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Judicial Support for Arbitration in Nigeria: On Interpretation of Aspects of Nigeria's Arbitration and Conciliation Act

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Abstract

The quality of judicial support and respect for the principle of minimum intervention are crucial factors in assessing whether a jurisdiction is attractive for arbitration. While there have been efforts to present Nigeria as an arbitration-friendly jurisdiction and an attractive arbitration venue, questions remain about the adequacy, effectiveness and certainty of legal rules concerning arbitration in Nigeria. There are also questions about the quality and efficiency of judicial support for arbitration in light of some judicial decisions affecting arbitration that have generated controversy. Through a careful analysis of key statutory provisions and judicial decisions, this article analyses support for arbitration in Nigeria in respect of selected topics, including party autonomy, upholding arbitration agreements (especially concerning the stay of judicial proceedings), the stay of arbitration proceedings and third party intervention. The article identifies scope for improvement in statutory and judicial approaches. It makes suggestions concerning both judicial approaches and reform of the statutory regimes.

Keywords
Judicial support, arbitration, Nigeria

INTRODUCTION

Some of the recent decisions of Nigeria's highest courts have highlighted the extent to which the Nigerian judiciary supports commercial arbitration. They have also focused attention on whether Nigeria is an "arbitration-friendly jurisdiction". While some of the decisions have been commended as indicating a favourable disposition towards arbitration, others have raised eyebrows and led to expressions of concern[1] about the extent and quality of judicial support for arbitration[2] in Nigeria.

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1 J Wilson and O Grazebrook "Nigerian Court of Appeal allows third party to challenge arbitration award" (17 February 2015), available at: <https://www.insideenergyandenvironment.com/2015/02/nigerian-court-of-appeal-allows-third-party-to-challenge-arbitration-award/> (last accessed 6 February 2018); A Ross "Nigerian

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This article explores the scope and quality of judicial support for arbitration in Nigeria through an examination of judicial attitudes to a number of issues important to both arbitration and the parties to an arbitration agreement. The issues considered include party autonomy and upholding an arbitration agreement (particularly in relation to the stay of judicial proceedings), the stay of arbitration proceedings and third party challenges to arbitration proceedings.[3] The article provides a careful analysis of important Nigerian judicial decisions in light of extant legislation and underlying legal principles. It raises some questions about the interpretation and application of aspects of the Arbitration and Conciliation Act (ACA), which remains Nigeria's principal law on arbitration.[4]

The ACA draws inspiration from the UNCITRAL Model Law on International Commercial Arbitration of 1985 (Model Law)[5] and similarities between some of the provisions of the two instruments are clear. The Model Law contains provisions that enable the courts to assist arbitral tribunals on some matters relating to arbitral proceedings and for judicial intervention in limited circumstances. On the other hand, concerns have often been expressed as to whether court intervention in the arbitral process could amount to unwarranted interference.

The ACA also reflects the ability of the Nigerian courts to assist the arbitral process and to intervene in limited circumstances, and Nigerian courts have not been exempt from charges that some forms of judicial intervention concerning arbitration amount to unwarranted interference. Accordingly, the article also addresses the risk of the Nigerian courts interfering unduly

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judgment paves way for third-party challenges to awards?" (6 January 2015) *Global Arbitration Review*, available at: <http://globalarbitrationreview.com/news/article/33282/nigerian-judgment-paves-third-party-challenges-awards> (last accessed 6 February 2018).

2 It is generally accepted that the quality of judicial support and respect for the principle of minimum intervention are crucial factors in assessing whether a particular jurisdiction is attractive for arbitration. See for example, Justice J Allsop "Judicial support of arbitration" (paper presented at the APRAG 10th anniversary conference, Melbourne, 28 March 2014), available at: <http://www.austlii.edu.au/au/journals/FedJSchol/2014/5.html> (last accessed 6 February 2018).

3 Other aspects of judicial support for arbitration outside the scope of this article include, for example, the appointment of arbitrators, interim measures and the enforcement of awards. See also E Onyema (ed) "Rethinking the role of courts and judges in supporting arbitration in Africa" (paper delivered at School of Oriental and African Studies Arbitration in Africa conference, Lagos, 22–24 June 2016), available at: <http://eprints.soas.ac.uk/22727/> (last accessed 6 February 2018).

4 The Arbitration and Conciliation Act 1988 (a federal law applicable throughout Nigeria) remains the principal piece of Nigerian arbitration legislation. It is now considered dated but efforts to replace it are currently stultified in the legislative process. One constituent state, Lagos, has enacted more modern arbitration legislation, but there is ongoing controversy as to whether state arbitration legislation can be validly invoked in respect of international commercial arbitration.

5 The act has not been updated to take account of subsequent revisions to the Model Law.

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with arbitration, possibly as a result of an over-protective approach to the jurisdiction of the courts.

The article starts by exploring two preliminary matters of interpretation concerning arbitration legislation in Nigeria: party autonomy in light of the existence of federal and state legislation on arbitration; and the differentiation between commercial and customary arbitration. The article suggests alternative approaches to interpreting some of the provisions of the ACA and regarding attempts to reform and replace the act.

THE "LEX ARBITRI" AND PARTY AUTONOMY

The concept of party autonomy underlies arbitration as a whole and is reflected at various stages in the arbitration process. First, arbitration is a private consensual arrangement for resolving disputes outside the judicial process. Accordingly, the parties' ability to give such an arrangement binding legal effect must derive from an established legal basis and recognized doctrine. The widely accepted concept of party autonomy provides an acceptable basis for recognizing the right of disputants to agree to resolve disputes outside judicial processes.[6]

Crucial considerations for parties choosing to resolve commercial disputes through arbitration are the possibility of and facility for enforcing the resulting arbitral award. The recognition and enforcement of an arbitral award depend in turn on acceptance of the legal validity of the arbitration proceedings. It follows that an arbitration process needs to be anchored to a legal system whose ability to confer validity on the proceedings is recognized,[7] at least in the place(s) where enforcement of the award is sought. Generally, the law or legal system that provides the overarching background for arbitration proceedings, the *lex arbitri*,[8] is taken to be the law of the place where the arbitration has its "seat".[9] As the parties are entitled to choose the place for arbitration, it follows that they are able, albeit if indirectly, to select the *lex arbitri*.

Ordinarily, the selection of Nigeria as the place of arbitration would result in the conclusion that the *lex arbitri* is Nigerian arbitration law. However, as

6 Concerns typically expressed in the past that an arbitration agreement amounts to an attempt to "ouster" the courts' jurisdiction now seem outdated. See for example, R Goode "The role of the lex loci arbitri in international commercial arbitration" (2001) *Arbitration International* 19 at 20.

7 It has been noted that even "delocalized arbitration" is not independent of *any* legal order: J Paulsson "Arbitration in three dimensions" (2011) 60/2 *International and Comparative Law Quarterly* 291 at 298; Goode, id at 29.

8 This is also sometimes referred to as the "governing" or "curial" law.

9 Technically, it is possible to separate the law of the place of arbitration (*lex loci arbitri*) from the law governing arbitration (*lex arbitri*) to the extent that it is acceptable for the governing law of arbitration to be different, or arbitration proceedings "delocalized", from the law of the "seat" of the arbitration.

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Nigeria is a federation, there is a spate of arbitration legislation that, potentially, can be invoked as the *lex arbitri* for arbitration held in Nigeria. Clarity may be enhanced if the parties select a particular place or state in Nigeria as the "seat" of the arbitration. Ordinarily, the *lex arbitri* would be the arbitration regime applicable in that place. This initially apparent simplicity is complicated by the fact that the relationship between federal and state arbitration legislation has not been satisfactorily clarified by the courts and has generated uncertainty.

The ACA purports to apply throughout Nigeria and was intended "to provide a unified legal frame work".[10] The question arises whether a state which is the place of an arbitration in Nigeria can make its own arbitration law applicable as the *lex arbitri*. This question has become significant since Lagos State, Nigeria's largest commercial centre and the most likely to attract international arbitration, enacted a new arbitration law (Lagos State Law),[11] rivalling the ACA.

The decision of the Nigerian Court of Appeal in *Compagnie Générale de Géophysique v Dr Jackson D Etuk* (*Etuk*)[12] suggested that, with the ACA, the federal legislature had covered the whole field of arbitration and that the ACA prevails over state arbitration statutes, which are null and void to the extent of any inconsistency with the ACA. More recently, in *Stabilini Visinoni v Mallinsons & Partners*,[13] the Court of Appeal seemed to resile from that approach when it suggested that it might be possible for arbitration parties to select which, as between the ACA and state arbitration legislation, should be the *lex arbitri*.

The uncertainty surrounding whether perceived progressive state arbitration legislation can be invoked in respect of international commercial arbitration or whether such proceedings must be subjected to the dated ACA has the potential to deter parties contemplating arbitration in Nigeria. Inevitably, the final settlement of this controversy is a matter for the courts, but an approach that affirms party autonomy and respects the parties' right to select the *lex arbitri* is preferable and more amenable to further the aspiration to present Nigeria as a viable venue and an arbitration-friendly jurisdiction. This approach leaves open the possibility for parties contemplating international commercial arbitration in Nigeria to select between federal legislation and alternative state legislation, especially the Lagos State Law. It has been argued that this approach is consistent with the Nigerian Constitution and the distribution of legislative competence between federal and state legislatures.[14] It has also been contended that, in light of extant judicial authority, the doctrine

10 ACA, preamble.

11 Lagos State Arbitration Law No 18, 2009.

12 [2004] 1 NWLR (pt 853) 20.

13 [2014] 12 NWLR (pt 1420) 134.

14 'G Bamodu "Legislative competence over arbitration in Nigeria: Towards resolving the constitutional controversy" (2016) 19/1 *International Arbitration Law Review* 1.

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of covering the field invoked by the Court of Appeal in *Etuk* is inappropriate for settling the issue of legislative competence over arbitration in Nigeria.[15]

This discussion has assumed that the ACA will remain the relevant federal law for some time. In the longer term, the more desirable course is that the replacement of the ACA be drafted in a manner maximizing party autonomy without necessarily jeopardizing the harmonization of arbitration law in Nigeria. The replacement legislation could be made available nationwide, still leaving the parties with the option to choose a state arbitration law.[16]

COMMERCIAL ARBITRATION VERSUS CUSTOMARY ARBITRATION

Nigerian arbitration legislation has historically been premised on a western rather than indigenous conception of arbitration. The earliest arbitration statutes were based on English legislation and contemplated arbitration from the perspective of English statutory and common law.[17] The ACA focuses on commercial arbitration and expressly defines arbitration to mean "a commercial arbitration whether or not administered by a permanent arbitral institution".[18] In addition, the act applies to both domestic and international commercial arbitration.[19] In contrast, the Lagos State Law does not seem to be confined to commercial arbitration and seems to contemplate other forms of arbitration.

Concern is sometimes expressed that legislative and judicial attitudes towards arbitration tend to have a subjugating effect on indigenous methods of dispute settlement categorized as "customary arbitration".[20] It was commented recently that "reliance is placed on the parameters of modern arbitration in the determination of a valid customary arbitration award in Nigeria".[21] One widely held notion of customary arbitration perceives it as referring

15 Ibid. See also 'G Bamodu "A field not covered: Arbitration and the Nigerian Constitution" (2016) 2 *Gravitas Review of Business and Property Law* 36.

16 Compare with Lagos State Law, sec 2.

17 See the old Arbitration Ordinance 1914, later cap 13 Laws of the Federation of Nigeria and Lagos 1958.

18 ACA, sec 57.

19 Part I of the act contains provisions concerning arbitration generally, while part III contains additional provisions concerning international commercial arbitration.

20 Although some commentators have expressed reservations about the appropriateness of the use of the term "arbitration" for forms of traditional indigenous dispute resolution in Africa, the expression "customary arbitration" is used widely in both literature and judicial decisions. On the appropriateness of the appellation "arbitration", which may carry particular common law or modern connotations, in relation to customary forms of dispute settlement, see AN Allott "Customary 'arbitration' in Nigeria: A comment on *Agu v Ikewibe*" (1998) 42 *Journal of African Law* 231.

21 MM Akanbi, LA Abdulrauf and AA Daibu "Customary arbitration in Nigeria: A review of extant judicial parameters and the need for paradigm shift" (2015) 6/1 *Afe Babalola University Journal of Sustainable Development Law and Policy* 199 at 199.

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disputes to chiefs or elders for settlement.[22] It has been noted however that the reality is more complex, as details of practices vary in light of the diversity of indigenous communities and ethnicities.[23]

The ACA does not explicitly exclude customary arbitration from its purview. Strictly, there are two elements required to bring arbitration within the act: that the arbitration agreement is in writing;[24] and that it is a commercial arbitration.[25] The fact that agreements or consent to resolve disputes by indigenous traditional means are not typically recorded in writing would tend to exclude "customary arbitration" from the scope of the ACA. Conversely, if the agreement or consent is in writing, it is prudent to be cautious before assuming that it cannot fall within the scope of the act. In relation to the requirement that the arbitration is commercial, the ACA does not define "commercial arbitration". Instead it defines "commercial" in broad terms as "all relationships of a commercial nature" and gives a number of examples of transactions included in the definition. The examples are mostly transactions unlikely to be contemplated under indigenous customary law, apart from the specific example of "supply or exchange of goods or services".[26] As a sale or exchange of goods is within the definition of "commercial" in the ACA, it follows that an agreement or consent in writing to refer disputes concerning a simple sale to arbitration would prima facie fall under the act. It is not certain that the mere fact that the resolution of the dispute is entrusted to chiefs or elders, rather than a formal arbitral tribunal, would on its own be enough to exclude it from the scope of the act.

Notwithstanding the possibility that a written reference of a dispute to chiefs or elders may, in literal terms, fall within the scope of the ACA, it is more realistic to conclude that the act does not truly contemplate the methods of dispute resolution classified as customary arbitration. While there is still some debate, it is generally considered that one element of customary arbitration is that a party to the arbitration can resile from an unfavourable decision of the tribunal,[27] whereas the provisions of the act indicate that arbitration is a process resulting in binding decisions. It is also noteworthy that customary arbitration is not expected to be attended by formalities associated with commercial arbitration on, inter alia, submission of evidence, argument and general procedure, as provided under the ACA.

22 *Agu v Ikewibe* [1991] 3 NWLR (pt 180) 385.

23 See Akanbi et al "Customary arbitration", above at note 21; Allott "Customary 'arbitration'", above at note 20.

24 ACA, sec 1.

25 Id, sec 57(1).

26 Ibid.

27 *Agu v Ikewibe*, above at note 22. On whether it is accurate to hold that parties to "customary arbitration" can resile from an unfavourable conclusion, see VC Igbokwe "The law and practice of customary arbitration in Nigeria: *Agu v Ikewibe* and applicable law issues revisited" (1997) 41 *Journal of African Law* 201. Compare with Allott "Customary 'arbitration'", above at note 20.

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Furthermore, analysis of the provisions of the ACA and consideration of the background and underlying reasons for its enactment lead reasonably to the conclusion that the act is more concerned with disputes arising out of transactions not typically contemplated under traditional customary laws or anticipated for dispute resolution by chiefs or elders. The act mainly contemplates disputes arising out of more formal and complex transactions, including international commercial transactions. The act was, of course, enacted in part to implement Nigeria's international obligations under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention).

The case of *Williams v Williams*,[28] while not specifically addressing or deciding the point as to whether customary arbitration falls under the ACA, provides an insight into the interface of traditional approaches to dispute settlement and arbitration contemplated under the act. The parties reached a "family agreement" over the estate of a deceased prominent person,[29] after what was described as "protracted mediation" chaired by a former justice of the Nigerian Supreme Court. The mediation seemed to have involved family elders, including one person who acted as a witness to the family agreement. The agreement contained a clause that referred disputes connected with it to a sole arbitrator to be appointed under the terms of the ACA. The trial court held that the arbitration clause only related to disputes arising out of the family agreement and not all disputes concerning the estate. The Court of Appeal overruled the lower court and held that the arbitration clause related to all disputes concerning the estate and that judicial proceedings should be stayed in favour of arbitration. As the dispute concerned the distribution of an estate and the validity of a will, it is surprising that neither counsel nor the court considered whether the matter concerned a relationship of a "commercial nature" falling under the ACA.

The concerns about the subjugation of customary arbitration can be addressed by a conscious awareness, on the part of the courts and investigators, of the true nature and purposes of the different forms of dispute resolution. The concern about the possibility of approaching customary arbitration, in both judicial disputes and doctrine, through the lens of western commercial arbitration is legitimate. The courts and commentators need to be more rigorous in ascertaining the true understanding and practices of particular communities on customary dispute resolution and to strive to establish an authentic autochthonous jurisprudence of customary arbitration. It is desirable that the courts demonstrate that judicial support for arbitration also extends to traditional forms of dispute settlement classified as customary arbitration.

28 [2014] 15 NWLR (pt 1430) 213.

29 The dispute related to the estate of the late FRA Williams, who was one of Nigeria's most senior and best known lawyers.

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UPHOLDING THE ARBITRATION AGREEMENT AND STAY OF PROCEEDINGS

A significant element of judicial support for arbitration is the attitude of the courts towards upholding an arbitration agreement and directing the parties to refer a dispute to arbitration as agreed. Often this necessitates consideration of whether a court should stay proceedings commenced before it.

The ACA contains provisions reflecting acceptance of the binding effect of an arbitration agreement and the desire to require the parties to abide by the agreement. First, the act provides that, unless a different intention is expressed, an arbitration agreement is irrevocable except by agreement of the parties or by leave of the court.[30] The act also provides for the severability of the arbitration agreement from the substantive contract of which it forms part. Accordingly, it is provided that a decision by a tribunal that the underlying contract is void does not mean that an arbitration clause in the contract is invalid.[31]

The ACA also limits the extent to which a court can intervene in arbitration proceedings. Section 34 provides that a court shall not intervene in any matter governed by the act except where the act itself provides for intervention. As the objective of the act is to provide a framework "for the fair and efficient settlement of commercial disputes by arbitration …",[32] it follows that the ability of the courts to intervene in arbitration matters should be consistent with the provisions of the act. While it is clear that the ACA aims to support arbitration as a means of commercial dispute settlement, the challenge that has often been highlighted relates to the attitude of the courts on the interpretation and application of the act and a concern about approaches that may hamper the efficacy of arbitration.

Stay of judicial proceedings

There have been instances where the Nigerian courts betrayed a grudging attitude to arbitration through an approach of jealously guarding the court's jurisdiction.[33] Recently, the courts have come to recognize the importance of holding parties to an arbitration agreement bound by that agreement in the absence of any statutory provision or legal requirement compelling the exercise of jurisdiction by the courts. The shift towards an outlook more receptive to arbitration is partly influenced by the provisions of sections 4 and 5 of the ACA. Nevertheless, apparent inconsistency between sections 4 and 5 (which are set out in further detail below) as well as inadequate rigour in

30 ACA, sec 2. See for example *Williams v Williams*, above at note 28.

31 Id, sec 12.

32 Id, preamble.

33 A notorious example is *Panormos Bay v Olam*, discussed later in this article; see note 62 below.

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some judicial decisions still leave question marks about how far the courts have come.

The modern position of the Nigerian courts was set out by the Supreme Court in a unanimous decision in *The Owners of MV Lupex v Nigerian Overseas Chartering & Shipping Ltd* (*MV Lupex*).[34] The court overruled the decisions of the lower courts that had refused to grant the stay of an action commenced by a party who had agreed to arbitration in London, had submitted to the jurisdiction of the arbitral tribunal and had even filed a counterclaim before the tribunal. In the lead judgment, Mohammed JSC summarized the principle thus: "[w]here parties have chosen to determine for themselves that they would refer any of their dispute to arbitration instead of resorting to regular courts a prima facie duty is cast upon the courts to act upon their agreement."[35]

The other members of the court in *MV Lupex* concurred with the lead judgment. In particular, Iguh JSC noted that it was an abuse of process for a party who had already submitted to arbitration to file a suit in respect of the same matter in the absence of a strong, compelling and justifiable reason. He based this conclusion on his reinforcement of the court's general position, stating:

> "… prima facie the general policy of the courts in such circumstances is to hold parties to the bargain into which they had entered although the point must be stressed that this is not an inflexible rule. The court … undoubtedly has a discretion in the matter which, in the ordinary way and in the absence of strong reason to the contrary would be exercised in favour of holding parties to their bargain. It is only where a strong reason to the contrary is established that the court will be disposed to depart from the aforesaid general policy".[36]

While the *MV Lupex* decision confirmed that the courts have a prima facie duty to hold parties to an arbitration agreement bound to their bargain and would normally stay proceedings, the decision left open the possibility that the courts could refuse to stay proceedings if there is a strong and justifiable reason for the refusal. A deeper consideration of the decision raises questions about the proper interpretation and application of sections 4 and 5 of the ACA, which are the provisions that empower the courts to stay proceedings in favour of a reference to arbitration. An incidental question is whether, in light of the courts' approach to sections 4 and 5, Nigeria is fully meeting its obligation under article II.3 of the New York Convention. This article is considered to require the court mandatorily to refer parties to arbitration if the matter before the court is the subject of an arbitration agreement between the parties.

34 (2003) 15 NWLR (pt 844) 469.
35 Id at 488.
36 Id at 490–91.

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A preliminary consideration is the apparent disparity between the provisions of sections 4 and 5 of the ACA, which seemingly both concern the same issue. Section 4(1) provides that, if the action before the court is the subject of an arbitration agreement, the court "shall" stay its proceedings and refer the parties to arbitration at the request of a party, so long as that party makes the request not later than when submitting his first statement on the substance of the dispute. Section 4(2) then provides that arbitration proceedings may commence or continue even while the matter is pending before the courts.

The language used in section 4 suggests an inclination to give priority to arbitration proceedings when there is an arbitration agreement. The use of the word "shall" in section 4(1) also suggests that the intention is that a court *must* stay its proceedings and the only precondition is that the action before the court is the subject of an arbitration agreement. Although there are circumstances when the use of the word "shall" in legislation may simply imply futurity or be merely directory or permissive, the use of "shall" in legislative provisions is more generally regarded as creating an imperative, compelling a mandatory action.[37]

Section 4 of the ACA seems to be based on article 8 of the Model Law.[38] From the drafting approach of the act, it does not appear that the provisions of section 4 are directly intended to implement article II.3 of the New York Convention, even though that provision is reflected in article 8(1) of the Model Law.[39] In one significant respect, section 4(1) of the ACA differs from both article 8(1) of the Model Law and article II.3 of the New York Convention. Whereas both the Model Law and the convention state exceptional circumstances when a court may refuse to grant a stay of proceedings (that is, if the arbitration agreement is null and void, inoperative or incapable of being performed), section 4 of the ACA does not contain this exception. Theoretically, this should make the Nigerian provisions more restrictive in terms of a court's ability to exercise discretion in refusing to grant a stay of proceedings.[40]

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37 *Ifezue v Mbadugha* (1984) 5 SC 79.

38 ACA, sec 4(1) is similar though not identical to the Model Law, art 8(1); and ACA, sec 4(2) is almost identical to the Model Law, art 8(2), except for the substitution of "subsection" and "section" for "paragraph" and "article" respectively and the addition of a few words of clarification.

39 Although the ACA also makes the New York Convention applicable in Nigeria, this is done by incorporating the convention as a schedule to the act and providing that it "shall apply to any award made in Nigeria or in any contracting state": ACA, sec 54.

40 In comparison, English courts consider the English Arbitration Act 1996, sec 9(1) and (4), which reflects the New York Convention, art II.3, to require a mandatory stay of proceedings unless the case falls within the exceptions. See *Joint Stock Company "Aeroflot Russian Airlines" v Berezovsky and Others* [2013] EWCA Civ 784; *Capital Trust Investment Ltd v Radio Design AB* [2002] EWCA Civ 135.

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Apart from requiring the applicant to make the request for a stay of proceedings not later than when submitting its first statement on the substance of the dispute, there are only two requirements under section 4(1) of the ACA: there must be an arbitration agreement; and the "action before the court"[41] must be the subject of the arbitration agreement.[42] Section 4 does not place any other specific obligation on the applicant for a stay of proceedings. The section does not even set the burden of proof regarding who has to show that the action before the court is the subject of an arbitration agreement.[43] It is noteworthy that the provisions of section 4 are directed primarily at the court and its duty concerning a stay of proceedings, the role of the applicant being phrased as a contingency.

Section 5(1) of the ACA is directed at an applicant who desires the court to stay proceedings if the action before it is "with respect to any matter which is the subject of an arbitration agreement".[44] In a sense, the provisions of section 5(1) reiterate the provisions that are conditional for the exercise of duty by the court to stay proceedings under section 4(1). Section 5(1) provides that the applicant can apply[45] to the court to stay proceedings at any time after their appearance and before pleadings or taking any other step in the proceedings.[46] The court must be satisfied that there is an arbitration agreement

41 Under sec 4 it is the *action* that is required to be the subject of an arbitration agreement; this is atypical as it is more usual to limit similar provisions to matters that are the subject of an arbitration agreement. Compare with ACA, sec 5, Lagos State Arbitration Law, sec 6, and the draft Federal Arbitration and Conciliation Bill 2009, sec 5. See also note 44 below.

42 On similar provisions in the English Arbitration Act 1996, sec 9(1), see *Albon v Naza Motors* [2007] EWHC 665 (Ch).

43 Logically, the burden of establishing the threshold for the court to entertain an application for a stay lies on the applicant: *Albon v Naza Motors*, id, para 14. However, the burden of establishing that an arbitration agreement is null and void, as under the Model Law and convention exceptions, falls on the claimant resisting the application: *Downing v Al Tameer* [2002] EWCA Civ 721.

44 Arguably, the contemplated end result is the same as that intended under sec 4, despite the difference in drafting; in other words, judicial proceedings could be stayed if, and possibly to the extent that, the proceedings concern a matter agreed to be referred to arbitration. Compare with *Fulham Football Club (1987) Ltd v Richards and Another* [2011] EWCA Civ 855 and *Lombard North Central plc and Another v GATX Corporation* [2012] EWHC 1067 (Comm).

45 There is a difference, perhaps cosmetic, between secs 4 and 5 in that, while sec 5 requires a party desiring reference to arbitration to "apply to the court" for a stay of proceedings, sec 4 only requires him to "request" a stay of proceedings.

46 Arguably, the timeframe in sec 5 for making an application for a stay of proceedings is less generous than that provided in sec 4. In sec 4 the applicant must make the request "not later than when submitting his first statement on the substance of the dispute"; thus he would be entitled to make the request at the same time as filing a statement of defence. Conversely, an application made under sec 5 at the same time as when filing a statement of defence might be too late as the timeframe is "any time after appearance and before delivering any pleadings or taking any other steps in the proceedings".

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and that the action is in respect of a matter that is the subject of the agreement.

The provisions of section 5 then begin to differ in significant respects from those of section 4. Specifically, section 5(2) goes on to provide that the court "may" stay its proceedings if satisfied of certain conditions. It is noteworthy that, unlike section 4(1) that uses the word "shall", section 5(2) clearly introduces an element of discretion in providing that the court "may"[47] stay its proceedings. The conditions precedent to the exercise of discretion by the court to stay its proceedings are that the court should be 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".[48]

The conditions in section 5(2) go beyond the simple requirement of section 4(1) that the action before the court should be the subject of an arbitration agreement. Further, while section 4 seems to place a mandatory obligation on the court to stay its proceedings, section 5 gives the court a discretionary power. One way of approaching the apparent disparity between sections 4 and 5 of the ACA is to suggest that section 4 applies in respect of international commercial arbitration, while section 5 relates to domestic arbitration. This approach has understandable logic since section 4 seems to be based on article 8 of the Model Law and also reflects article II.3 of the New York Convention. Section 5 on the other hand reflects provisions from Nigeria's historic arbitration statutes, which essentially only address domestic arbitrations.[49] This situation was also reflected in England where, before the Arbitration Act 1996, the 1975 Arbitration Act used the word "shall" in relation to international arbitration while the Arbitration Act 1950 used the word "may" in relation to domestic arbitration.[50]

While the approach that regards sections 4 and 5 as applying to international and domestic arbitration respectively is attractive, the drafting and language of the ACA do not reflect this. Both sections are in part I of the act, which contains provisions relating to arbitration generally, with no specific distinction between international and domestic arbitration. Part III of the act, however, contains *additional* provisions relating to international commercial arbitration. The result is that the provisions in part I apply to both domestic and international arbitration, except where they are modified in respect of the latter by additional provisions in part III. For example, it is rarely

47 However, compare with notes 73 and 74 below.

48 ACA, sec 5(2).

49 See for example Arbitration Ordinance 1914, sec 5, and Arbitration Law of Cross River State 1981, sec 5.

50 The distinction between the mandatory standard of the 1975 act and the discretionary standard of the 1950 act was acknowledged in *Halki Shipping Corporation v Sopex Oils Ltd* [1997] EWCA Civ 3062.

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disputed that section 1, which requires an arbitration agreement to be in writing, applies to both domestic and international commercial arbitration. On the other hand, the provision in section 7 (in part I) of the act that the Nigerian courts have powers to appoint an arbitrator(s) in the event of party default is modified in respect of international commercial arbitration by sections 44 and 54 (in part III), which provide that powers to appoint arbitrators in the event of party default lie with the secretary general of the Permanent Court of Arbitration at The Hague.

The position that section 5 is meant to apply in respect of domestic arbitration, while section 4 is to apply to international commercial arbitration, is also challenged by the fact that the Nigerian courts frequently apply section 5 in respect of what is clearly international commercial arbitration according to the ACA.[51] In *MV Lupex*, both the Court of Appeal and Supreme Court applied the discretionary provisions of section 5 in relation to a dispute concerning international commercial arbitration.[52] It would be better for the apparent discrepancy between the provisions of sections 4 and 5 of the ACA to be addressed fully by the courts, as it cannot simply be attributed to a distinction between domestic and international commercial arbitration. Arguably, the non-resolution of the discrepancy is in part responsible for some of the more questionable decisions of the courts in cases of applications for a stay of proceedings pending arbitration. It appears that the courts tend to overlook the provisions of section 4 and simply apply the discretionary standard under section 5, even in cases concerning international commercial arbitration.

In *MV Lupex*, the Supreme Court did not pay sufficient attention to section 4 and did not compare it with section 5 of the ACA. Mohammed JSC's lead judgment proceeded on the basis that, in accordance with common law decisions since *Heyman v Darwins*[53] and in view of section 5 of the act, the courts have the discretion to grant a stay of proceedings if the matter is the subject of an arbitration agreement.[54] The essence of the conclusion of the lead judgment is captured in the following statement: "[t]he court has power to stay proceedings when an application is filed before it. See section 5 of Arbitration and Conciliation Act …. The power is indeed discretionary …".[55]

The lead judgment in *MV Lupex* did not discuss section 4(1) at all and the only allusion to the section was by way of a quote from a book.[56] In the quoted section of the book, the author also said that the courts have a discretion and that they should normally exercise that discretion in favour of a stay, considering that section 4(2) of the act allows arbitration proceedings to continue

51 See sec 57(2), which reproduces with enhancement the definition of "international commercial arbitration" from the Model Law.

52 Iguh JSC expressly acknowledged that the case concerned international commercial arbitration within the meaning of ACA, sec 57(1) and (2): *MV Lupex*, above at note 34 at 490.

53 (1942) AC 356.

54 *MV Lupex*, above at note 34 at 484.

55 Id at 487.

56 E Akpata *The Nigerian Arbitration Law in Focus* (1997, West African Book Publishers).

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while a matter is pending in court. The other members of the court agreed with the lead judgment and only Iguh JSC provided further comments "in the interest of emphasis".[57]

Iguh JSC's further comments provide interesting points for analysis and comparison. First, the comments made more references to section 4 of the ACA. There was no detailed consideration of section 4, however, or any indication of awareness of an apparent conflict with section 5. Certainly, Iguh JSC also considered the court's power to stay proceedings to be discretionary even in the face of the provisions of section 4(1), considering in particular his statement referring to "the statutory discretion of the court under sections 4 and 5 of the [ACA] for the stay of court proceedings in favour of arbitration".[58] He placed more reliance on section 5 for the court's power to grant a stay of proceedings. While he recognized that "sections 4 and 5 … endow a court … with the power to stay proceedings … in favour of arbitration",[59] he said that the "power of the court to stay such proceedings is exercisable under and by virtue of section 5".[60] In fairness, this supporting judgment does fulfil its intention of emphasis, being more emphatic that the court's discretion should normally be exercised in favour of granting a stay of proceedings and employing language that may suggest a binding obligation. For example, Iguh JSC stated that, "the court is bound to stay the proceedings unless it is satisfied that there is sufficient reason to justify the refusal to refer the dispute to arbitration".[61]

What emerges from *MV Lupex* is that the Supreme Court confirmed that the courts have discretion to stay proceedings pending arbitration and that the discretion will normally be exercised in favour of a stay. While the demonstration of an orientation to support arbitration agreements through the grant of a stay of proceedings is welcome, the omission to address the interpretation and application of section 4(1) of the ACA is disappointing and the apparent assumption that sections 4 and 5 are in harmony seems rather simplistic. On the other hand, the Court of Appeal seemed to acknowledge a friction between sections 4 and 5 in a subsequent case, which generated controversy for other reasons.

The action in *Panormos Bay v Olam* (*Panormos Bay*)[62] concerned a dispute arising out of a contract under which the parties had agreed to arbitration in London. The Court of Appeal applied, inter alia, section 5 of the ACA in upholding the decision of the court below to refuse a stay of proceedings. The court held that section 4 of the ACA is "controlled and limited by section 5(2)".[63] It held that the trial court could not be entitled to order the parties to

57 *MV Lupex*, above at note 34 at 491.
58 Id at 491.
59 Id at 490.
60 Ibid.
61 Ibid.
62 [2004] 5 NWLR (pt 865) 1.
63 Id at 15, lead judgment of Galadima JCA, Ogebe and Muhammad JJCA concurring. The court said that ACA, sec 2 is similarly controlled and limited by sec 5(2).

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go to arbitration, despite finding that there was a subsisting and irrevocable arbitration agreement and that the applicant had not taken a step in the proceedings before making the application. The court ruled that, in the circumstances, the arbitration clause was an invalid attempt to oust the courts' jurisdiction.[64] In addition, the court held that a party applying for a stay of proceedings in an action pending reference to arbitration must support the application by showing in his affidavit documentary evidence of the steps he took or intends to take for the proper conduct of the arbitration; it was not enough for him merely to depose that he was ready and willing to do all things necessary for causing the matter to be decided by arbitration.

Several aspects of the conclusions in *Panormos Bay* are curious and of dubious accuracy. While it is commendable that the court saw and tried to address the difference between sections 4 and 5, the court did not explain how it arrived at the conclusion that section 4 is "controlled and limited by" section 5(2). Neither did it explain how that dubious conclusion disentitled the lower court that accepted the subsistence of an arbitration agreement from ordering a stay, when the applicant had not taken a step in the proceedings. In imposing the condition that an applicant for a stay of proceedings pending arbitration must show the steps he took or intends to take for the conduct of the arbitration *by means of documentary evidence in his affidavit*, the court introduced a formalistic requirement not provided for in section 5 of the ACA and which is more glaringly missing from section 4.

Section 5(1) sets out the basic conditions that an application for a stay must satisfy before it can be entertained by the courts and it was not in issue in *Panormos Bay* that these conditions were met. Additionally, section 5(2) sets out the basis for the court to exercise its discretion on the grant of a stay of proceedings. Under section 5(2), the court should be satisfied that there is no reason why the matter should not be referred to arbitration according to the arbitration agreement, and that the applicant was and remains ready to do all things necessary for the proper conduct of the arbitration.

Strictly, it would in many circumstances be possible for a court to be satisfied about the two requirements in section 5(2) of the ACA without requiring documentary evidence in an affidavit. On the first issue, the question whether the matter should not be referred to arbitration in accordance with the arbitration agreement would in many cases be a question of law. One example is whether the matter is arbitrable under prevailing law, a matter to be addressed by legal argument rather than evidence.

The second condition (which requires that the court should be satisfied as to the applicant's readiness and willingness to do all things necessary for the proper conduct of the arbitration) is also capable of being satisfied without the production of documentary evidence. A deposition in an affidavit to the effect that the applicant is ready and willing to do all things necessary for

64 This part of the decision was based on the controversial Administration of Justice Act 1991, sec 20.

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the proper conduct of arbitration should ordinarily be sufficient to meet the requirements of section 5(2).[65] It bears reiterating that the provision does not require the production of documentary evidence[66] and that the obligation is to show "readiness and willingness" to facilitate the proper conduct of the arbitration. The applicant is not required to show that he has initiated arbitration proceedings or that either party has actually initiated arbitration proceedings.[67] In particular, where the applicant is merely a defendant to a claim advanced by the claimant, it is not for the applicant to commence arbitration. In applying for a stay of judicial proceedings, the applicant essentially argues that the claimant should pursue his claim through arbitration as agreed, that is, that he should have commenced or *should now* commence arbitration.[68]

Considering that the Supreme Court in *MV Lupex* laid down a policy of holding the parties to an arbitration agreement bound by their bargain, with a prima facie disposition to grant a stay of proceedings, the imposition of unduly formalistic requirements in *Panormos Bay* is undesirable. It is noteworthy that even a possible failure of arbitration does not necessarily deprive the party who commenced the action of a judicial remedy. If the court agrees to defer to the parties' choice of arbitration, the suit before the court is not necessarily terminated, as the court is only required to stay its proceedings and not to strike out the suit.[69] It would be possible to apply to the court for the resumption of proceedings should it later become necessary and if legally justifiable.[70]

Although the decision in *Panormos Bay* imposing the requirement of documentary evidence on an applicant for a stay has been followed in one case,[71]

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65 There are examples in Nigerian case law where, consistent with the suggestions here, the courts indicated that a deposition in an affidavit of readiness to facilitate arbitration would be sufficient. See *NPA v Cogefa* (1971) 2 NCLR 44 at 50–51; *Ginscon Construction Company v Amu* suit no FCT/HC/CV/4046/11, Federal Capital Territory (Abuja) High Court ruling of 26 July 2011.

66 Neither sec 4 nor sec 5 of the ACA expressly requires that a request or application to the court to stay proceedings pending arbitration should be made in writing, unlike sec 1, which expressly requires an arbitration agreement to be in writing. Nevertheless, a request or application for a stay of proceedings will invariably be in writing, as it will typically be in the form of a formal motion before the court. However, compare with RM Merkin and L Flannery *Arbitration Act 1996* (2008, Informa) at 40.

67 Compare with UK Supreme Court in *Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP* [2013] UKSC 35, para 23: "A stay is not made conditional upon arbitration being on foot, proposed or brought."

68 The obligation of the applicant to show readiness and willingness relates to the proper conduct of the arbitration. The applicant should not necessarily have to forego his right to challenge questionable aspects of the conduct of the arbitration, for example if the tribunal goes beyond its remit under the terms of the reference. The applicant's duty should be confined to demonstrating readiness to do such things enabling the lawful establishment of the tribunal and undertaking to participate in its lawful processes.

69 *Sino-Afric Agricultural & Industrial Co Ltd v Ministry of Finance Incorporation and Another* [2014] 10 NWLR (pt 1416) 515 at 538.

70 Compare with *Nissan (Nigeria) Ltd v Yaganathan* [2010] 4 NWLR (pt 1183) 135.

71 *UBA v Trident Consulting Ltd* (2013) 4 CLRN 119.

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the discernible trend is that the courts do not tend to insist on the requirement. It is also noteworthy that *Panormos Bay* is widely perceived as aberrational[72] and that the jurisprudence and overall approach of Nigeria's higher courts in recent years have been clearly disposed towards upholding arbitration agreements. Since *MV Lupex*, the overall pattern discernible from the cases is that the courts will normally grant a stay of proceedings at the behest of an applicant; the key condition is often that the courts be satisfied that, at the time the application was made, the applicant had not taken a step in the proceedings other than entering appearance.

An important recent case that reiterates the favourable disposition of the Nigerian courts towards arbitration also raises an interesting point of comparison. While the decision recognized that the word "may" in section 5 of the ACA indicates discretionary power, it also acknowledged that an arbitration agreement providing that disputes "may" be referred to arbitration can create a mandatory obligation to go to arbitration. In *Sino-Afric Agricultural & Industrial Co Ltd v Ministry of Finance Incorporation and Another* (*Sino-Afric*),[73] an arbitration clause provided that either party "may" refer any dispute to arbitration. When one party commenced litigation, the other applied for a stay of proceedings pending the appointment of an arbitrator. In a rigorous and well-reasoned decision, the Court of Appeal held unanimously that, in context, the arbitration agreement created a mandatory obligation to submit to arbitration. The same type of reasoning and conclusion in the lead judgment of Orji-Abadua JCA in that case was later employed by the United Kingdom's Privy Council in *Anzen Ltd and Others v Hermes One Ltd*.[74]

Sino-Afric is important in the particular context of Nigerian jurisprudence and on the attitude of the courts to arbitration for a number of reasons, including its striking contrasts to *Panormos Bay*. First, the court did not require that the arbitration proceedings must have commenced, as the application was for a stay of court proceedings *pending the appointment of an arbitrator*. The court did not demand that the applicant had to show *by documentary evidence* that he was ready and willing to facilitate the proper conduct of the arbitration. Commenting that an arbitration agreement "does not generate the heat of ouster of jurisdiction of the court",[75] the court reiterated the standard jurisprudence that the courts have discretion to stay proceedings under section 5 of the ACA, once they are satisfied of the merits and provided that

72 See F Abbas "Stay of proceedings pending arbitration: A critique of the decision of the Court of Appeal in *UBA v Trident Consulting Ltd*", available at: <http://www.academia.edu/6000412/Stay_of_Proceedings_Pending_Arbitration_A_Critique_of_the_decision_in_UBA_v._Trident_Consulting_Ltd._2013_4_CLRN_119> (last accessed 6 February 2018); O Shasore "Nigeria: Injunctions and protective orders", available at: <https://www.cdr-news.com/categories/nigeria/nigeria:-injunctions-and-protective-orders> (last accessed 6 February 2018).

73 Above at note 69.

74 [2016] UKPC 1.

75 Above at note 69 at 538.

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the defendant has not delivered any pleadings or taken any steps in the proceeding beyond entering appearance.

In a similar vein to *Sino-Afric*, the Court of Appeal in *Onward Enterprises Ltd v MV Matrix* (*Onward Enterprises*)[76] did not demand any requirement of documentary evidence from an applicant for a stay of proceedings pending arbitration. Rather, the court re-emphasized the importance of holding parties to an arbitration agreement to be bound to the agreement, particularly considering the general principles laid down by the Supreme Court in *MV Lupex*. In the wake of *Onward Enterprises*, one commentator has argued that *Panormos Bay* is no longer tenable.[77]

Sino-Afric and *Onward Enterprises* mark a departure from the dubious approach of *Panormos Bay* and better reflect the spirit of the Supreme Court's decision in *MV Lupex* that the court's stated discretion should prima facie be exercised in favour of granting a stay of proceedings in the face of an arbitration agreement. To that extent, the modern attitude of the Nigerian courts towards arbitration agreements is comforting. It is unfortunate, however, that the courts have not really paid close attention to the differences between sections 4 and 5 of the ACA. It is also odd that the courts have not addressed the question of whether, in light of the coexistence of sections 4 and 5 and the tendency of the courts to rely on section 5, Nigeria is in compliance with its obligations under article II.3 of the New York Convention.

It is tempting to suggest that, so long as the ACA remains the applicable federal arbitration legislation, the Supreme Court should revisit the interpretation of section 4 of the act. It is probably safest to accept, with some resignation, that, although the Nigerian courts now have commendable and reasonably well formulated principles concerning the grant of a stay of proceedings pending arbitration, these nevertheless arguably fall short of international obligations or expectations. A more realistic approach would be to expect a better formulation and statutory drafting under the proposed replacement of the ACA.[78]

Stay of arbitral proceedings

The stated position of the Nigerian courts being favourably disposed towards staying judicial proceedings in light of an arbitration agreement has been reinforced in a different and significant respect. The courts have recently had to grapple with a controversial strategy[79] whereby a party applies for an

76 [2010] 2 NWLR (pt 1179) 530.

77 Abbas "Stay of proceedings", above at note 72.

78 The draft Federal Arbitration and Conciliation Bill 2009 omits the discretionary provisions of ACA, sec 5. Compare also with the Lagos State Arbitration Law, sec 6.

79 One commentator described the strategy as "a wholly undesirable practice": O Shasore "Injunctions and protective orders: Commercial arbitration in Nigeria", available at: <http://www.ajumogobiaokeke.com/assets/media/5345aee63d7a47d24601b1d5e6236df0.pdf> (last accessed 22 February 2018).

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injunction to restrain the commencement or continuance of arbitration proceedings.[80] Typically, a party who had agreed to refer disputes to arbitration (and might have started taking part in the arbitration proceedings) would apply to the courts for an injunction restraining the proceedings on the basis that the concerned dispute is not arbitrable or is a matter that is statutorily assigned for adjudication by a particular court or another tribunal. More controversially, there is at least one case where an entity that was not a party to an arbitration agreement or proceedings sought declaratory reliefs from the court as to whether the arbitral tribunal had jurisdiction to try the subject matter of the dispute, which it argued, was a matter in respect of which jurisdiction had been conferred on the Federal High Court.

In *Statoil (Nigeria) Ltd and Another v Nigerian National Petroleum Corporation (NNPC) and Two Others* (*Statoil*),[81] the Court of Appeal set aside an order of the Federal High Court granting an injunction restraining arbitration proceedings on the application of NNPC. Statoil and Texaco on the one hand and NNPC on the other were parties to an agreement that contained a clause referring disputes to arbitration. When a dispute arose, Statoil and Texaco commenced arbitration, while NNPC objected to the tribunal's jurisdiction; NNPC contended that the subject matter was not arbitrable under Nigerian law as it concerned taxation, which it argued was a matter that could only be heard by a tax tribunal. Although NNPC initially agreed that the arbitral tribunal would decide on both its objection and the substantive case, it subsequently and successfully approached the Federal High Court for an injunction to restrain Statoil, Texaco and the arbitration tribunal from continuing the arbitration proceedings. The Court of Appeal set aside the injunction issued by the lower court and held that, in light of section 34 of the ACA, a court cannot intervene in arbitral proceedings except as provided in the act. The court held that the issue of an injunction to restrain arbitral proceedings is not one of the exceptions provided for in the act and that the act contains no provision that allows a court to terminate arbitration proceedings prematurely. The Court of Appeal also reiterated that, where parties have chosen to refer disputes to arbitration, the courts have a prima facie duty to act upon the agreement.

In *Nigerian Agip Exploration Limited v Nigerian National Petroleum Corporation and Oando Oil 125 and 134 Ltd* (*Agip*),[82] the agreement between the parties also included an arbitration clause. NNPC participated in the arbitral proceedings until the tribunal issued a partial award on liability pending a further award on damages. NNPC then applied to the Federal High Court to set

80 Part of the blame for this ethically questionable strategy has been attributed to approaches adopted by counsel; see A Akinbote "Arbitration in Africa: The state of arbitration in Nigeria" (paper presented at the 2008 Colloquium of the Association for the Promotion of Arbitration in Africa, Yaoundé, 14–15 January 2008).

81 [2014] 14 NWLR (pt 1373) 1.

82 Court of Appeal no CA/A/628/2011, 25 February 2014.

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aside the partial award and, crucially, to restrain both the tribunal and the other parties from taking any further action in relation to the arbitration proceedings, including reconstituting the tribunal for the purposes of continuing the arbitration and making a final award. Once again, the Federal High Court granted orders restraining the parties and the tribunal from continuing the arbitration proceedings. The Court of Appeal overturned the orders, holding that the ACA does not permit the issue of an injunction to restrain arbitral proceedings.

The decisions of the Court of Appeal in *Statoil* and *Agip* were widely heralded by commentators and seen as confirming Nigeria as an "arbitration-friendly jurisdiction".[83] Nevertheless, although these two decisions reinforce the position that the courts will not generally restrain arbitral proceedings at the behest of a party to an arbitration agreement, they do not mean that the courts will necessarily relinquish jurisdiction when an action is commenced before them in respect of a dispute that is claimed to be subject to such an agreement. Instances could include that there is a dispute as to the existence of the agreement or that it is contrary to public policy or contravenes extant legislation,[84] or even possibly that the arbitration agreement is no longer applicable due, for example, to an accepted repudiation.[85] Another possible instance, as in the example below, could be that the court action is commenced by an entity that is not a party to the arbitration agreement.

Third party challenge to arbitration proceedings

While the *Statoil* and *Agip* cases arose from a challenge to arbitration proceedings by a party to the relevant arbitration agreement, a recent case has demonstrated that different considerations may apply where the challenge to arbitration proceedings is made by a person who is not a party to the agreement but who claims that his interests may be affected by the outcome of the proceedings.

In *Statoil Nigeria Ltd and Another v Federal Inland Revenue Service and Another* (*Statoil v FIRS*),[86] a contract between Statoil and Texaco on the one hand and

83 See UH Azikiwe and F Onyia "A review of recent Nigerian Court of Appeal decisions" (16 October 2014) *Global Arbitration Review*, available at: <https://globalarbitrationreview.com/insight/the-european-middle-eastern-and-african-arbitration-review-2015/1036886/nigeria> (last accessed 22 February 2018); BJ Fagbohunlu et al "The principle of limited court intervention survives in Nigeria … But how far will the courts go?" (2 August 2013) *Kluwer Arbitration Blog*, available at: <http://kluwerarbitrationblog.com/blog/2013/08/02/the-principle-of-limited-court-intervention-survives-in-nigeria-but-how-far-will-the-courts-go/> (last accessed 6 February 2018).

84 See for example *Shell Petroleum Development Company of Nigeria Limited v Crestar Integrated Natural Resources Limited* Court of Appeal no CA/L/331M/2015, delivered 21 December 2015.

85 *Downing v Al Tameer*, above at note 43, para 34: "it is open to the court to decide that there is no arbitration agreement for whatever reason and therefore to dismiss the application to stay".

86 (2014) LPELR-23144.

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NNPC on the other contained an arbitration clause and, following a dispute, arbitration was commenced under the ACA. The Federal Inland Revenue Service (FIRS), which was not a party to the contract, arbitration agreement or arbitral proceedings, commenced an action in the Federal High Court seeking declaratory reliefs, including whether the arbitral tribunal had jurisdiction to entertain a matter dealing with taxation, especially as an award might impinge on FIRS's right to assess and collect tax and generate revenue for the Federal Government of Nigeria. It also sought an order restraining the parties to the arbitration from continuing the proceedings.

FIRS's interest in the matter was that the dispute between the parties concerned whether tax returns prepared by Statoil and Texaco or NNPC would be filed with FIRS, which had the statutory duty and authority to assess and collect tax. FIRS's decision to commence the action was based on its view that the issues in the dispute between the parties before the arbitral tribunal were basically issues and controversies arising from the differing interpretations of the Petroleum Profit Tax Act and other tax legislation and that these issues, disputes and controversies are within the Federal High Court's jurisdiction. The court dismissed both a request to stay its proceedings and objections to its jurisdiction by the oil companies. In a judgment that generated some consternation,[87] the Court of Appeal upheld the decision of the lower court.

It appears that the Court of Appeal's decision hinged on whether FIRS, which was not a party to the arbitration agreement or proceedings, had locus standi to commence an action seeking declaratory remedies when it alleged that an award made under the agreement and proceedings would infringe constitutional provisions or other laws, or impede FIRS's constitutional and statutory functions or powers. The court noted that court rules[88] confer an entitlement to seek declaratory reliefs on a person who claims, inter alia, a legal or equitable right in a case where determining whether that person is entitled to the right depends upon the construction of an enactment. It held that Statoil and Texaco had made a tacit admission that FIRS had locus standi by accepting in their affidavit that a favourable arbitral award would direct that it is the tax return prepared by them that would have to be filed with FIRS.

The Court of Appeal held that a third party like FIRS should not be debarred of declaratory remedies in respect of an arbitration agreement and

87 F Adekoya "Third party rights: Arbitrability, locus standi and precipate [sic] action in arbitration proceedings in Nigeria" (10 December 2014) *African International Legal Awareness Blog*, available at: <http://blogaila.com/2014/12/10/third-party-rights-arbitrability-locus-standi-and-precipate-action-in-arbitration-proceedings-in-nigeria-by-funke-adekoya-san/> (last accessed 6 February 2018); Wilson and Grazebrook "Nigerian Court of Appeal", above at note 1. Compare with "Third party challenge of arbitration agreement in Nigeria" *Phillipsons Consultancy Blog*, available at: <http://phillipsonsconsultancy.com/blog/challenge-arbitration-agreement-in-nigeria/> (last accessed 6 February 2018).

88 Specifically Federal High Court (Civil Procedure) Rules, 2009, order 3 rules 6–7.

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proceedings that it claimed affected its statutory functions, considering that the parties to the agreement and proceedings can themselves commence an action challenging the continuation of arbitration proceedings or claiming that the arbitration agreement was void. Accordingly, the court held that FIRS had locus standi and that the lower court was entitled to dismiss the objections to its jurisdiction and refuse a stay of proceedings.

There is internally consistent logic to the decision in *Statoil v FIRS*.[89] To the extent that the issues and arguments as framed and presented before the courts concerned whether FIRS had locus standi to bring the action, the courts' conclusion is understandable. As once noted by the English High Court, "the Rule of Law in general and subject only to limited exceptions requires that a party should not be barred from access to the court for the resolution of disputes unless the grounds for such bar are established".[90] The court noted further that a bar on access to the court on the basis of the conclusion of an arbitration agreement is not established until it is held that the arbitration agreement has been concluded.[91]

The court in *Statoil v FIRS* might have, nevertheless, been expected to give further consideration to certain provisions of the ACA and provide an explanation as to why they did not prevent the assumption of jurisdiction. Specifically, the court could have demonstrated greater mindfulness of section 12 of the act, which provides that an arbitral tribunal shall be competent to rule on matters pertaining to its own competence although, admittedly, it would not have been open to FIRS to "interject" in the arbitral proceedings.[92] Similarly, the courts might also have shown greater mindfulness of section 34 of the ACA, which provides that a court shall not intervene in any matter governed by the act except where so provided in the act itself. In fairness, the court pointed to section 35 of the ACA, which provides that the act's provisions do not affect another law by which certain disputes are not arbitrable or are only arbitrable in accordance with the provisions of that or any other law.[93]

89 See also "Third party challenge", above at note 87.

90 *Albon v Naza Motors*, above at note 42, para 20.

91 Ibid.

92 From this perspective, the court's decision is not a challenge to the "Kompetenz-Kompetenz" concept recognized in ACA, sec 12, although concern might arise about the impact of a case like this on the privacy and confidentiality of arbitration. More generally, the decision is somewhat comparable to the situation where one party claims the existence of an arbitration agreement that is denied by the other. In such a case it is understandable that a court might rule that it and not the arbitral tribunal would decide the issue: *Albon v Naza Motors*, id; *Fiona Trust v Privalov* [2007] EWCA 20, para 36.

93 See *Nigerian Ports Authority v Panalpina World Transport (Nigeria) Ltd* (1973) 1 All NLR (pt 1) 486; compare with the English decision in *Clyde & Co LLP v Bates Van Winkelhof* [2011] EWHC 668 (QB), which held that an employee's statutory right to have a dispute heard by an employment tribunal made it impossible to submit the dispute exclusively to arbitration.

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Arguably, the aspect in which the decision in *Statoil v FIRS* is most open to criticism is that the courts might have provided an explanation of why the court's jurisdiction to exercise discretion to stay proceedings pending arbitration, whether under the ACA or the court's inherent jurisdiction, could not have been invoked. Even in this respect, a number of points must be conceded in favour of the decision. First, the wording of section 5 of the ACA would have made that provision incapable of being invoked to stay proceedings in this case. This is because the wording requires that both the action before the court and the application to stay proceedings must have been commenced by a party to the arbitration agreement; FIRS commenced the action but was not a party to the agreement.[94] In the case of the arguably mandatory provisions of section 4 of the act, the requirement that the action before the court be "the subject of an arbitration agreement" (which it arguably is not in this case) would also probably prevent the courts from being able to stay proceedings under the section.

Considering that the court's jurisdiction under either section 4 or 5 of the ACA to stay proceedings in favour of arbitration could probably not have been invoked in *Statoil v FIRS*, attention should be given to whether a stay of proceedings could have been sought and / or made under the court's inherent jurisdiction. The court has an inherent common law jurisdiction (sometimes as provided in rules of court) to stay its own proceedings in some circumstances. Although the exercise of this jurisdiction may be sought by a party seeking to pursue arbitration, it is in principle independent of statutory provisions in arbitration legislation[95] and would normally be based on the interests of justice. It would probably not have been appropriate, however, for the court to grant a stay in *Statoil v FIRS* on the basis of this inherent jurisdiction. The court was clearly not persuaded by the argument that the case before it was an abuse of process or vexatious or oppressive,[96] which could have been adduced as possible bases for the exercise of the jurisdiction to stay proceedings or to dismiss the suit.

When *Statoil v FIRS* is analysed from these perspectives, the suggestions in some extant commentary that it is a setback to the gains made from the decisions said to be portraying Nigeria as an arbitration-friendly jurisdiction are possibly exaggerated. The decision is not to be seen as presenting a carte

94 Compare with *Carvill America Incorporated v Camperdown UK Ltd* [2005] EWCA Civ 645, para 53.

95 See *Reichhold Norway ASA v Goldman Sachs International* [1999] EWCA Civ 1703 (UK); *Casaceli v Natuzzi SpA* [2012] FCA 691 (Australia); *Shanghai Construction (Group) General Co Singapore Branch v Tan Poo Seng* [2012] SGHCR 10 (Singapore); D Chan "Stay of proceedings in favour of arbitration under the court's inherent jurisdiction" (15 August 2012) *Kluwer Arbitration Blog*, available at: <http://arbitrationblog.kluwerarbitration.com/2012/08/15/stay-of-proceedings-in-favour-of-arbitration-under-the-courts-inherent-jurisdiction/?print=pdf> (last accessed 6 February 2018).

96 The court rejected a claim of collusion between FIRS and NNPC, which was a party to the arbitration agreement and proceedings.

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blanche for third party interference in arbitration proceedings; neither is it to be seen as a case of courts interfering unwarrantedly with arbitration as such. It is noteworthy that at the stage of proceedings that led to the interlocutory appeal to the Court of Appeal, the trial court had not actually ruled on the reliefs sought by FIRS. The court's refusal to stay proceedings did not mean that, on consideration of the substantive claims, the courts would grant the reliefs sought.

It is also noteworthy that the reliefs sought in *Statoil v FIRS* were mostly declaratory remedies concerning the interpretation and effect of part of the Nigerian Constitution and certain statutory provisions. The most controversial aspect of FIRS's claim was the prayer seeking to restrain the three parties to the arbitration agreement and proceedings from continuing with the proceedings, although it does not seem to have sought to restrain the tribunal itself. It is of course very possible that the courts will, when considering this particularly controversial claim, undergo a more careful examination of legislative provisions and be mindful of the modern and supportive approach of the Nigerian Supreme Court in respect of stays of proceedings pending arbitration.

Inasmuch as it is important for the courts to support commercial arbitration and while acknowledging the desire of interested parties to promote Nigeria as an arbitration-friendly jurisdiction, neither of these should detract from a recognition of the courts' duty to interpret the law accurately and apply it properly. Similarly, the desire to encourage arbitration should not lead to undue neglect of what may be the legitimate rights of interested parties,[97] who may not be privy to an arbitration agreement to pursue remedies that may be legally available in respect of matters that may be affected by the outcome of the dispute between the parties to the agreement.

CONCLUDING REMARKS

There has been much interest in the positioning of Nigeria as an arbitration-friendly jurisdiction. Considerable effort has been devoted to initiatives and awareness building for stimulating and encouraging the use of arbitration as a commercial dispute resolution mechanism and towards attracting arbitration business to Nigeria. While much of the drive behind these initiatives is attributable to self-interest on the part of providers of arbitration and related services and other arbitration professionals, wider consideration of the potential economic and other benefits to the legal and judicial system instructs that the increasing use of arbitration in Nigeria deserves encouragement.

It is very important that the legal framework for arbitration is sound and effective; thus, Nigeria needs modern federal arbitration legislation capable of application in every part of the country. On the other hand, new federal legislation should preferably make it possible for parties to opt for an alternative arbitration regime. This approach should lay to rest the current

97 Compare with *Assaubayev v Michael Wilson & Partners Ltd* [2012] EWHC 90223 (costs).

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undesirable constitutional controversy and at the same time present Nigeria favourably as encouraging parties' autonomy.

It is equally important that judicial approaches to arbitration agreements and processes are informed by sound legal perspectives and commercial awareness. There are different aspects in which an effective legal framework and adequate support from the judicial system can be helpful or crucial to the success of arbitration as a dispute resolution mechanism agreed by the parties. This article has considered only some of the aspects in which legislative and judicial support is important. Conversely, legal and judicial systems can also benefit from a favourable disposition towards arbitration. Increased use of arbitration has the potential to help reduce busy dockets in the courts of particularly busy commercial jurisdictions.

Interestingly, a noteworthy point of concern has been raised in the context of an evaluation of the potentially negative impact of increasing resort to arbitration on the development of commercial law jurisprudence by the courts. This concern was raised in respect of England, from which Nigeria derives much of its legal and judicial tradition and whose legal developments and thinking still have significant influence on Nigerian jurisprudence. Furthermore, it was raised by the Lord Chancellor of England and Wales, a very senior member of the English judiciary. In brief, the concern is that the "diversion of more claims from the courts to arbitration" coupled with the restricted opportunity to appeal arbitral decisions to the courts "reduces the potential for the courts to develop and explain the law" with the consequence of "undermining of the means through which much of the common law's strength - its 'excellence' was developed".[98]

It may be argued that peculiar Nigerian circumstances make other considerations more important than the concerns highlighted above. For example, it is considered that the growth of, and increasing resort to, arbitration can benefit the Nigerian judiciary through a reduction of case load, although this is probably only true of a busy commercial jurisdiction like Lagos. More realistically, it would be true to point out that the volume of commercial arbitration in Nigeria has not reached the point where the ability or opportunity for the courts to continue developing Nigerian common law is threatened. It is also noteworthy that commercial arbitration proceedings often involve very experienced members of the Nigerian Bar and retired members of the Bench, especially as arbitrators. This set of people can of course directly and indirectly contribute to informing the courts' approaches on important and novel commercial law issues. Nevertheless, it is important that all who are interested in developing and promoting arbitration law and practice in Nigeria have a holistic view of the entire legal and justice system.

98 Lord Thomas LCJ "Developing commercial law through the courts: Rebalancing the relationship between the courts and arbitration" (the Bailii Lecture 2016, 9 March 2016), para 22, available at: <https://www.judiciary.gov.uk/wp-content/uploads/2016/03/lcj-speech-bailli-lecture-20160309.pdf> (last accessed 6 February 2018).

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