my humble view that unless such deposition is controverted by the adverse party, a Court is at liberty to act upon deposition by an applicant that he is willing and ready to ensure that the arbitration is properly

³⁷ Failure to apply, or failure to apply promptly, for stay of proceedings and reference to arbitration amounts to waiver of the right to arbitrate and submission to the jurisdiction of the court: Judgement of Nigeria’s Court of Appeal of 7th December 2017, *Federal Ministry of Health v. Dascon*. CA/Y/22/2016. (Nig) Ltd. [2019] 3 NWLR (Pt.1658) 127 at 139–140 paras G–B; Judgement of the Supreme Court of Nigeria of 20th May 1977, *Obi Obembe v. Wemabod Estates Ltd*. SC.466/1975. [1977] 5 SC (Reprint Edition) 70 at 80; Judgement of the Supreme Court of Nigeria of 15th June 1990, *K.S.U.D. B. v. Fanz Construction Ltd*. SC.45/1988. [1990] 4 NWLR (Pt.142) 1. Nigerian courts tilt towards ensuring strict compliance with section 5(1) of the Act, particularly as to the time of the conduct that demonstrates the intention to submit to arbitration. In this regard, a party who intends to arbitrate the dispute is expected to apply for stay of proceedings after appearance, but before taking any other step in the proceedings: J.N.M. Mbadugha, *Principles and Practice of Commercial Arbitration...*, p. 84, paragraph 1.

³⁸ Judgement of the Supreme Court of Nigeria of 20th May 1977, *Obi Obembe v. Wemabod Estates Ltd*. SC.466/1975. [1977] 5 S.C. (Reprint Edition) 70 at 79–80, Lines 20–15.

³⁹ Arbitration and Conciliation Act, CAP A.18 Laws of the Federation of Nigeria, p. 5 (2).

⁴⁰ Judgement of Nigeria’s Court of Appeal of 20th April 2018, *CA/L/1349/2016*, [2018] LPELR – 45546 (CA).

conducted, thereby fulfilling the requirement in Section 5(2)(b). I totally agree that the reasoning in **UBA v. Trident Consulting Limited (supra)** is only potent and tenable in instances where the Applicant's deposition in the Affidavit in support of the Application for stay is challenged and/or contradicted by the Respondent. In such cases, it will be necessary for the Applicant to provide further evidence in support of his deposition in that regard which is not the case in the instant appeal⁴¹;

- d. however, if the deposition, as stated above, is challenged the party should file a further affidavit in support of the application and therein show the steps he has taken or intends to take for the proper conduct of arbitration⁴²; and the party fulfils this condition by notifying the other party in writing of his intention of referring the matter to arbitration and by proposing therein an arbitrator or arbitrators for the arbitration.⁴³ Although a party will not lose anything if in his affidavit in support of the application for stay he deposes the steps he has taken or intends to take for proper conduct of the arbitration but rather it will obviate the need of, subsequently, filing a further affidavit in respect of this point.

5. CONCLUSION

In Nigeria, existence of an arbitration agreement does not oust the jurisdiction of Nigerian Courts to entertain a dispute subject to arbitration. To this extent, a court can grant or refuse to grant a stay of proceedings in favour of arbitration. By a necessary implication, this means that if a court before which a matter subject to arbitration is brought refused to stay proceedings that arbitration can no longer be commenced or continued in respect thereof or an award rendered therein. Refusal to stay proceedings in the circumstance means that the right to arbitrate is lost and brings the arbitration agreement to an end or may mean that the intended arbitration is ended, in consequence whereof the court will determine the dispute as if there was no arbitration agreement *ab initio* between the parties,⁴⁴ except an appellate court reverses the decision.

Courts do not take up matters by themselves but rather parties refer matters to the court. Judicial powers, though vested in the courts by the Constitution, are activated when parties refer their matters to the Court provided the subject matter is within the court's jurisdiction. Once the jurisdiction and judicial powers⁴⁵ of the court are activated, the provision of **section 4(2) of ACA** that an arbitral proceedings

⁴¹ Judgement of Nigeria's Court of Appeal of 20th April 2018, *Mekwunye v. Lotus Capital Ltd & Ors.* CA/L/1349/2016. [2018] LPELR – 45546 (CA)66–67.

⁴² Judgement of Nigeria's Court of Appeal of 2nd July 2003, *M.V Panormos Bay v. Olam Nig PLC.* CA/L/243/2000. [2004] 5 NWLR (Pt.865) 1 at 16.

⁴³ Judgement of Nigeria's Court of Appeal of 15th March 2013, *UBA v. Trident Consulting Ltd.* CA/L/103/2010. [2013] 4 CLRN 119.

⁴⁴ Judgement of Nigeria's Court of Appeal of 24th May, 2013, *R.C. O & S Ltd v. Rainbowed Ltd.* CA/OW/110/2010. [2014] 5 NWLR (Pt.1401) 516.

⁴⁵ *Ibidem*, No. 8.

may be continued and an award may be rendered by the arbitral tribunal while the matter is pending in court – particularly where there is no stay of proceedings – amounts to limiting or whittling the judicial powers of the Nigerian Courts or conferring judicial powers on arbitral tribunals which it may exercise *pari passu* with or share with Nigerian Courts in a circumstance within the section’s purview, and thus inconsistent with **sections 6(1) and 6(6)(a) of Nigeria’s 1999 Constitution**.

By virtue of **section 1(1)(3) of 1999 Constitution**, the Nigerian Constitution is supreme and its provisions have binding force on all authorities and persons throughout the Federal Republic of Nigeria; and if any other law is inconsistent with the provision of the Constitution, the Constitution prevails and that other law shall to the extent of the inconsistency be void. Therefore, **sections 4(1) and (2) of ACA** are void for being inconsistent with **sections 6(1) and 6(6)(a) of the 1999 Constitution**.

Section 4(1) of the ACA is in conflict with its **section 5(1)** and thus **section 5** prevails over and supersedes by reason of the accepted cannon of construction that where there is a conflict between two provisions of an Act the later provision prevails over the former; **section 4** has been judicially held to be limited and controlled by **section 5**⁴⁶ and to this extent **section 5** still supersedes **section 4**.

It follows that **section 4 of the ACA** is not an alternative to **section 5** and **section 5** prevails over and supersedes it given that **section 4** is in conflict with **section 5**; it is controlled and limited by **section 5(2)**; its **sub-sections 1 and 2** – that is, **sections 4(1) and (2)** – are inconsistent with **section 6(1) and 6(6)(a) of the 1999 Constitution of the Federal Republic of Nigeria** (as amended) and are to the extent of the inconsistency null and void by reason of **section 1(1)(3)** of the same **Constitution**. Therefore, **section 4 of the ACA** is inapplicable. As a result, the only option available to a party who intends to arbitrate in the face of breach of an arbitration agreement by litigation is to promptly apply under **section 5 of the ACA** for stay of proceedings and reference to arbitration and meet the requirements imposed by the section.

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⁴⁶ *Ibidem*, No. 42.

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ENFORCEABILITY OF ARBITRATION AGREEMENTS – THE INTERPLAY BETWEEN SECTIONS 4 AND 5 OF NIGERIA'S ARBITRATION AND CONCILIATION ACT, 2004

Summary

This article presents the enforceability of arbitration agreements – the interplay between sections 4 and 5 of Nigeria's Arbitration and Conciliation Act, 2004 (ACA). The following issues are discussed: whether given the unique and distinct but related provisions of sections 4 and 5 of ACA dealing with the same subject matter, they are in conflict, could be applied in the alternative or simultaneously or whether one supersedes the other or is inapplicable; whether section 4 of ACA amounts to limiting or controlling the constitutionally vested judicial powers of the courts or the courts sharing their judicial powers with arbitral tribunals and is therefore null and void by reason of sections 1(1)(3) of the Nigeria's 1999 Constitution; and the procedural steps for enforcement under section 5 of ACA.

Using the doctrinal research method vis-a-vis primary sources the author concludes that section 5 of ACA supersedes its section 4; section 4 is not an alternative to section 5; sections 4(1) and (2) of the ACA by whittling or limiting judicial powers of the courts are inconsistent with sections 6(1) and 6(6) (a) of the 1999 Constitution of the Federal Republic of Nigeria (as amended) and thus are null by reason of section 1(1) (3) of the same 1999 Constitution and in consequence inapplicable; that Nigerian courts disregard any statute that seeks to limit or whittle or regulate and obliterate the judicial powers conferred on them by the Constitution

or that has provided for sharing of their judicial powers with any other body other than the courts in which it is invested by the Constitution.

Key words: Arbitration, Enforceability of arbitration agreements, taking steps in proceedings, stay of proceedings, judicial discretion, judicial power, waiver of the right to arbitrate, sections 4 and 5 of Arbitration and Conciliation Act

WYKONALNOŚĆ POROZUMIEŃ ARBITRAŻOWYCH – WZAJEMNE ODDZIAŁYWANIE ROZDZIAŁÓW 4 ORAZ 5 NIGERYJSKIEJ USTAWY O ARBITRAŻU I POSTĘPOWANIU ROZJEMCZYM Z 2004 ROKU

Streszczenie

Niniejszy artykuł przedstawia kwestię wykonalności porozumień arbitrażowych – wzajemnego oddziaływania rozdziałów 4 i 5 nigeryjskiej Ustawy o Arbitrażu i Postępowaniu Rozjemczym z 2004 roku (ACA). Autor omawia następujące zagadnienia: czy w przypadku unikalnych i odmiennych, ale pokrewnych przepisów rozdziałów 4 i 5 ACA dotyczących tych samych zagadnień są one w sprzeczności, mogą być stosowane alternatywnie bądź równocześnie, czy też jeden przepis wypiera drugi lub jest niemożliwy do zastosowania; czy rozdział 4 ACA oznacza ograniczenie lub kontrolę władzy sądowiczej powierzonej sądom przez Konstytucję, czy też związku z tym dzielenie przez sądy władzy sądowiczej z trybunałami arbitrażowymi jest nieprawomocne na podstawie rozdziału 1(1)(3) tej samej Konstytucji Nigerii z 1999 roku; oraz kroki proceduralne w celu wdrożenia rozdziału 5 ACA.

Stosując metodę badań doktrynalnych dotyczących źródeł pierwotnych, autor wyciąga wnioski, że rozdział 5 ACA wypiera rozdział 4; rozdział 4 nie jest alternatywny w stosunku do rozdziału 5; rozdziały 4(1) i (2) ACA, uszczuplając lub ograniczając władzę sądowiczą sądów, pozostają w sprzeczności z rozdziałami 6(1) oraz 6(6) Konstytucji Federalnej Republiki Nigerii z 1999 roku (z późniejszymi zmianami), a zatem są nieprawomocne na podstawie rozdziału 1(1)(3) tej samej Konstytucji z 1999 roku i nie mogą mieć zastosowania; że nigeryjskie sądy nie uznają aktów prawnych, które mają na celu ograniczyć, uszczuplić lub regulować i skasować władzę sądowiczą przyznaną przez Konstytucję lub stanowią o dzieleniu władzy sądowiczej z jakimikolwiek ciałami innymi niż sądy, którym Konstytucja przyznała tę władzę.

Słowa kluczowe: arbitraż, wykonalność porozumień arbitrażowych, podejmowanie kroków w postępowaniu, zawieszenie postępowania, niezależność sędziowska, władza sądowicza, zrzeczenie się prawa do rozstrzygnięcia, rozdziały 4 i 5 nigeryjskiej Ustawy o Arbitrażu i Postępowaniu Rozjemczym

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