

THE PRACTICABILITY OF SECTIONS 4 AND 5 OF THE ARBITRATION AND CONCILIATION ACT 1988 IN THE NIGERIAN COURT

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ABSTRACT

The Arbitration and Conciliation Act (ACA) 1988 is inspired by the UNCITRAL Model Law on International Commercial Arbitration and the New York Convention on the Recognition and Enforcement of Foreign Arbitration Awards of 1988¹. One of the purposes of its enactment was to implement Nigeria's obligations under the Convention on the Recognition and Enforcement of Foreign Awards. The Act², though still remains the major statute regulating arbitration in Nigeria, has created an irreconcilable situation for the regular court in its dealing with any application brought before it relating to stay of proceedings. Evidently the intention of arbitration as an alternative dispute resolution process (ADR), is just like it is called, to look for a means of settling dispute without the Court's interference. Notwithstanding, the Act recognises and created an opportunity for parties to seek the Court's intervention when either parties intend to renege on his part of the agreement reached but in so doing, it created a confusion by not only duplicating the provisions but making the provisions contradictory. This paper intends to examine the provisions of these contrasting sections i.e Sections 4 and 5 of ACA and the their a practice/applications in the regular Courts.

INTRODUCTION

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¹ Nigeria is a signatory to the Convention (the New York Convention on the Recognition and Enforcement of Foreign Arbitration Awards of 1988)

² The Arbitration and conciliation Act (ACA) 1988

Arbitration is one of the processes of Alternative Dispute Resolution that has been developing over the years as a result of the need to settle dispute out of the Court system/litigation process, especially in commercial transactions. It is in this bid that a specific statute came to be purposely to regulate arbitration proceeding independent of Court interference. How well ACA has gone in shutting the Court out of Arbitration is another issue for discuss but it can be said that one way or the other the Court has found its way into Arbitration issue (May be not too deeply) not on its own volition but by the provisions of ACA. Two of such provisions are S. 4 & 5 of ACA.

Sections 4 and 5 of ACA deal with stay of court proceeding. The rationale behind stay of proceeding is that parties to an arbitration agreement should be bound by their agreement that any dispute arising from such transaction shall be settled by arbitration (principle of “**party autonomy**”) and to prevent delay in the adjudication. This is to ensure that none of the parties will unjustifiably breach the agreement by referring the matter to court when dispute arises. This is *in tandem* with the opinion of Professor George Delaume when he observed that:

“The courts are attentive not to permit a party to renege on its obligation by diverting a dispute from arbitral to judicial adjudication or to frustrate arbitral proceedings by lack of cooperation.”³

In line with the above opinion of the learned Professor, the court in the case of *Nissan (Nig.) Ltd -VS- Yoganathan*⁴ held thus:

“If by their own agreement the parties opted for arbitration if and when disputes arise in their affairs, the courts respect such agreements and would decline jurisdiction and refer the matter to arbitration”⁵

³ Delaume G.R, ‘Court Intervention in Arbitral Proceedings’ in Resolving Transnational Dispute through International Arbitration. P. 195 at 206 (T. Carbonneau ed., 1984) cited in Chijoke E., Enote et al (ed.) (Auto-Century PUB-Coy-Ltd, Enugu: 1996) ‘The Recognition and Enforcement of Arbitration Agreement and Award in a New Legal Environment: The Case of Nigeria’ in ‘Essays on Contemporary Legal Issues’ Pp. 173-174

⁴ [2009] All FWLR [Pt 494] p. 1585 at 1602, paras A-B

⁵ See also the decisions in *Obembe -VS- Wemaboard Estate Ltd* [1997] 5 SC II5, *Kano state U.D.B -VS- Fanz Construction Co. Ltd.* [1990]21 NCLR [PT 2] 339, [1990]4 NWLR [PT 142]

The effect of stay is that if an award is made in the arbitral proceedings commenced after a stay is granted then the stay cannot be lifted because there is no need for the suit. In ***Government of Niger State -VS- Alhaji Albishir & Son***⁶, it was held that if arbitration fails or award is set aside the suit can be revived. This shows that the suit can only be revived where the award is set aside or arbitration failed.

Stay of proceedings upholds the presumption that parties are bound by their agreement to arbitrate and should go to arbitration. Where an application for stay is brought, the Law places a burden on the opposing party (the party opposing the application for stay) to show reason why stay should not be granted for the parties to go to arbitration.⁷

These sections have introduced two contradictory provisions in the law governing stay of court proceedings pending arbitration and they cannot be easily harmonized. In this paper, an attempt would be made at reconciling the provisions of the two sections⁸.

STAY OF COURT PROCEEDINGS UNDER SECTION 4

This section of ACA is an amended version of Article 8 of the UNCITRAL Model Law, which is designed to regulate International arbitration. For better appreciation of the section, it would be reproduced. The section provides thus:

“(1) A court before which an action which is 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.

*(2) Where an action referred to in subsection (1) of this section has been brought before a court, arbitral proceeding may nevertheless be commenced or continued, and an award may be made by the arbitral tribunal while the matter is pending before the court.*⁹

⁶ [1985] 3 NWLR [PT 13] 458

⁷ ‘Studies and Materials in International Commercial Arbitration’ (1996) Chapter Two ‘Stay of Proceedings Pending Arbitration in Nigerian Law’ p.3513 J.Int. Arb 3, p.119. see also the case of Bristol Corp -VS- John Aird Co. [1913] Ch. 241, 249

⁸ Sections 4 & 5 ACA

⁹ Section 4 ACA

Under this section, the court has no discretion as the section appears to be mandatory¹⁰; once the request is made timely, the court must order a stay.¹¹ Under Section 8 (1) of the Model Law, Section 1(1) of the English Arbitration Act, 1975 and Article II.3 of the New York Convention which are substantially similar to section 4 ACA, a court is empowered to refuse a stay if satisfied that the agreement is inoperative,¹² incapable of being performed or null and void or that there are no disputes between the parties to be referred to arbitration.¹³ All these are ignored in Nigerian ACA. However, section 4 of ACA does not contain the caveat that the court should not refer the parties to arbitration “if the Arbitration Agreement is null and void, inoperative or incapable of being performed” as provided in the UNCITRAL Model Law.¹⁴ This is a fatal omission by the drafter of the law. The importance of the phrase can not be over emphasized, as it is likely to cause a kind of absurdity.

Although some sections of the Nigerian ACA makes provisions to that regard¹⁵ but not in respect of stay of proceedings. The effect is that the court will consider whether the arbitration agreement is actually in existence and that it is valid and in accordance with Section 1 of ACA which requires such to be in writing.¹⁶ After this, it is apt to consider whether there is a dispute at all to be referred to arbitration and where it is shown that there is a dispute, the next to consider is whether such dispute is such that can be settled by arbitration,¹⁷ this is very important as where a dispute arise but such dispute is not arbitrable, in such circumstance, a legal proceeding should

¹⁰ This is deduced from the use of the word “**shall**” which has been interpreted to be mandatory in many decided cases.

¹¹ Ezejiofor G., ‘The Law of Arbitration in Nigeria’, (1997) p. 39

¹² ‘Studies and Materials in International Commercial Arbitration’ (1996) Chapter Two ‘Stay of Proceedings Pending Arbitration in Nigerian Law’ p.3513 J.Int. Arb 3 Pp. 223-229

¹³ Ibid.

¹⁴ Article 8(1) of the UNCITRAL Model Law, see also Chijoke E., Enote et al (ed.) (Auto-Century PUB-Coy-Ltd, Enugu: 1996) ‘The Recognition and Enforcement of Arbitration Agreement and Award in a New Legal Environment: The Case of Nigeria’ in ‘Essays on Contemporary Legal Issues’ p. 167, see also Second Schedule to Cap 19, Article II.3 of the Convention on the Recognition and Enforcement of Foreign Arbitral Award of 1958 (refers to as ‘the New York Convention’) which provides thus: “The court of a contracting state when seized of an action in matter in respect of which the parties have made an agreement within the meaning of this Article, shall at the request of one of the parties refer the parties to arbitration, unless it find that the said agreement is null and void, inoperative or incapable of being enforced.” It is worth noting that section 4 ACA omitted the phrase ‘unless it finds that the said agreement is null and void, inoperative or incapable of being enforced’ which ought to be included.

¹⁵ Section 1 ACA requires arbitration agreement to be in writing. This provision is similar to Article II.1 & II.2 of the New York Convention which is in the second schedule of the ACA, Article II.3 of the New York Convention and also Section 35 ACA which deals with arbitrability.

¹⁶ See also Articles II.1 & II.2, the court will refuse stay where the arbitral agreement is obtained by fraud or is based on illegality.

¹⁷ See section 12 ACA for arbitrability. This is essential because the court is likely to refuse to refer parties to arbitration when the subject matter of the dispute can not be resolved by arbitration.

be instituted in law court and where a party applies for stay, such application should be refused otherwise, it will delay the adjudication of justice.

The condition under Section 4 ACA is that the “request must be made not later than when submitting his first statement on the substance (merits) of the dispute” and if made at a time later than that, it may be deemed as a waiver of the right to object.¹⁸ The question that comes to mind at this stage is, what the “first statement on the substance of the dispute” means. Scholars¹⁹ are of the opinion that it means the party’s statement of defence or counter claim this is because of the fact that it is the defendant to the action or party who counter claims that will want the matter to be taken away from the court and not the plaintiff, because the plaintiff will invariably not institute an action in court if he is desirous of having it resolved by arbitration in accordance with the arbitration agreement. Unless the arbitration agreement obliged them to first institute an action in court before requesting the court as arbitral body to refer the parties to arbitration.²⁰

A defendant can waive his right to arbitration if he prefers litigation to arbitration and this arises if he has taken step in the proceedings by “submitting his first statement”.²¹

In *Radio Publicity (Universal) Ltd. -VS- Luxembourgeoise de Radiodifusion*,²² the Court held that although delivery of a counter claim amounts to bringing an action within the section but when the subject of the counter claim is one which has been agreed to be referred, a stay may be applied for by the plaintiff provided he has not taken step in the proceedings after the delivery of the counter claim.

Subsection (2) of section 4 (which corresponds with Article 8(2) of the Model Law) is to the effect that if the court refused to stay an action, or if the defendant has abstained from asking for stay, the parties can still resort to arbitration while the court action relating to same is still pending in court. This provision, according to Akpata,²³ renders the exercise of seeking for stay in court meaningless. We disagree with the learned author’s position, because the provision will only render the exercise of stay meaningless where the parties have agreed to go for arbitration notwithstanding the fact that the matter is still pending before the court and in so doing abandon

¹⁸ Section 33 ACA

¹⁹ Akpata E., Orojo J.O & Ajomo M.A and Ezejiofor G. in their various book on the topic of this seminar

²⁰ Akpata E., ‘The Nigerian Arbitration Law in Focus’ (19 West African Book publishers Limited, Lagos, Nigeria: 1997) p.23

²¹ Ibid. see also the cases of *Kurubo -VS- Zach-motison (Nig.) Ltd.* [1992]5 NWLR [PT 239]102 and *Kano State Urban Development Board -VS- Franz Contruction Co. Ltd.* [1990] NWLR [Pt 142] 1

²² [1936] 2 All E.R 721

²³ Akpata E., ‘The Nigerian Arbitration Law in Focus’ P. 24

the court case. However, parties in most cases do not agree with each other in that regard. That is the reason why one of them (usually the defendant to the court action) seeks a stay of court proceeding so as to force the other party to obey their agreement by referring the dispute to arbitration.

The learned Author opined as well that the provision of subsection 2 of section 4 seems to give legal backing to what could be regarded as ousting the jurisdiction of the court. We do not agree with the opinion of the learned Author, because where a party applies for stay and the court refuses same, if he can convince the other party, they may decide to commence an arbitral tribunal while the court proceedings is still pending and the award obtained, if satisfactory to the parties will be adopted. Such award will be binding and the court proceedings may be withdrawn or abandoned or ignored. This does not oust the jurisdiction of the court nor does it constitute an abuse of court process but can only raise ethical issue especially when legal practitioner represents any of the parties. This is supported by the decision of the Court of Appeal in *Marine Academy of Nig. -VS- A.Q.S*²⁴ where it was held thus:

“A situation permitted by law can not constitute abuse of court process. In the instant case, the learned trial judge was right when he held that what otherwise would have been abuse of court process, in the instant case was expressly permitted by section 4(2) of ACA.”

PROFERING SOLUTION

To this extent, the issue as to whether it even constitutes an abuse of court process has been resolved by the decision of the court in *Marine Academy of Nig. -VS- A.Q.S* (supra) that it is not an abuse of court process. The provision of the subsection (2) was inserted in the Model Law and ACA, so as to ensure speedy resolution of dispute which is the hall mark of arbitration process.²⁵

The provision of subsection is commendable as it ensures that courts do not necessarily stop parties from arbitrating by refusal to stay proceedings. It knocks out the common law rule that is

²⁴ [2008]ALL FWLR [Pt 406] [P.1872 @ 1897](#), paras. A-B
²⁵ Akpata E., ‘The Nigerian Arbitration Law in Focus’ P. 11

against concurrent pendency of court and arbitral proceedings and invalidating arbitral award as against court judgment.²⁶

It is opined that section 4 deliberately omits the provision of Article 9²⁷ which provides thus:

“It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings from a court, an interim measure of protection and for a court to grant such a measure.”²⁸

But rather, Nigerian ACA in section 13(a) confers power on the arbitral tribunal to order interim measure of protection and by 13(b) the tribunal can request any party to provide appropriate security in connection with any measure taken under subsection (a).

STAY OF PROCEEDINGS UNDER SECTION 5 OF ACA

The provisions of this section is in *pari materia* with the provisions of section 5 of ACA 1958.²⁹ It is not contained in the Model law. This section relates to the jurisdiction of court to stay proceedings pending arbitration and as well states circumstances under which the court can stay a proceeding. The section is described as discretionary stay of proceedings.³⁰ For broader understanding of this provision, it will be proper to reproduce the provision of the section, which state thus:

“(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 pleading or taking any other steps in the proceedings, apply to 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:-

²⁶ ‘Studies and Materials in International Commercial Arbitration’ (1996) Chapter Two ‘Stay of Proceedings Pending Arbitration in Nigerian Law’ p.3513 J.Int. Arb 3, P. 45

²⁷ UNCITRAL Model Law.

²⁸ ‘Studies and Materials in International Commercial Arbitration’ (1996) Chapter Two ‘Stay of Proceedings Pending Arbitration in Nigerian Law’ p.3513 J.Int. Arb 3, P. 45

²⁹ CAP. 13 Laws of Federation of Nigeria 1958

³⁰ This is deduced from the use of the word “**may**” which has been interpreted to be discretionary

(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 arbitration , make an order staying the proceedings.”

Most decisions on stay of proceedings in Nigeria and England are based on this section and such decision can not be applied to construe the provision of section 4 ACA as the two sections are substantially different.³¹

Under Section 5 ACA, for a party to apply for stay of proceedings he must do so before the return date, that is, the date on which the defendant first appears in court in answer to the writ of summons. He should announce that he does not desire to deliver pleadings and that he wants time to move the court for stay of proceedings.³² This appears to be in conflict with the provisions of the High Court Civil Procedure Rules of various states which have abolished Demurrer and introduce proceeding in lieu of demurrer.³³ Under the new proceedings in lieu of demurrer, the rules entitles a party to raise by his pleadings any point of law and any point so raised which may be disposed of by the trial judge before, at or after the trial. At this junction, the question that comes to mind is; whether coming under the new proceeding in lieu of demurrer would not constitute a waiver to seek stay?

Since Section 4 ACA provides that party who intends to take advantage of an arbitration clause in a contract must do so before taking any steps in an action, it is clear that coming under the new proceeding in lieu of Demurrer would amount to waiver of right to stay.

Party seeking for a stay must also ensure that the subject matter of the arbitration agreement is arbitrable by the laws in Nigeria.³⁴

³¹ Orojo .J.O and Ajomo M.A , ‘Law and Practice of Arbitration in Nigeria’ (1999) P. 319

³² *Nir (Nig.) Ltd. -VS- El-Assad* [1971] All NLR 172

³³ See Order 22 Lagos, Order 22 Abuja and Order 24 Kano, Order 26 Rule 1Kwara State, among others.

³⁴ Section 35 ACA provides thus: “this Act shall not affect any other law by virtue of which certain disputes: (a) may not be submitted to arbitration, (b) may be submitted to arbitration only in accordance with the provisions of another law”

The essence of timely objection is to prevent it from being deemed as a waiver of the right to stay. This can be inferred from the provisions of the Act which provides thus:-

“a party who knows-

(a) that any provision of this Act from which the parties may not derogate; or

(b) that any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to non compliance within the time limit provided therefore shall be deemed to have waived his right to object to non compliance.”³⁵

The next question that needs to be answered is: what amounts to step taking in the proceedings under section 5? The court has held in plethora of cases what constitutes step taking in a proceeding that will constitute waiver. Some of these cases will be examined.

In *Enyelika -VS- Ogoloma*,³⁶ the court held that by entry of conditional appearance and filing of an application for extension of time within which to file and serve his statement of defence and subsequent filing of preliminary objection to the suit contending that the respondents had failed to comply with the condition precedent for the institution of a court action. The trial court dismissed the application on the ground that the applicant had already taken steps in the action and deemed to have waived his right to arbitration. The appellant being dissatisfied appealed to the Court of Appeal. The appeal was dismissed and the court held thus:

“An application seeking a stay of proceedings to enable parties refer to arbitration is not granted as a matter of course. For such an application to be granted, the applicant must have taken no step in the proceedings. If a party makes any application whatsoever to the court, even though it be merely application for time, he takes a step in the proceedings.”³⁷

³⁵ Section 33 ACA

³⁶ [2009] ALL FWLR [Pt. 453] P. 1335 @ 1342, paras. F-H

³⁷ See also *Kano State Urban Development Board -VS- Franz Contruction Co. Ltd* (supra)

Also in *Wuraola -VS- Northern Assurance*,³⁸ where the defendant filed a statement of defence instead of asking the court to stay proceedings against him and refer the matter to arbitration, the court held that failure of a party to take advantage of an arbitration clause by filing a statement of defence amounts to waiver of the clause.

Also in *Union Merchants (Overseas) Ltd. -VS- Odeh trading Co.*³⁹ the defendant defended the action without asking for stay but later in the proceedings challenged the plaintiff's right to bring the action. He was held to have waived his right.

More so in *Misr (Nigeria)Ltd –VS- Oyedele*,⁴⁰ filing of counter claim or even notice of intention to counter claim was held to amount to step taking that could be regarded as waiver.

In *Achonu -VS- National Employer Mutual & General Insurance*,⁴¹ where a party filed a motion to strike out the case so that the matter should go to arbitration was held to constitute step taking.

Even in the case of *Ighoronje -VS- Sokoto*,⁴² where the defendant entered a defence and in his defence indicated that at the hearing he would rely on the arbitration clause, it was held to amount to step taking.

In *Ajiboye -VS- Unity Life & Fire Insurance Co. Ltd.*,⁴³ where the court suggested that the defendant should file his pleadings and he does not reject it but kept quiet, it was held that he has taken step, that he ought to have rejected same and as such he is not entitled to stay of proceedings.

From the cases cited above, step taking in proceedings under section 5 ACA is crystal clear from that of Section 4 ACA. Under section 5 ACA it means something in the nature of an application to the court, and not just mere talk between solicitors or solicitor's clerks or the writing of letters⁴⁴ but actual step taken in court such as summons or something of that kind.⁴⁵ Causing a

³⁸ [1966] N. COMM.LR 129 Cited in Chijoke E., Enote et al (ed.) (Auto-Century PUB-Coy-Ltd, Enugu: 1996) 'The Recognition and Enforcement of Arbitration Agreement and Award in a New Legal Environment: The Case of Nigeria' in 'Essays on Contemporary Legal Issues' p. 178, footnote 40

³⁹ [1962] WNLR 229

⁴⁰ [1966] 2 All NLR 249

⁴¹ [1971] 1 ALR. COMM. 449

⁴² [1966] N.N.L.R 78, see also the case of *Thomas Alpin -VS- Sanusi* [1965] L.L.R 13

⁴³ Suit no. CCHCJ/12/7313

⁴⁴ As in the case of *Brighton Marine Place Co. Ltd. -VS- Woodhouse* [1893] 2 CH. 486, where the defendant's solicitor write to the plaintiff's solicitor on two occasions asking for an extension of time to putting his statement of defence was held not to constitute step in proceeding.

⁴⁵ See Ezejiofor G., 'The Law of Arbitration in Nigeria' p.41

summons to be put on counsel's list, that is, list of matters which parties intend to appear by counsel is not a step in proceedings that warranted refusal of stay. More so, obtaining consent of the plaintiff for extension of time for delivery of reply does not constitute step taking.⁴⁶

In the case of *Attorney General of Imo state -VS- Road & General Construction Co. (Nigeria) Ltd.*,⁴⁷ the court listed what must be ascertained before a court can grant an application for stay of proceedings. These are:-

- the precise nature of the dispute,
- whether the dispute falls within the terms of the arbitration clause,
- whether the arbitration clause is effective or ineffective,
- whether there are sufficient reason why the matter in dispute should not be referred to arbitration.

In summary, we can rightly say that court may grant stay of proceedings in the following circumstances:-

1. If there is a valid and subsisting arbitration agreement.⁴⁸
2. If the action has been instituted by a party to the agreement against a party to the agreement.⁴⁹
3. If the action is in respect of a dispute agreed to be referred to arbitration, that is, in respect of the same subject matter as in the arbitration agreement.⁵⁰
4. If the application for stay is made by a party to the action.
5. If the application is made after appearance and before he delivered any pleadings or takes any other steps in the proceedings.⁵¹ However, the court has no discretion to stay, if the defendant, by implication, prefers to litigate by taking a "step in the proceedings."

⁴⁶ Ezejiofor G., 'The Law of Arbitration in Nigeria' p.41

⁴⁷ Chijoke E., Enoté et al (ed.) (Auto-Century PUB-Coy-Ltd, Enugu: 1996) 'The Recognition and Enforcement of Arbitration Agreement and Award in a New Legal Environment: The Case of Nigeria' in 'Essays on Contemporary Legal Issues' p. 173

⁴⁸ Akpata E., 'The Nigerian Arbitration Law in Focus' p. 26

⁴⁹ Ibid.

⁵⁰ Orojo J.O and Ajomo M.A, 'Law and Practice of Arbitration in Nigeria' P. 319

⁵¹ Akpata E., 'The Nigerian Arbitration Law in Focus' p. 26

6. If the plaintiff/respondent adduces no sufficient reason why arbitration should not take place.
7. If the defendant/applicant shows at the time of commencement of the proceedings that he was and still ready and willing to take necessary step towards the proper conduct of arbitral proceedings.

However, these are subject to the discretion of the court, because the discretionary power of the court under this section is very wide, that is even where all the conditions above are satisfied the court can decide not to stay the proceedings, although, it has been held in plethora of cases that where court is to exercise its discretion, such should be exercise judicially and judiciously⁵².

The onus of showing that a stay should not be granted and that proceedings should continue is placed on the plaintiff. All that the defendant needs to do is to satisfy the court that there is a valid and subsisting arbitration agreement covering the subject matter of the proceedings and that he is ready and willing to proceed to arbitration. Even where all these are shown the court may refuse to order a stay if it is of the opinion that it should not be referred to arbitration.

For instance where; it is shown that the matter in dispute is outside the scope of the agreement, the existence of the arbitration agreement is in dispute or was ab initio illegal or obtained by fraud or undue influence or deception,⁵³The matter is of serious constitutional question,⁵⁴It appears to the court that justice cannot be done to the parties in the arbitral process.⁵⁵

The Act also requires the applicant to show that he was ready and willing to take necessary step towards arbitration both at the institution of the suit and at the time of application. The question that comes to mind is: what is the effect, where a party was not willing at the time the suit was instituted, but at the time of the application he is willing and ready to go to arbitration? Does that make him to lose the right to apply? It is our humble view that the Act does not intend to deny him of his right solely on that, so long as he shows a present willingness to go to arbitration and there is nothing showing that he encouraged the filing of the suit, he should be able to apply for a stay.

Notwithstanding the fact that a party has taken steps in the proceedings, the court can still order a stay based on one of these clauses embedded in an arbitration agreement, namely:

⁵² What is here
⁵³ *Benue Cement Co. Ltd -VS- Leander Construction & Engineering Co.*[1979] 7-8 CCHCJ [VOL. 4] 114
⁵⁴ *Heyman -VS- Darwins* [1942] A.C 356
⁵⁵ *Ives & Baker -VS- Williams* [1894] 2 CH.478

SCOTT –VS- AVERY CLAUSE

This clause is a common law principle which was derived from the famous case of *Scott -VS- Avery*.⁵⁶ The case was based on insurance policy of Mutual Insurance Company. One of the conditions written in the policy was that any member who suffered loss or damage would be paid such an amount of money as would be determined by a committee and if a member rejects such amount determined by the committee, the matter would be submitted to arbitrator, provided such a member would not be entitled to maintain an action at law, or a suit in equity on the policy until the matter has been decided by the arbitrators. The House of Lords held that it is competent for the parties to provide in the contract that an arbitration and award shall be a condition precedent to any right of action at law and that such does not amount to an ouster of the jurisdiction of the court.

According to Mustill and Boyd, the clause *Scott -VS-Avery*, performed two different functions namely:

1. It creates an obligation to arbitrate and as such, it gives the defendant to a court action a right to stay the proceeding; and
2. It creates a condition precedent to the plaintiff's right of action; and as such, it gives the defendant a substantive defence to the action.⁵⁷

The decision in the case has been followed in many cases.⁵⁸ In Tanzanian case of *Khetran -VS- New Indian Assurance Co. Ltd.*⁵⁹ where the parties contract contains a *Scott -VS-Avery clause*, the plaintiff, nevertheless, commenced an action. The defendant did not apply for a stay of proceedings but went ahead and defended the action and contended that a cause of action has not arisen, because an award had not been made. The submission of the defendant's counsel was upheld and it was held that the defendant did not waive the condition precedent simply because he did not apply for a stay.

⁵⁶ [1856] 25 L.J. EX. 308, 5 H.L.C 811

⁵⁷ See Mustill & Boyd, 'The Law & Practice of Commercial Arbitration in England' (2nd Edn. 1989) p.165

⁵⁸ *Oyedele -VS- New India Assurance Co. Ltd* [1969] 3 A.L.R COMM.200, *Jebara -VS- Mercury Assurance Co. Ltd.* [1971] 1 A.L.R. COMM

⁵⁹ [1968] 3 A.L.R. COMM 115

However, in *Ezeigbo -VS- Lion of African Insurance Co. Ltd.*⁶⁰ where a dispute arose in respect of an insurance policy which contained a *Scott -VS-Avery clause*, the defendant while submitting his defence to the action, sought to rely on the clause to suspend the proceedings. The learned Judge, Egbuna J. who did not appear to appreciate the import of the clause ruled that the defendant could apply for a stay of proceedings and since it did not do so the action must proceed to judgment.

Once the clause is present in the agreement the defendant to a court action in breach of the clause is entitled to apply to court at any time even after delivering pleadings, to suspend the proceedings in order to enable arbitration to take place. The clause can as well be used as a defence to the court proceedings.

However, the clause will not be applicable or avail a party who is in violation of the clause (that is, party that instituted the action in violation of the clause), such a party can not come back and hide under the clause.⁶¹

On the contrary in jurisdiction where there is ceaser of the clause by virtue of a Law in that jurisdiction, the court in such jurisdiction will annul such a clause.⁶²

ATLANTIC SHIPPING CLAUSE

This emanated from the court's decision in the case of *Atlantic Shipping & Trading Co. Ltd -VS – Louis Dreyfus*.⁶³ In the case, the respondents chartered a ship to carry a cargo of linseed from Rasario to Hull. The charter-party contained an arbitration clause to the effect that all disputes as regarding the agreement be referred to two arbitrator appointed by the parties and claim must be made in writing and claimant's arbitrator appointed within three months of final discharge, and where the provision is not complied with, the claim shall be deemed to be waived and absolutely barred. After the arrival of the ship, the charters/respondents informed the ship owner/appellant that they intend to put in a claim in respect of damages occasioned to the linseed in the cause of the voyage, they did not appoint their arbitrator within three months of the final discharge of the

⁶⁰ [1968] 3 A.L.R COMM 88

⁶¹ *Shaibu -VS- Maximum Insurance Co.* [1976] 1 A.L.R COMM. 179

⁶² Section 25(4) of the 1950 Arbitration Act of U.K, which provides that "where it is provided (whether by means of a provision in the arbitration agreement or otherwise) that an award under an arbitration agreement shall be a condition precedent to the bringing of an action with respect to any matter to which the agreement applies the High Court or Court of Appeal if its orders (whether under the this section or under any other enactment) that the agreement shall cease to have effect as regards any particular dispute, may further order that the provision making an award a condition precedent shall also cease to have effect.

⁶³ [1922] 2 A.C. 250

cargo. Later, they commenced an action in respect of the alleged damage to the cargo. The appellant opposed the action but the trial court held that making of such within three months is a condition precedent. On appeal that such clause is contrary to public policy as it is an ouster of the jurisdiction of the court, the House of Lords held that it does not oust the jurisdiction of the court. This decision was followed in subsequent cases.⁶⁴

Atlantic Shipping clause is a provision in the arbitration agreement to the effect that arbitration must commence within a stipulated period and if it is not so commenced then the claim by the injured party is barred, which may be in two forms, namely:

- barring an action at law (court) or
- barring the parties from the right to arbitrate.

These show that where this clause constitutes an absolute bar (barring an action at law), a party can object to the legal action at any time even after taking step or in the defense to the action and such would be upheld.

DIFFERENCES BETWEEN SECTION 4 AND 5 ACA

The followings are some of the differences in the two sections of ACA (Sections 4 and 5).

1. Under Section 4 it is mandatory⁶⁵ for court to grant stay (this can be deduced from the wordings of the provision and the use of the word “**shall**”); while under section 5 the court has a wide discretion whether to grant stay or not (the use of the word “**may**”)
2. Taking of a mere formal step after appearance will not deprive the applicant of the right to apply for stay under section 4 while under section 5 it will as it must be done after appearance before delivering any pleadings.⁶⁶ In *Obembe -VS- Wemaboard Estate Ltd.*⁶⁷ The court underscored the differences between sections 4 and 5 of ACA, that the former requires that the applicant must not have submitted his first statement on substance of the dispute while the latter, no step must have been taken no matter how minor the step is.

⁶⁴ *Pinneck Bros -VS- Lewis Peat Ltd.* [1923] 1 KB. 690

⁶⁵ Orojo .J.O and Ajomo M.A , ‘Law and Practice of Arbitration in Nigeria’ P. 318

⁶⁶ Orojo .J.O and Ajomo M.A , ‘Law and Practice of Arbitration in Nigeria’ P.317, see also P. 319 where instances and cases where slightest step made by applicant were held to be sufficient to bar the applicant.

⁶⁷ [1977] 5 SC 115@ P. 132

3. Under section 4 the court action does not stop the arbitral process which may be commenced or continued and an award may be made while the matter is still pending in court. There is no such provision in section 5.
4. Section 4 confers supremacy on an arbitration clause. This is to the effect that even an allegation that the main contract is null and void will not affect the arbitration clause as it has been said to be separate and independent of the main contract.⁶⁸
5. Section 4 unlike section 5 does not require the party to show willingness or readiness at any time to go to arbitration.
6. It is opined that section 4 is applicable in international arbitration while section 5 is applicable to domestic arbitration, although, the drafter has failed to specify this.

CONCLUSION

From the provisions of the Act in relation to sections 4 and 5, it appears that under section 4 it is mandatory for court to grant stay of proceedings while under section 5 it appears that the court have a discretion which is expected to be exercised judicially and judiciously.

From our discussion so far, it can be rightly said that it is an error having the two sections in the Act. We do not believe that the intention of the drafters of the Act is to incorporate two dissimilar provisions from different sources dealing with the same subject in the same Act. We are of the view that it is a mistake and that they intended to incorporate one of the two provisions.

As this has been mistakenly incorporated, a party who intends to apply for a stay can choose to do so under either of the sections. There is a tendency that most applicants would rather come under section 4 because success is more guaranteed as the provisions appear to be mandatory, court will grant the application.

Ezeiofor G, is of the view that Section 4 be removed,⁶⁹ Orojo and Ajomo M.A are of the view that apart from the contradiction in these two sections, the enactment of section 5 in the Act is

⁶⁸ Principle of Separability, provided for in section 12(2) ACA
⁶⁹ P. 42

unnecessary and as such be removed,⁷⁰ while Akpata, opined that section 4 be placed under Part III of ACA which deals with International Commercial Arbitration while section 5 be retained in its place as it is applicable in Domestic Arbitration.

Based on all the aforesaid, we are of the opinion that Section 5 of ACA be removed and Section 4 be retained. Section 4, if amended would be suitable for both international and domestic arbitration. Our opinion is based on the mandatory nature of stay under the section which upheld the very essence of arbitration agreement and ensures that courts do not necessarily stop parties from arbitrating by refusal to stay proceedings.

Amendment of Section 4 of ACA is necessary so as to prevent absurdity. It should be amended to incorporate the caveat that the court should not refer the parties to arbitration “if the Arbitration Agreement is null and void, inoperative or incapable of being performed or where there are no disputes between the parties to be referred to arbitration” as provided in the UNCITRAL Model Law and the New York Convention which are substantially similar to section 4 ACA.⁷¹ If this is done the section will be suitable for domestic as well as international commercial arbitration.

⁷¹ Article 8(1) of the UNCITRAL Model Law, see also Chijoke E., Enote et al (ed.) (Auto-Century PUB-Coy-Ltd, Enugu: 1996) ‘The Recognition and Enforcement of Arbitration Agreement and Award in a New Legal Environment: The Case of Nigeria’ in ‘Essays on Contemporary Legal Issues’ p. 167, see also Second Schedule to Cap 19, Article II.3 of the Convention on the Recognition and Enforcement of Foreign Arbitral Award of 1958 (refers to as ‘the New York Convention) which provides thus: “The court of a contracting state when seized of an action in matter in respect of which the parties have made an agreement within the meaning of this Article, shall at the request of one of the parties refer the parties to arbitration, unless it find that the said agreement is null and void, inoperative or incapable of being enforced.” It is worth noting that section 4 ACA omitted the phrase ‘unless it finds that the said agreement is null and void, inoperative or incapable of being enforced’ which ought to be included.

