EFFECT OF THE REMEDY OF STAY OF PROCEEDINGS ON ANTI-SUIT INJUNCTION IN INTERNATIONAL ARBITRATION IN THE LIGHT OF NEW YORK CONVENTION, NIGERIA AND EUROPEAN UNION LAWS*

Abstract

Stay of proceedings and anti-suit injunction are both equitable reliefs available to parties to international arbitration. They are deployed at the appropriate stage to preclude a party in breach, or likely breach, of an arbitration agreement from litigating or continuing with litigating the dispute and to compel that party to arbitrate. Selection of either of the reliefs may mean abandonment of the other. This article examines the effect of stay of proceedings on anti-suit injunction in international arbitration in the light of New York Convention 1958, Nigeria's Arbitration and Mediation Act 2023 and European Union Regulations. It was found that, though selection of a seat of arbitration confers on the court of the seat the jurisdiction to preserve and supervise an arbitration, this jurisdiction is not exclusive; commencing a suit in breach of an international arbitration agreement may mean suspension, by reason of the New York Convention, albeit temporarily, of the supervisory, supportive and preservative jurisdiction of the court of the seat of arbitration; failure to apply for a stay of proceedings or refusal of such application allows the court seized of the dispute to determine the dispute. Given that article II (1) & (3) of the New York Convention 1958 empowers the court seized of a dispute subject to arbitration to determine whether to stay proceedings and refer the parties to arbitration, resorting to anti-suit injunction rather than applying for stay of proceedings in the event of litigation contravenes article II (1) & (3) of the New York Convention as well as any national law that incorporated this article. In addition, anti-suit injunction is in the circumstances incompatible with the European Union Regulation 1215/2012, 'the Recast Brussels Regulation', and also renders ineffective any national law, like sections 1(7) and 5 of Nigeria's Arbitration and Mediation Act 2023, which empowers a national court before which a matter subject to arbitration is pending to stay proceedings even if the seat of the arbitration is a different country or the parties have not designated the seat or no seat has been determined. Thus, anti-suit injunction interferes with and disrupts national courts due administration of justice and as well denies the parties – particularly the plaintiff – access to justice, at least, the court determining whether to stay proceedings. The doctrinal research method was used. As a result, this article examined the law in the area as it is and offered a critique in some instances and where appropriate provided an explanation of the law by placing it in a useful theoretical context. Primary sources (legislations, conventions and case-laws) as well as secondary literature in the area were studied in the theoretical and/or conceptual dimensions of the article.

Keywords: Arbitration, Resolution, Dispute, Agreement, Rights, Liabilities, Anti-suit Injunction, Stay of Proceedings

1. Introduction

Arbitration, as an alternative mechanism of dispute resolution, is the process by which a dispute between two or more parties as to their mutual legal rights and liabilities is, pursuant to their agreement, referred to and determined judicially by one or more persons instead of by a court of law.[1]

A party to an arbitration agreement may, when the contemplated dispute within the arbitration agreement had arisen, resort to litigation rather than arbitration. This may, *prima facie*, give an appearance of a breach of the agreement. To avoid this and preserve

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[1] J Mbadugha, SAN, 'Section 34 of the Arbitration and Conciliation Act: Issues Arising.' *The Gravitas Review of Business & Property Law*. [2017] Vol. 8. No. 2. p. 88

arbitration, the remedy of stay of further proceedings and reference to arbitration are provided by conventions,[2] treaties[3] and national laws.[4] Stay of further proceedings is available in both domestic and international arbitration.[5] However, with respect to international arbitration, the mechanism of anti-suit injunction evolved, also, as a veritable tool of protecting and preserving arbitration and to ensure that parties are bound by their agreement.

The object of either the remedy of stay of proceedings/reference to arbitration or anti-suit injunction is to prevent a party who intends to breach or who breaches an arbitration agreement through litigation from continuing with litigation and to leave such party with arbitration as the only option. These two remedies, although available, may be in the alternative. It is doubtful whether both can be sought contemporaneously or either of them granted after the right to either of them is lost or if an application in respect of either is refused.

Selection of one may therefore mean an abandonment of the other. However, if they are not alternative remedies, parties may not seek for both in a court or courts of the same country but rather in different countries' court(s). For example, it is doubtful that a party to an international arbitration whose seat is London but governed by USA law can seek for a stay of proceedings as well as an anti-suit injunction in Nigerian Court(s) if litigation is commenced in respect of the subject matter in a Nigerian Court. Whether a court in any country has the jurisdiction to grant either of the remedies in any particular international arbitration depends on the seat of the arbitration,[6] the country whose law governs the arbitration[7] and the country in which action is instituted in breach of an arbitration agreement.[8]

As both remedies achieve the same goal, viz: protecting and preserving arbitration and ensuring that parties refer their dispute to arbitration pursuant to their agreement, this article discusses the appropriate stage for seeking either of the remedies; whether failure to

[2] New York Convention, 1958, Articles II (1) and (3)

[3] UNCITRAL model law on International Commercial Arbitration, 1985 (as amended in 2006) article 8 (1)

[4] Nigeria's Arbitration and Mediation Act, 2023, Section 5.

[5] Arbitration is international if – (a) the parties to an arbitration agreement have their places of business in different Countries at the time of the conclusion of that agreement; (b) the seat of the arbitration, if determined under the arbitration agreement or any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject matter of the dispute is most closely connected is situated outside the State in which the parties have their places of business; or (c) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one State; the parties, despite the nature of the contract, expressly agree that any dispute arising from the commercial transaction shall be treated as an international arbitration. An Arbitration could still be international regardless of whether the parties are of the same nationality if, by virtue of the object of the underlying contract, the contract can extend beyond national borders, such as when a contract is concluded between two nationals of the same state for performance in another country, or when it is entered into between a state and a subsidiary of a foreign company doing business in that state: UNCITRAL Model Law on International Commercial Arbitration 1985, article 1(3) (as amended in 2006); the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York Convention 1985, article II; Nigeria's Arbitration and Mediation Act, 2023, Section 91(5) (a) – (c).

[6] The National Court of the seat of Arbitration exercises supervisory and supportive roles over an arbitration at the seat and this includes an *injunctive jurisdiction.* See Mbadugha J.N.M. *SAN*, [2015] Principles and Practice of Commercial Arbitration. Lagos, University of Lagos press, page 80 para 1 and Fn 39

[7] An injunctive jurisdiction, also, exist in the national court of the country whose law governs the arbitration. See *SOC. Nat. Ind. Aerospatiale v Lee Kui Jak* [1987] AC 871, XL Insurance Ltd v Owens Corning [2000]2 Lloyd's Rep 500

[8] The New York Convention, 1958, article II (1) and (3); UNCITRAL Model Law on International Commercial Arbitration 1985 (as amended in 2006) article 8 (1); Nigeria's Arbitration and Mediation Act, 2023, Section 5; *Channel Tunnel Group Ltd & Anor v Balafour Beauty Construction Ltd & Ors* [1993] 1 ALL ER 664 at 682 para C and paras F–G,

seek either at any stage amounts to a waiver of the other; whether resorting to either at a certain stage contravenes international conventions, interferes with the jurisdiction of national courts, or undermines the territorial integrity or sovereignty of another state.

2. Stay of Proceedings and Anti-Suit Injunction

A party to an arbitration agreement may, when a cause of action within the purview of the agreement arises, resort to litigation instead of arbitration or even, when the dispute is submitted to arbitration but before an award is rendered, commence an action in court in respect of the same subject matter pending at the arbitral tribunal.[9] Arbitration is in the context of litigating any dispute subject to arbitration rather than arbitrating the dispute *a res* which could be dissipated if the litigation is not stayed or stopped. In order to protect arbitration or arbitral process, treaties,[10] conventions,[11] and national laws[12] empower any court before which an action is brought in a matter which is the subject of an arbitration agreement to stay proceedings and refer the parties to arbitration provided certain conditions enumerated in paragraph 3.2 below are met.

In the same vein, in international arbitration, courts in common and civil law countries invented and exercised a jurisdiction *in personam* to restrain by injunction –anti-suit injunction – foreign proceedings brought in breach of an agreement to refer disputes to arbitration.[13] This injunction is granted on the theory that, without it, the claimant will be deprived of its contractual right (the right to have disputes settled by arbitration).[14] Whilst the court where an application for anti-suit injunction is made must be either in the country of the intended venue of the arbitration or in a country whose laws governs the arbitration,[15] an application for stay of proceedings and reference to arbitration must be made at the national court of the country where litigation is commenced.[16]

2.1. Litigation not Commenced

Injunctive jurisdiction is available to forestall a threatened breach or a continuing breach of a legal or equitable right. A party to an arbitration may reasonably suspect that the other may resort to litigation instead of referring their dispute to arbitration. A party who perceives that its right to arbitrate is threatened through litigation, or likely litigation, in a foreign court by a party to the agreement, or even by a non-party to the agreement but in collusion with a

[9] In Nigeria because of the trite principle that the existence of an arbitration agreement does not oust the jurisdiction of the Court to determine the same dispute subject to arbitration, either party to such an agreement may prior to when a submission to arbitration or award is made, commence an action in court regarding any claim or a cause of action contained in the submission: *Sakamori Construction (Nig) Ltd v L.S.W.C* [2022]5 NWLR (pt1823) 339 at 379 paras B–C. However, a subsequent action in court in respect of the same subject matter and parties pending in an arbitral tribunal may in appropriate situations constitute an abuse of process of court as was held by the Supreme Court of Nigeria in *MV LOPEX v NOC & S Ltd* [2013]15 NWLR (pt. 844) 439 at 490–491 paras G–A.

[10] The New York Convention 1958, article II (1) & 3

[11] UNCITRAL Model Law on International Commercial Arbitration, 1985 (as amended in 2006) article 8 (7)

[12] Arbitration and Mediation Act, 2023, Laws of the Federation of Nigeria, Section 5; English Arbitration Act 1996, Section 9.

[13] *Pena Copper Mines Ltd v Rio Tinto Co. Ltd* (1911) L.T. 846 (CA)

[14] Dicey & Morris [2000] the Conflict of Laws, 13th Edition, Sweet and Maxwell, Vol 1 para 12 – 128.

[15] *Soc. Nat Ind. Aerospatiale v Lee Kui Jak [1987]* A.C 871 XL Insurance Ltd v. Owens Corning *[2000]2* Lloyd's Rep 500.

[16] The New York Convention, 1958, Act II (1) & (3)

party to the agreement,[17] may apply to a court at the putative seat of the arbitration or in a country whose law governs the arbitration[18] for an anti-suit injunction.[19]

Anti-suit orders are directed against parties to litigation and not the foreign court itself but are intended to have the effect of precluding litigation from proceedings. An anti-suit order may be made against a non-party to an arbitration agreement if it seeks to assist a party to the agreement in bringing a wrongful foreign proceeding and/or if there is collusion[20] between them. In order to obtain an anti-suit injunction based on a breach of an arbitration agreement, an applicant would need to establish that there is at least a 'high degree of probability' that there is a valid arbitration agreement applying to the claim being brought in the foreign proceedings;[21] the application is made without delay;[22] it has not submitted to the jurisdiction of the foreign court; the respondent is amenable to the jurisdiction of the court;[23] and on the balance of convenience, it is right to make the order.[24] If the application is against a non-party to the arbitration, the applicant must show that the claim made (or threatened to be made) in the foreign proceedings is made by – or with the collusion of – a party to the arbitration agreement.[25]

On the other hand, stay of proceedings, just like anti-suit injunction, is to stop a party in breach of an arbitration agreement through litigation from continuing with the proceedings and to cause the party to arbitrate. While the right to stay of proceedings and reference to arbitration is activated by litigation in breach of arbitration, an application for stay of proceedings can only be made to only the court in which litigation is pending. Thus, when litigation is not commenced but there is a strong probability of a party resorting to litigation rather than arbitration, the appropriate mechanism in such circumstance for protecting and preserving arbitration and as well leaving the parties with arbitration as the only means of settling the dispute is anti-suit injunction.[26]

2.2.Lawsuit is Initiated and Pending

A party to an arbitration agreement may decide to litigate a dispute within the scope of the arbitration agreement and may as a result initiate proceedings in court. Where this happens, any party to the arbitration agreement may, not later than when submitting its first statement on the substance of the dispute, request the court before which the action is brought to refer them – the parties – to arbitration.[27] A court to which an application is made in these

[17] *Ingosstrakh – Investments v BNP Paribas SA* [2012] 1 Lloyd's Rep 239

[18] *Soc. Nat Ind. Aerospatiale Lee Kui Jak* [1978] AC 871; *XL Insurance Ltd v Owens Corning* [2000] 2 Lloyd's Rep 500.

[19] Anti-Suit injunction may also be used to prevent an award debtor – the party that lost in arbitration – from reopening the issues resolved by the arbitrators in some other forum.

[20] An anti-suit injunction may also be granted against an assignee of a party to a contract containing an arbitration clause. See *STX Pan Ocean v Woori Bank* [2012] 2 Lloyd's Rep 99 (Flaux J).

[21] *Ecobank Transnational Inc v Tanoh* [2016] 1 Lloyd's Rep 360 (CA) at [89]; *Emmott v Micheal Wilson &* [2017] 1 Lloyd's Rep 21 at [30] per O' Farrel J (upheld on appeal, where Sir Terrence Etherton endorsed the same test); *Micheal Wilson & Partners v Emmott* [2018] 1 Lloyds Rep 299 at [39].

[22] *Ingosstrakh-Investments AG v. BNP Paribas SA* [2012] 1 Lloyd's Rep 649 (CA); *Ecobank Transnational Inc v Tanoh* [2016] 1 Lloyd's Rep 360 at [85]-[89] (CA);

[23] *Glencore International AG v Exter Shipping Ltd* [2002] CLC 1090 (CA) at [42] per Rix LJ.

[24] This is a requirement common to all injunctions and is ultimately a matter of judicial discretion.

[25] See *Ingosstrakh Investments AG v. BNP Paribas SA* [2012] 1 Llyod's Rep 649 (CA)

[26] At this stage the right to stay of proceedings has not arisen and the court to which the application should be made hasn't crystallized.

[27] Nigeria's Arbitration and Mediation Act, 2023, s.5(1)

circumstances is statutorily empowered to refer the parties to arbitration unless it finds that the agreement is void, inoperative or incapable of being performed,[28] the dispute is inarbitrable,[29] or admitted,[30] or contrary to public policy, or that limitation period will render any order or award by the arbitral tribunal futile.[31]

In Nigeria, prior to enacting the Arbitration and Mediation Act 2023, a party seeking an arbitration-related stay of proceedings should promptly, at an early stage of the proceedings, apply for a stay of proceedings and reference to arbitration, as any delay in making the application amounts to waiving the right to arbitrate.[32] The party must not make any other application whatsoever or take any steps in proceedings.[33]

It is doubtful whether the requirement of prompt application at an early stage of the proceedings without taking any other steps in proceedings will still be applicable in Nigeria under the new Arbitration Act. The new Act requires a party to make an application not later than when submitting its first statement on the substance of the dispute. Thus, the Act provides in its section 5(1) that:

> Notwithstanding the provisions of any other law, a court before which an action is brought in a matter, which is the subject of an arbitration agreement shall, if any of the parties' request, not later than when submitting their first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is void, inoperative or incapable of being performed.[34]

The above provision is not entirely new. It is similar to the provisions of section 4 (1) of the repealed Nigeria's Arbitration and Conciliation Act.[35] Therefore, the cases that correctly interpreted particularly the proviso 'not later than when submitting their first statement on the substance of the dispute' in section 4(1) of the repealed Arbitration and Conciliation Act 2004 will be relevant in interpreting section 5(1) of the Arbitration and Mediation Act 2023.

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[28] Supra, n. 31

[29] *BCC Tropical Nig Ltd. v Government of Yobe State of Nigeria & Anor* [2011] LPELR – 9230; *KSUDB v FANZ CONSTRUCTION Co. Ltd* [1990] 4 NWLR (pt.142) 1 at 33

[30] *Sakamori Construction (Nig) Ltd v L.S.W.C.* [2022] 5 NWLR (pt.1823)339 at 389 – 390 paras B – E.

[31] *Sakamori Construction (Nig) Ltd v L.S.W.C*. (supra) at 392 paras B–E. In this case, the Supreme Court held that since under Nigerian Law an action to enforce an arbitral award cannot be brought after the expiration of six years from the date on which the cause of action arose, that for a case falling within this category an order for stay of further proceedings and referral to arbitration cannot be made. This decision is more appreciated within the context of Supreme Court's decision in *City Engineering (Nig) Ltd v. Federal Housing Authority* [1997] 9 NWLR (Pt. 520) 224 that time for enforcement of an arbitral award does not start from the date of the award but from the date of accrual of the cause of action that led to commencing an arbitration. However, this principle established by the Supreme Court in the City Engineering case has been modified by section 34(4) of Nigeria's Arbitration and Mediation Act, 2023, which provides that the time between the commencement of arbitration and the date of the award shall be excluded in computing the time for commencement of proceedings to enforce an arbitral award. Nonetheless, it is submitted that the scope of the applicability of the decision in Sakamori Construction (Nig) Ltd's case is not extended to when enforcement is by way of an action for damages for breach of an implied promise to perform a valid award given that under Nigerian Law, for this route of enforcement time ticks from the date an award debtor refused or failed to perform a valid award. See Mbadugha, J., SAN, [2016] Limitation Period and Award – The Challenge With Computation of Time. The Gravitas Review of Business & Property Law Vol. 7 No. 2 Page 42 at 44.

[32] *Federal Ministry of Health v. Dascon (Nig) Ltd* [2019] 3 NWLR (Pt. 1658) 127 at 139 – 140 paras G-B.

[33] *Obi Obembe v Wemabod Estates Ltd* [1970] 5 S.C (Reprint Edition) 70.

[34] Nigeria's Arbitration and Mediation Act, 2023, section 5(1)

[35] CAP A18, Laws of the Federation of Nigeria, 2004.

In *Compagnie Generale de Geophysique Nigeria Ltd v Ogiugo*, for example, the Court of Appeal held that 'the word "substance" used in section 4 of the Arbitration [and Conciliation] Act 1990 … is the substance of the dispute i.e. the claim or rights contained in or alleged in the suit which can only be garnered from the writ or the Statement of Claim.'[36] It follows from this decision that 'first statement on the substance of the dispute' refers to or means a statement of defence.

It may therefore mean that the requirement of prompt application for stay of proceedings – applying at any time after appearance but before delivering any pleadings or taking any steps in the proceedings – is no longer the law in Nigeria given the provisions of section 5 (1) of the Arbitration and Mediation Act 2023. Although this section is yet to be interpreted,[37] Nigerian Courts, particularly the Court of Appeal, may follow its earlier decisions that 'it is only acts done in furtherance of the defence that could amount to steps taken in proceedings.'[38]

However, in interpreting section 5(1) of the Arbitration and Mediation Act 2023 and in relying on the earlier cases, care must be exercised to avoid establishing precedents for delay and protracted litigation before an application for stay of proceedings is made. As a panacea, it is submitted that section 5(1) of the Arbitration and Mediation Act 2023 shall be read together and interpreted with its sections 1(1) and (4). Whilst section 1(1) provides that 'the objective of this part is to promote fair resolution of disputes by an impartial tribunal without unnecessary delay and expenses,' section 1(4) provides that:

> Parties, arbitrators, arbitral institutions, appointing authorities and court shall do all things necessary for the proper and expeditious conduct of the arbitral proceedings.[39] [Emphasis added]

Upon proper construction, the words 'without unnecessary delay;' 'parties… shall do all things necessary for the expeditious conduct of the arbitral proceedings' in sections 1(1) and (4) of the Arbitration and Mediation Act 2023 mean that a party desiring arbitration should not make spurious applications or delay in applying for a stay of proceedings and reference to arbitration. Thus, a prompt application is required. But the question of how prompt or at what point an application would be considered prompt is a likely challenge to be faced by the courts and parties.

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[36] [2011] LPELR – 3996 (CA) 5–7.

[37] Nigeria's Arbitration and Mediation Act, 2023 was enacted or assented to by the President of the Federal Republic of Nigeria on 26 May 2023. It is thus few a month old.

[38] *Onward Ent. Ltd. v M.V. Matrix* [2010]2 NWLR (Pt. 1179)530 at 552 Para C. See also *Sacoil 281 Nigeria Ltd. v Transnational Corporation of Nigeria Plc.* [2020] LPELR – 49761 (CA)1 at 73 paras C–F wherein the Court of Appeal following its earlier decision in the *Onward Ent. Ltd. v M.V. Matrix* case held that a step in proceedings 'is a step taken in furtherance of prosecution of the defence like the filing of a statement of defence or an application to file a statement of defence.' Again, the orbiter dictum of the Supreme Court of Nigeria in *Nigeria Produce Marketing Co. Ltd. v Compagnie Noga D' Importation Et D' Exportation Societe Anonyme* [1971] NWLR 223 at 226 that 'what is intended by a step in the proceedings is some steps which indicates an intention on the part of a party to the proceedings that he desires that the action should proceed and has no desire that the matter be referred to arbitration'; and the opinion of Mbadugha, J.N.M, SAN in his book Principles and Practice of Commercial Arbitration, (2015) University of Lagos Press at Page 83 that '… a step in proceedings is a step that indicates an intention on the part of a party to the proceedings that the action should proceed rather than be referred to arbitration' will be relevant and authorities in interpreting Section 5(1) of the Nigeria's Arbitration and Mediation Act, 2023.

[39] Nigeria's arbitration and Mediation Act, 2023.

Also, parties applying for stay of proceeding shall under Nigeria's Arbitration and Mediation Act 2023 do all things necessary for the proper conduct of the arbitral proceedings.[40] This requirement under the new Act is akin to section 5(2) of the old Act.[41] Although AMA 2023 uses the word 'parties' instead of the 'applicant' used in the ACA 2004, in determining what will amount to 'all things necessary for proper conduct of the arbitral proceedings' which parties must do, previous decisions of the Nigerian Courts which correctly interpreted and applied section 5(2) of ACA 2004 will be applicable and authorities in interpreting the new section 1(4). In *Mekwunye v Lotus Capital*, for example, the Court of Appeal held that in order to satisfy section 5(2) of ACA 2004 (similar to section 1(4) of AMA 2023) an applicant must show by its affidavit evidence that it has done all things necessary for the proper conduct of the arbitral proceedings.[42] This will suffice if the party deposes to this in its affidavit in support of the application except if the deposition is challenged or controverted through a counter affidavit by the Respondent(s).[43] In the event of the depositions being challenged, an applicant fulfils the condition if it files a further affidavit, in an answer, stating therein the step(s) he has taken or intends to take for the proper conduct of the arbitration.[44]

An application for stay of proceedings and reference to arbitration must be made to the court in which the suit commenced in alleged breach of the arbitration is pending and not in or at an appellate court.[45] The application which shall be through a motion on notice, must not be in the form of a preliminary objection by reason of section 5 of the Arbitration and Mediation Act,[46] as no ground of objection to the court's jurisdiction can be founded under section 5 of the Arbitration and Mediation Act 2023 or any other provision thereof.[47] The Applicant notifies the other in writing of its referring the matter to arbitration and therein proposes in writing an arbitrator or arbitrators for appointment in the case of a sole arbitrator, or informs the other party of his appointed arbitrator and requests that party to appoint its arbitrator.[48]

The above analysis is premised on the hypothesis that there is no anti-suit injunction precluding or restraining a party from litigating the dispute. Non-existence of an anti-suit injunction as at the time of commencement of a suit leaves the party who intends to arbitrate with the two remedies – anti-suit injunction and a stay of further proceedings – with the dilemma of which of the options to choose in order to avoid any unfavourable result or consequence.

[40] Nigeria's Arbitration and Mediation Act, 2023. S. 1(4).
[41] Arbitration and Conciliation Act, CAP, A.18 Laws of the Federation of Nigeria, 2004.
[42] *Mekwunye v Lotus Capital Ltd & Ors* [2018] LPELR – 45546 (CA) 66–67.
[43] Supra No.46
[44] *M.V Panormos Bay v Olam Nig PLC* [2004] 5 NWLR (Pt.865) 1 at 16.
[45] See *Sakamori Constr. (Nig) Ltd. v L.S.W.C.* [2022] 5 NWLR (Pt.1823) 339 – interpreting similar provisions - section 5(1) Arbitration and Conciliation Act, CAP A18, Laws of the Federation of Nigeria, 2004.
[46] Nigeria's Arbitration and Mediation Act
[47] See *Sakamori Constr. (Nig) Ltd v L.S.W.C.* [2022] 5 NWLR (Pt. 1823) 339 at 400 paras C–E. Although this decision is in relation to the ACA, 2004 it is relevant and applicable to the A&M, 2023.
[48] *UBA v Trident Consulting Ltd* [2013] 4 Clan 119. Whether a party commencing arbitration will propose an arbitrator(s) for appointment or inform the other party of its appointed arbitrator depends on the arbitration agreement and the rules or law governing the arbitration.

2.3.Stay of Proceedings or Anti-Suit Injunction?

If there is no anti-suit injunction prior to a party resorting to litigation rather than arbitration the question of whether the party who wants arbitration will apply for an anti-suit injunction at the seat of arbitration or for stay of proceedings at the court in which litigation is pending becomes fundamental and critical. Given that any step taken in the litigation proceedings may amount to waiving the right to arbitrate or submission to the jurisdiction of the Court; and resorting to anti – suit injunction may undermine a national court's jurisdiction and interference with its due administration of justice.

It is beyond dispute that the national court of the seat of arbitration exercises supervisory or supportive roles which includes but is not limited to an injunctive jurisdiction[49] over an arbitration at the seat. The supervisory and controlling jurisdiction of the national court of the seat starts from the time a seat is selected or a nation is the putative seat even though an arbitration is yet to be commenced. Thus, national courts of the seat, or the putative seat, have the jurisdiction to protect and preserve arbitration yet to be commenced. This jurisdiction extends to determining issues such as the validity, scope, arbitrability or waiver of an arbitration agreement.

Under the Nigerian law, the court at the seat does not have an exclusive jurisdiction in this regard. This is consistent with and results from the principle, under Nigerian law, that an arbitration agreement does not automatically oust the jurisdiction of the courts;[50] the statutory provision states that the power of the court to stay proceedings and refer parties to arbitration shall apply even where the seat of arbitration is outside the Federal Republic of Nigeria or the parties have not designated the seat or no seat has been determined.[51] Therefore, if a suit is commenced in respect of a matter subject to arbitration, the court before which the suit is pending has jurisdiction over the subject matter except where it declines jurisdiction, or stays its proceedings, according to its national laws.[52] From Nigeria's Arbitration Law and perspective, the court in which a suit is pending, irrespective of whether it is the seat of the arbitration, is the most appropriate forum to determine issues such as the validity, scope, waiver and arbitrability of the arbitration agreement. This is to enable the court, in the event of an application to stay its proceedings, to determine whether to stay proceedings and refer the parties to arbitration. For example, no court will stay its proceedings if an arbitration agreement is invalid or has been waived or if the dispute before it is not within the scope of the arbitration agreement or is not arbitrable as a matter of its national law.[53]

It follows that if litigation is commenced in any national court, for example in Nigeria, allegedly in breach of an arbitration agreement that puts in abeyance the protective and preservatory jurisdiction of the national court of the seat of arbitration over the arbitration until the Nigerian Court determines whether to stay further proceedings pending

[49] Injunctive jurisdiction also exists at the national court of the country whose law governs the arbitration. See Mbadugha, J.N.M, SAN [2015] Principles and Practice of Commercial Arbitration, Lagos, Nigeria: University of Lagos Press, pp.27, 80 (para. 1 and fn. 39) and 92

[50] *Obembe v Wemabod Estates Ltd* [1977]5 SC (Reprint Edition) 70 at 79-80; *Sakamori Construction (Nig) Ltd. v L.S.W.C.* [2022]5 NWLR (Pt. 1823) SC 339 at 379 paras A-9 and 388-389 paras H-A.

[51] Nigeria's Arbitration and Mediation Act, 2023, Section 1 (7).

[52] *Channel Tunnel Group Ltd & Anor v Balfour Beatty Construction Ltd & Ors* [1993] 1 ALL ER 664, at 682 para C and paras. F–G.

[53] *Shell Petroleum Development Company of Nigeria Ltd v Crestar Integrated Natural Resources Ltd* [2015] LPELR – 40034 (CA) 1 at 27–29 paras C–B and 39–40 paras C–C.

arbitration. This proposition is consistent with Articles II (1) & (3) of the New York Convention 1958 which provides that:

> (1) Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration
>
> (3) The Court of a Contracting State, when seized of an action in a 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 finds that the said agreement is null and void, inoperative or incapable of being performed.[54]

It is submitted that, upon proper construction, article II (3) of the New York Convention confers jurisdiction on the court of a contracting state seized of an action in a matter subject to arbitration to determine if the arbitration agreement is null and void, inoperative or incapable of being performed.[55] To determine whether an arbitration agreement is null and void is to determine whether it is valid; while to determine whether it is inoperative or incapable of being performed or whether the subject matter is capable of settlement by arbitration includes a determination as to its scope, whether it has been waived and issues of its arbitrability.

It is not within the purview of article II (1) & (3) of the New York Convention 1958 that a party in a proceeding commenced in a court of a contracting State in respect of a matter subject to arbitration will resort to anti-suit injunction in a foreign court, or even in any court, to enforce the arbitration agreement. That the New York Convention provides for stay of proceedings and not anti-suit injunction and/or did not mention anti-suit injunction means that anti-suit injunction is excluded. This reasoning is consistent with the *principle* of statutory interpretation expressed in the Latin maxim '*expressum facit cessare tactum*', meaning that mentioning of one or more things of a particular class means excluding all other members of the class.

Therefore, article II (3) of the New York Convention recognizes that a court in any signatory country when seized of any matter which is subject to an arbitration retains a

[54] Also, article 8(1) of the UNCITRAL Model Law on International Commercial Arbitration, 1985 (as amended in 2006) gives credence to the proposition. This article provides that "a court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed."

[55] Concomitantly, the same court will determine in the same proceedings whether the party has waived its right to arbitrate or submitted to the jurisdiction of the court or taken steps in proceedings. By the Arbitration and Mediation Act, 2023 (AMA) Nigeria incorporated or enacted the New York Convention and is a signatory to the UNCITRAL Model Law. Please, see for example, section 5(1) AMA which was influenced by article 8(1) of the UNCITRAL Model Law and section 60 of AMA and its second schedule that incorporated the New York Convention. Consequently, Nigeria court, in the circumstance, will determine whether the party has taken steps in proceedings or has submitted to the court's jurisdiction and waived its right to arbitration.

jurisdiction even if it is not the court of the seat to determine whether to refer the parties to arbitration or to proceed with the litigation.[56] Thus, the New York Convention 1958 is the international legal framework or authority which empowers courts of contracting states to determine whether to stay further proceedings and refer parties to arbitration whenever any matter subject to arbitration is litigated in their courts. Consequently, anti-suit injunction is, in the circumstance, inconsistent with, or a breach of, article II (1) & (3) of the New York Convention 1958.

Many countries have incorporated the New York Convention and/or its article II (1) & (3).[57] To this extent, anti-suit injunction is both a breach of the national law of the countries that incorporated the New York Convention and an interference with those countries' national courts' due administration of justice and/or jurisdiction. In the same premise, anti-suit injunction negates the power of the Nigerian Courts and breaches as well as undermines the effectiveness of section 1(7) (a) of Nigeria's Arbitration Act 2023 by preventing Nigerian courts from deciding for itself whether it should stay proceedings and refer parties to arbitration or conclusively determine the suit. Section (1) 7 of the Act provides that:

> The powers of the court under this subsection shall apply even where the seat of the arbitration is outside the Federal Republic of Nigeria or the parties have not designated the seat or no seat has been determined –
>
> (a) section 5 (power to stay court proceedings).

However, since anti-suit injunction is directed against the parties and not the courts it may be argued that it does not interfere with any court's due administration of justice and/or jurisdiction nor contravenes the New York Convention or any national law. Conversely, as it precludes or restrains parties from participating or continuing with the national court's proceedings, it contemporaneously halts and eventually terminates the court's adjudicatory functions in relation to the dispute and the parties given that without parties courts' adjudicatory function will only exist in theory. It is only when parties submit their disputes to courts that courts' jurisdiction and adjudicative powers are activated. By restraining a party from continuing with litigation proceedings anti-suit injunction though not directed against the court undoubtedly stops the court from adjudicating the particular dispute in question at least determining whether to refer the dispute to arbitration – since the parties would no longer appear before it. To this extent, anti-suit injunction interferes with a national court's jurisdiction and due administration of justice.

Anti-suit injunction denies parties access to the national court, at least, for the national court to decide whether to stay proceedings and refer the parties to arbitration. A denial of access to court is a refusal of access to justice. Access to justice may be defined as the right to bring a dispute before a tribunal or a court and the right to enter and participate in the judicial process of adjudication of the dispute by either a court or a tribunal. It is also

[56] This is consistent with Section 1(7) (a) of the Nigeria's Arbitration and Mediation Act 2023.

[57] There are 172 parties to the New York Convention as at 9th May, 2023: https://uncitral.un.org>texts>status2. Accessed on 9th May, 2023.

the right to have questions bordering on one's civil rights and obligations determined judicially[58] by either courts or tribunals. There is no question more fundamental in the whole process of adjudication than that of access to justice, that is, access to courts or tribunals.[59] Access to justice is a basic principle of the rule of law. The courts of every civilized nation and the United Nations condemn any act that denies access to justice to the extent that it has become the duty of the courts to nurture, preserve and even expand the horizons of law with the ultimate intention to make access to court a reality.[60] Thus, anti-suit injunction violates the constitutional right of the litigant before a national court like the Nigerian Courts.

In *Aiteo Eastern E & P Company Ltd. v African Finance Corporation & Ors*,[61] for example, *Aiteo* sued AFC and 8 others (Defendant) in Nigerian Federal High Court over an onshore and offshore facility agreement and obtained an *ex-parte* order against the defendants. Rather than apply for stay of proceedings and reference to arbitration the Defendants appealed to the Nigerian Court of Appeal on grounds of lack of trial court's jurisdiction to entertain the suit as the two facility agreements provided for arbitration in London. Whilst both cases were pending the Defendants obtained an *ex-parte* interim anti-suit injunction from the London High Court restraining *Aiteo* from *inter alia* continuing with the suit. Subsequently, the English High Court ordered, inter alia:

> … the Defendant is restrained from continuing, prosecuting, taking any further steps in, enforcing, or otherwise participating in the proceedings filed by the Defendant in the Federal High Court in the Abuja Judicial Division ('the Federal High Court') Suit No: FHC/ABJ/CS/1310/2019 ('the Nigerian Proceedings'), including by way of applications for further or renewed injunctive relief.[62]

The English Court's final anti-suit injunction order contains a penal notice that:

> if you, Aiteo Eastern E & P Company Limited, the within-named Defendant, disobey this Order you may be held to be in contempt of court and any of your directors or officers imprisoned, fined, and/or have your assets may be seized. Any other person (legal or natural) who knows of this Order and does anything which helps or permits the Defendant to breach the terms of this Order may also be held to be in contempt of court and may be imprisoned, fined, have their assets seized and/or face other punishment under the law.

[58] Constitution of the Federal Republic of Nigeria, CAP. C23, Laws of the Federation of Nigeria, 2004 s.6 (6) (b).
[59] *Nnadi v Okoro* [1998] 1 NWLR (Pt. 535) 573 C.A.
[60] *Houtmangracht v Oduba* [1995] 1 NWLR (Pt. 371) 295 at 312 para. D
[61] Suit No. FHC/ABJ/CS/1310/2019
[62] *African Insurance Corporation v Aiteo Eastern E & P Company Ltd.* [2022] EWHC 768 (COMM) Claim No. CL – 2020 – 000808. England and Wales High Court of Justice, Queens Bench Division, Commercial Court. Final order made on 12 April, 2022.

The English Court further ordered thus:

> Pursuant to section 37(1) of the Senior Courts Act 1981, the Defendant is required to take any and all steps necessary to obtain the discontinuance and/or dismissal of the Nigerian Proceedings as soon as reasonably possible (and no later than by 4pm Nigerian Time by 3 May 2022).

Consequent upon the English High Court final order of anti-suit injunction and penal notice, Aiteo stopped participating in the Nigerian High Court proceedings. This abruptly and prematurely ended the Nigerian High Court's adjudicatory function and jurisdiction over Aiteo and as well denied Aiteo access to the court at least to determine whether to stay proceedings.

It follows that where a country is a signatory to the New York Convention 1958 or has incorporated it as her domestic law, resorting to anti-suit injunction in a foreign court rather than applying to the court of that country for stay of proceedings if a suit is commenced in a court of such country in a seeming breach or even in breach of an international arbitration agreement will *inter alia* contravene that country's law[63] and the New York Convention. That will also undermine that country's judiciary; it interferes with the country's courts' jurisdiction and/or due administration of justice; and thus, it interferes with the country's territorial integrity. It will as well deny the parties – at least the Plaintiff – access to justice and breaches the Plaintiff's constitutional right to having the court determine whether to stay proceedings and refer the parties to arbitration.

The European Court of Justice came to a similar, or the same, conclusion pursuant to relevant EU Regulations. In case *No. 159/02, Turner v. Grovit* [2004],[64] the full Court of European Court of Justice found that it was inconsistent with the Brussels I Regulation to issue an anti-suit injunction to restrain proceedings in another Convention country. That is so even where that party is acting in bad faith in order to frustrate existing proceedings. The Court stated that the Brussels I Regulation enacted a compulsory system of jurisdiction based on mutual trust of Contracting States in one another's legal systems and judicial institutions. Thus, it held that:

> It is inherent in that principle of mutual trust that, within the scope of the Convention, the rules on jurisdiction that it lays down, which are common to all the courts of the Contracting States, may be interpreted and applied with the same authority by each of them… Any injunction prohibiting a claimant from bringing such an action must be seen as constituting interference with the jurisdiction of the foreign court which, as such, is incompatible with the system of the Convention.

[63] In addition to an anti-suit injunction in such circumstance contravening Sections 5(1) and 60 of Nigeria's Arbitration and Mediation Act, 2023, it also contravenes Section 1 (7) of the same Act which in its mandatory terms gives Nigeria Court the power to determine whether to stay proceedings and refer the parties to arbitration even if the seat of arbitration is outside the Federal Republic of Nigeria or the parties have designated the seat or no seat has been determined.

[64] ECR I-3565

In the subsequent Case *No. 185/07, Allianz v West Tankers* [2009],[65] the question arose as to whether it was inconsistent with the Brussels I Regulation to issue an anti-suit injunction to restrain proceedings in another Convention country on the basis that such proceedings would be contrary to an English arbitration agreement. In its decision, the Grand Chambers of the European Court of Justice found that notwithstanding that article 1(2)(d) excludes arbitration from the scope of the Brussels I Regulation, an anti-suit injunction would be incompatible with the EC Regulation for the court of a member state to grant an order enjoining a party from commencing proceedings before courts of another member state even though the proceedings would be in violation of a valid arbitration agreement since, at any rate, such an injunction bars the parties' access to an EU Member Court. And that, a court order which undermines the effectiveness of the EC Regulation by preventing a court in another member state from deciding for itself whether it had or should exercise jurisdiction under the EC Regulation is incompatible with the regulation regardless of whether the proceedings in which the order was made are themselves within the scope of the EC Regulation.

The Brussels I Regulation was later repealed by Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast) (the Recast Brussels Regulation'). However, in *Nori Holding Limited v Public Joint Stock Company*,[66] the English Commercial Court was asked to determine whether given the Recast Regulation, the decision of the European Court of Justice in West Tankers Inc. remains good law. The court held that 'there is nothing in the Recast Regulation to cast doubt on the continuing validity of the decision in West Tankers… which remains an authoritative statement of EU law.'[67]

Consequently, it is beyond conjecture that resorting to an anti-suit injunction as a panacea to a breach of an international arbitration agreement by litigation not only contravenes the New York Convention 1958, national laws and Eu Regulations, it also undermines the judiciary and territorial integrity of the country of the court of litigation as well as interferes with the jurisdiction of such courts. Therefore, if an anti-suit injunction is not in existence as at the time litigation is commenced in a country, such as Nigeria, in a seeming breach or even in breach of an international arbitration agreement, resorting to an application for stay of proceedings rather than for an anti-suit injunction in a foreign country would be the proper choice and procedure in the circumstance.

2.4.Not Applying for Stay of Proceedings

Any party to an arbitration agreement who intends to preserve its right to arbitration if proceedings are commenced against it in respect of a matter within the scope of the arbitration agreement may, under Nigerian Law, not later than when submitting its first

[65] ECR I-00663

[66] [2018] EWHC 1343 (Comm).

[67] Similarly, according to Trevor Hartley anti-suit injunctions 'are giving rise to increasing friction between courts in different Countries; Hartley C. Trevor [1987] Comity and the use of Anti-Suit Injunctions in International Litigation. The American Journal of Comparative Law, Vol. 35, No. 3 Pages 487–511. See also Laker Airways v. Pan Am World Airways 559 F. Supp. 1124, 1138 (P.D.C. 1983), aff'd, 731 F. 2d 909 (D.C. Cir 1984) where a USA district court accused an English Court of interfering in an American lawsuit "without appropriate regard to principle of comity" when it issued an anti-suit injunction to prevent a British company from pursuing an action in the court of United States.'

statement on the substance of the dispute, request to the court in question to stay the proceedings.[68] If a party fails to apply for stay of proceedings or the court refused such an application, the party would be deemed as having waived its right to arbitrate and will be found to have submitted to the jurisdiction of the court in consequence whereof the court determines the dispute.[69] In *Obi Obembe v Wemabod Estates Ltd.*,[70] the Supreme Court of Nigeria held that:

> …any agreement to submit a dispute to arbitration such as the one referred to above, does not oust the jurisdiction of the court. Therefore, either party to such an agreement may, before a submission to arbitration or an award is made, commence legal proceedings in respect of any claim or cause of action included in the submission… No stay was asked by the defendants after they were served with writ of summons … Moreover, if the court has refused to stay an action or if the defendant has abstained, as in the case in hand from asking it to do so, the court has seisin of the dispute, and it is by its decision, and by its decision alone that the rights of the parties are settled. (Emphasis added)[71]

A prerequisite to getting an order of stay of proceedings is that the applicant is proactive by participating in the litigation to the extent of complying with section 5 AMA 2023 through requesting not later than when submitting its first statement on the substance of the dispute that the parties be referred to arbitration. A wholesome reading of section 5 AMA 2023 reveals that the legislature does not, by virtue of this section, create an avenue to stall judicial proceedings in courts of law. The section envisages the participation of both parties in the litigation process. It does not preclude a party from participating in the litigation process on account of an arbitration clause. This legislative intent is deduced from the fact that the law permits any party to make an application under this provision at any time not later than when submitting its first statement on the substance of the dispute. In other words, only an active participant in the litigation process can take advantage of this provision.[72]

Thus, a party who rather than being proactive but remains silent when served with an originating process in respect of a matter subject to arbitration and sits on its right of applying for a stay has, under Nigerian Law, waived its right to arbitrate. Thus, in *The Vessel MT Sea Tiger v. ASM (HK) Ltd*, the appellants were served with an originating process in respect of a matter subject to arbitration in London but they failed to either enter an appearance or participate in the proceedings and the Nigerian Court of Appeal held that:

> The failure or refusal by it to appear in reaction to the originating process to enable the appellant to challenge the jurisdiction of the lower

[68] Arbitration and Mediation Act, 2023, section 5 (1)

[69] *KSUDB v Fanz Construction Co. Ltd* (1990) 4 NWLR (Pt. 142) 1; *Obi Obembe v Wemabod Estates Ltd* (1977)5 S.C. (Reprint Edition) 70.

[70] [1977]5 S.C. (Reprint Edition) 70.

[71] *Obi Obembe v Wemabod Estates* [1977] S.C. (Reprint Edition) 70 at 79-80 lines 20-15.

[72] See *Sakamori Construction (Nig) Ltd. v L.S.W.C.* [2022] 5 NWLR (Pt. 1823) SC 339 at 378 paras E-H and at 397-398 paras. F–A. wherein the Supreme Court of Nigeria interpreted equivalent provisions of Nigeria's ACA, CAP A.18, 2004.

> court on the ground of the arbitration clauses… left no other reasonable presumption in law and option to the lower court than that the appellants had submitted to the jurisdiction of that court to adjudicate over the suit… The failure or refusal to enter an appearance and be represented in the suit constituted and amounted to a muted but clear submission to the jurisdiction of the lower court in the case.[73]

However, there may be instances where a party who sat on its right or remained silent and did not apply for stay of further proceedings or has taken steps in proceedings or has waived its right of arbitration applied to the court of the seat of arbitration for anti-suit injunction to preclude the Plaintiff from continuing with litigation. In such scenario, it may be asked: would the fact that by the law of the country or place of litigation the party has taken steps in proceedings or waived its right of arbitration constitute a bar to its right to an order of anti-suit injunction particularly but not exclusively if it did not apply for a stay of proceedings?

An injunction cannot be granted if an applicant has no legal or equitable right which is threatened.[74] An applicant for an injunctive relief must establish that it has a recognizable legal or equitable right to be protected[75] and that such legal or equitable right has been infringed or threatened. This presupposes that since anti-suit injunction is an equitable remedy, it cannot be granted if an applicant has no legal or equitable right, the breach of which is likely or which is threatened by litigation or continuation of litigation. Thus, a party who has waived its right to arbitrate or has taken a step or steps in proceedings or has lost its contractual right to arbitrate is not legally entitled to an anti-suit injunction.

In *AFC & 8 Ors. v AITEO*,[76] there were onshore and offshore facility agreements. Both agreements contained arbitration clauses. Whereas the onshore was governed by Nigerian Law the offshore was governed by English Law. Upon a dispute arising, the respondent initiated proceeding at the Nigerian Federal High Court and obtained an *ex-parte* order against the claimants therein. The claimants, *inter alia*, appealed against the *ex-parte* order to the Nigerian Court of Appeal. As both the Federal High Court and Court of Appeal proceedings were pending, the claimant commenced the London suit and obtained an interim anti-suit injunction against the respondent. Upon the claimant's application for a final anti-suit injunction, the respondent argued, *inter alia*, that the claimants had waived their rights to arbitrate because of the roles or steps they took in the Nigerian proceedings. In granting the final anti-suit injunction, the English Court, held that:

> Where a party takes a step which furthers a defence to a claim brought in court the party evinces an intention not to have the merits of the claim determined by arbitration but in court. It therefore makes sense in such a case for the party to have lost his right to arbitrate and be

[73] *The Vessel MT Sea Tiger v ASM* (HK) Ltd (2020) 14 NWLR (Pt. 1745) 418, at 453–454.
[74] *Adenuga v Odunewu* [2001]2 NWLR (Pt. 696) 184 at 195 para. G.
[75] *Larabee Enterprises Ltd & Anor v Nigerian Export Import Bank & Anor* [2022] LPELR – 57007 (CA) 1 at 15 paras A-B; *Ayorinde v A.G. Oyo State* [1996]3 NWLR (Pt. 343)20; *A.C.B. Ltd. v Awogboro* [1996]3 NWLR (Pt. 437) 383.
[76] [2022] EWHC 768 (Comm). The author rendered an expert opinion in this matter and gave oral evidence in respect thereof at the English High Court of Justice, London, UK.

> unable to seek a stay. In the present case the Lenders, apart from the First Claimant, issued a notice of appeal seeking to have the injunction granted at first instance set aside and for the proceedings at first instance to be dismissed or struck out, the basis of that appeal, in Grounds 1 and 3, was the arbitration agreement. Rather than evincing an intention to have the merits of the claim determined in court the Lenders were insisting upon the merits of the claim being determined in arbitration. It is therefore difficult to understand why it makes sense in such a case for the Lenders to have lost their right to arbitrate and to be unable to seek a stay… Finally, it is to be noted that the Nigerian Court of Appeal has recently dismissed the Borrower's application for injunctive relief restraining the Lenders from proceeding with the London arbitrations. That dismissal sits unhappily with the suggestion that the Lender's Notice of Appeal had caused the Lenders to have lost their right to arbitrate… For the same reasons I find that the notice of objection filed by the first Claimant which objected to the jurisdiction of the Nigerian Courts was not, in Nigerian law, a step in the action. It was manifestly not a step that indicated an intention on the part of the First Claimant that the proceedings should proceed rather than be referred to arbitration, to adopt Professor Mbadugha's statement of Nigerian law in his textbook.[77]

Implicit in the English Court's decision in the *AFC v AITEO*'s case is that had the court found that the Claimants had lost or waived their rights to arbitrate it would not have granted the final order of anti-suit injunction but would have set aside the *ex-parte* interim order of anti-suit injunction. It follows that a party who has lost its right to arbitrate or taken a step in proceedings cannot be granted an order of anti-suit injunction. However, since such an application is likely to be made at a foreign court – the seat of arbitration – whether that court will grant the application will depend on that court's understanding of the law of the country of litigation. In *AFC & Ors. v AITEO* (supra) the English Court granted a final order of anti-suit injunction based on its understanding of Nigerian law and not what exactly Nigerian law is.

[77] AFC v. AITEO [2022] EWHC 768 (Comm) paras. 57, 62 and 64. The decision of the English court in this case does not represent the Nigerian law on the subject, although the court's reliance on Nigerian Court of Appeal's dismissal of AITEO's application to restrain the Claimants from continuing with the London arbitration seem to distinguish this case from the cases in which the Nigerian Apex Court established the law on the subject even though the Nigerian Court of Appeal did not determine whether the Claimant had taken step in proceedings. The English court refused to follow nor even refer to the Supreme Court's recent decision on the issue in Main Street Capital Bank Ltd. v. Nigeria Reinsurance Corporation [2018] 14 NWLR (Pt. 1640) SC 423 which the Respondent cited to the court and relied on. Again, the English Court's decision is inconsistent with the latest Nigerian Supreme Court decision in Sakamori Construction (Nig) Ltd. v. L.S.W.C. [2022]5 NWLR (Pt. 1823) SC 339. In this case, the Appellant attempted to challenge the jurisdiction of the trial court to entertain the suit on grounds of arbitration rather than apply for a stay, as the Claimant in *AFC v AITEO* did in the cases before Nigerian Courts, and the Supreme Court held that the Appellant had lost its right to arbitrate as there is no ground of objection to the jurisdiction of the court that can be founded upon Section 5 ACA or any other provision thereof and that the section envisaged only an application for stay of proceedings which the court has the discretion to grant or refuse.

2.5.Litigation when Arbitration is Pending

While arbitration is commenced and pending a party may, despite participating in the arbitral proceedings, commence litigation in respect of the same subject matter of arbitration.[78] A Respondent in this scenario should apply for a stay of proceedings in accordance with article 11(3) of the New York Convention 1958 or provisions of any relevant national law of the country of the court of litigation requiring a party in that situation to apply for a stay of proceedings and reference to arbitration. In *MV Lupex v NOC&S Ltd.*[79] an arbitration was already commenced in London. The Respondent filed a counterclaim therein before commencing a suit in Nigeria in respect of the same subject matter of the London arbitration. The Appellant applied for, *inter alia*, a stay of proceedings. In allowing the appeal and granting the application the Supreme Court of Nigeria held that:

> It is a basic principle of law that where parties to a contract have under the terms thereof agreed to submit to arbitration if there is any dispute arising from the contract between them, a defendant who has not taken any steps in the proceedings commenced by the other party, may apply to the court for a stay of proceedings of the action to enable the parties go to arbitration as contracted. The power of the court to stay such proceedings is exercisable under and by virtue of section 5 of the Arbitration and Conciliation Act and 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... In the present case, the respondent had voluntarily submitted to arbitration in London pursuant to the agreement between the parties. It however went on to file a suit against the appellant in respect of the dispute which is the subject – matter of the arbitration at the Federal High Court, Lagos... it seems to me that the said respondent, having voluntarily submitted to arbitration as contracted by the parties, it was an abuse of the process of the court for it to institute a fresh suit in Nigeria against the appellant in respect of the same dispute during the pendency of the arbitration proceedings unless there was a strong, compelling and justifiable reason for such an action… I think learned counsel for the appellant is right when he argued that in refusing to grant the stay of proceedings applied for, the court below granted to the respondent a right it did not possess in the contract between the parties. This is because, the respondent, under the said contract, was not reserved the right to resort to litigation in court at the same time as the arbitration proceedings between the parties were in progress.[80]

[78] In some jurisdictions, like Nigeria, if an action in respect of a dispute subject to arbitration is pending in a court, arbitral proceedings may nevertheless be commenced or continued and an award may be made by the arbitral tribunal while the matter is pending before the court.

[79] *MV Lupex v NOC&S Ltd* [2005] 15 NWLR (Pt. 844) S.C. 469.

[80] *MV Lupex v NOC&S Ltd* [2003] 15 NWLR (Pt. 844) S.C. 469 at 490-491 paras D-F.

3. Conclusion

In order to save arbitration from dissipation through litigation, conventions,[81] treaties and national laws[82] provide the remedy of stay of proceedings and reference to arbitration. Stay of proceedings is applicable in both domestic and International Arbitration. In the same vein, in international arbitration, courts in common and civil law countries invented and exercised a jurisdiction *in personam* to restrain by injunction – anti-suit injunction – foreign proceedings brought in breach of an agreement to refer disputes to arbitration.[83]

Article II (3) of the New York Convention recognizes that a court in any contracting State when seized of any matter which is subject to an arbitration retains a jurisdiction even if it is not the court of the seat to determine whether to refer the parties to arbitration or to proceed with the litigation. Thus, the New York Convention 1958 is the international legal framework or authority that confers jurisdiction on courts of signatory states to determine whether to stay further proceedings and refer parties to arbitration whenever any matter subject to arbitration is litigated in their courts.

Therefore, anti-suit injunction is in the circumstances inconsistent with, or a breach of, article II (1) & (3) of the New York Convention 1958. Many countries have incorporated the New York Convention and or its article II (1) & (3). To this extent, anti-suit injunction is a breach of the national laws of the countries that incorporated the New York Convention and an interference with those countries' National Courts' due administration of justice. To hold otherwise will be contrary to the principle that 'every statute is interpreted, so far as its language permits, so as not to be inconsistent with the comity of nations or the established rules of international law.'[84]

Further, it is not within the contemplation of article II (1) & (3) of the New York Convention 1958 that a party in a proceeding commenced in a court of a contracting State in respect of a matter subject to arbitration will resort to anti-suit injunction proceeding in a foreign court, or even in any court, to enforce the arbitration agreement. That New York Convention provides for stay of proceedings and not anti-suit injunction and or did not mention anti-suit injunction means that anti-suit injunction is excluded. This reasoning is consistent with the *principle* of statutory interpretation expressed in the latin maxim '*expressum facit cessare tactum*', meaning that mentioning of one or more things of a particular class means excluding all other members of the class.

As anti-suit injunction precludes parties from participating or continuing with the national court proceedings it contemporaneously halts and eventually terminates the court's adjudicatory functions in relation to the dispute and the parties given that without parties courts' adjudicatory function will only exist in theory. It is only when parties submit their disputes to courts that courts' jurisdiction and adjudicatory duties are activated. By restraining a party from continuing with litigation proceedings, anti-suit injunction though not directed against the court, indirectly stops the court from adjudicating the particular suit in question since the parties would no longer appear before the court. To this extent, anti-

[81] New York Convention, 1958, Articles II (1) and (3); UNCITRAL Model Law on International Commercial Arbitration, 1985 (as amended in 2006)

[82] Nigeria's Arbitration and Mediation Act, 2023, S. 5.

[83] *Pena Copper Mines Ltd v Rio Tinto Co. Ltd* (1911) L.T. 846 (CA)

[84] Lagan. P. St. J [2008] Maxwell on Interpretation of statutes (EDS) 12th Edition, sixteenth impression, India: LexisNexis Butterworths, Page 183

suit injunction interferes with a national court's jurisdiction and due administration of justice.

It follows that if a country is a signatory to the New York Convention 1958 or has incorporated it as her domestic law and a suit in respect of a subject matter of arbitration is commenced in the country's court, resorting to anti-suit injunction in a foreign court rather than applying to the court of that country to stay proceedings will *inter alia* contravene that country's law and interfere with its courts' jurisdiction and/or due administration of justice. Further, anti-suit injunction is in the circumstances incompatible with the European Union Regulation 1215/2012, 'the Recast Brussels Regulation', and also renders ineffective any national law, like sections 1(7) and 5 of Nigeria's Arbitration and Mediation Act 2023, which empowers a national court before which a matter subject to arbitration is pending to stay proceedings even if the seat of the arbitration is a different country or the parties have not designated the seat or no seat has been determined.

Therefore, if an anti-suit injunction is not in existence as at the time litigation is commenced, resorting to an application for stay of proceedings rather than for an anti-suit injunction in a foreign country is recommended as the proper choice and procedure in the circumstance. Resorting to anti-suit injunction in a foreign court instead may mean that the party is involved in interfering with the court's due administration of justice or obstructing the cause of justice and this may result in contempt proceedings against the party.