Abe & Asotie LP

THE DOCTRINE OF SEVERABILITY AS IT RELATES TO ARBITRATION CLAUSES IS NO LONGER ABSOLUTE – A SALIENT DEVELOPMENT IN THE ARBITRATION & MEDIATION ACT, 2023.

FEBRUARY 2026

Introduction

Typically, arbitration clauses are treated as independent and separate agreements, distinct from the main or underlying contract between the parties. It therefore follows that when a contract which is the subject of an arbitration clause is terminated, the arbitration clause survives the terminated contract. In other words, parties would still be bound by an arbitration clause notwithstanding the termination of the main contract. This is generally known as the Doctrine of Severability, a long-standing principle of law in relation to arbitration clauses.[1]

The doctrine of severability connotes that an arbitration clause is distinguishable, different and independent from the main contract and is therefore treated as a separate agreement that can be independently enforced. This doctrine is recognized in the Arbitration and Mediation Act 2023, particularly under section 14(2) of the Act provides that: "an arbitration clause which forms part of a contract will be treated as an agreement independent of the other terms of the contract and a decision by the arbitral tribunal that the contract is void does not entail ipso jure the invalidity of the arbitration clause." The doctrine was also well explained in the case of Project Vision Actualizers Ltd v. Ilushin Estates Ltd & Another (2021) LPELR-55629(CA), where the Court held as follows: "Generally, in Agreements that have an arbitration clause, the arbitration clause is regarded as a separate contract, such that even if the Agreement fails, the arbitration clause survives as a separate contract."

The Current Position

With the enactment of the new Arbitration and Mediation Act 2023 (the "Act"), the doctrine of severability as it relates to arbitration clauses is no longer absolute, as the circumstances under which arbitration clauses would survive an agreement have been restricted or qualified. Under the provisions of Section 5 of the Act, an arbitration clause in an agreement is now unenforceable if the agreement (in which an arbitration clause is embedded) is void, inoperative or incapable of being performed. For ease of reference, the said provisions of section 5 of the Act read:

> *"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." (Emphasis supplied).*

It is instructive to note that the qualifications or exceptions in the above provision were not contained in the defunct Arbitration and Conciliation Act, LFN 2004. They are therefore new to arbitration jurisprudence in Nigeria and posit that Nigerian Courts are no longer bound to enforce arbitration clauses/agreements if they find

[1] See the decision of the Supreme Court in NNPC v. CLIFCO NIG. LTD (2011) LPELR-2022(SC).

that the main or underlying agreement is void, inoperative or incapable of being performed.

A void agreement is an agreement that is invalid and unenforceable from inception, either because it is predicated on illegal acts, or is fraught with fundamental mistakes, or was executed by a party or parties that lack the capacity to contract, such as minors, persons of unsound mind, a bankrupt person, etc. Also, an agreement is said to be inoperative when it is no longer operative (as the word implies) or has become ineffective. It is an agreement that was once valid but ceases to have legal effect or can no longer be enforced as a result of subsequent actions of parties and circumstances, such as repudiation, revocation, abandonment, termination, waiver, etc. Lastly, a contract is considered incapable of being performed when an unforeseen event, which is not attributable to either party occurs and makes performance impossible, illegal, or radically different from what was envisaged or agreed. Examples are destruction of the subject matter, war, government action, or personal incapacity/death for personal service contracts, supervening illegality (as a result of new laws), etc.

Suffice to say that when a court finds that a contract or agreement falls under any of the categories described in the foregoing, the arbitration clause becomes unenforceable under the provisions of Section 5 of the Act, and the Court can, on this basis, reject a party's request for the matter before it to be stayed pending referral to arbitration. It may appear that there is a conflict between the provisions of sections 5 and 14(2) of the Act, in relation to void contracts. However, a closer look would reveal that the provisions of section 5 relate to determination by courts, while the provisions of section 14(2) relate to determination by arbitral tribunals. Thus, while courts can reject the enforcement of an arbitration clause on the ground that the underlying contract is void, arbitral tribunals cannot.

One rationale for the separate and distinct allocation of powers to the court and arbitral tribunals, respectively, is that: (i) a court's competence is statutory and exists independently of the parties' contractual arrangements. (ii) it would amount to a waste of time and resources for courts to refer a matter to arbitration when it finds that the underlying contract itself is void, inoperative or incapable of being performed. Conversely, unlike courts, the arbitral tribunal's authority to act depends on the existence of an arbitration agreement. Thus, to reject an arbitration clause simply because of a void underlying contract would rob an arbitral tribunal of the competence to decide on its own jurisdiction. Hence, under section 14 (2), the arbitral tribunal has the authority to decide on its own jurisdiction, irrespective of whether the underlying contract containing the arbitration agreement is void.

Notably, the new position of the law as contained in section 5 of the Act was recently tested in the case of Tripzapp Travels Network Limited v. Baron Architecture Limited

[2] See also Article II (3) of the New York Convention (1958); Article 8 of the UNCITRAL Model Law

(Suit No. LD/5080CMW/2024) which is pending at the High Court of Lagos State Coram Honourable (Mrs.) Justice L.A Okunnu. In this case, the Claimant and the Defendant executed a contract for the rendering of management services. The contract contained an arbitration clause requiring disputes arising from the contract to be resolved by arbitration. In the course of the contract, a dispute arose between the parties. Rather than submit the dispute to arbitration, the aggrieved Defendant decided to terminate the contract, putting an end to the relationship between the parties. Consequently, the Claimant instituted an action at the High Court of Lagos State challenging the wrongfulness and effect of the Defendant's termination of the contract. In response, the Defendant, relying on the provisions of section 5 of the Act, filed an application for stay of proceedings pending the initiation and determination of the dispute by arbitration, on the grounds that the claim ought not to have been filed before a court because the terminated agreement contains an arbitration clause. This application was opposed by the Claimant, and same was presented to the Court for determination.

The Position of the Court

In a ruling delivered on 6th October 2025, the court copiously examined the facts of the case and came to a finding that the contract had been terminated, and the termination rendered the contract inoperative. The court then proceeded to apply its findings to the provisions of section 5 of the Act, which directs it not to refer matters before it to arbitration if it finds that the contract is inoperative. Upon this application, the court took the position that by virtue of the fact that the contract is inoperative, the arbitration clause in the contract also becomes inoperative and cannot be enforced by the grant of a stay of proceedings under the provisions of section 5 of the Act. The relevant excerpt of the ruling is set out below as follows:

> *"...the Defendant cannot put an end to the agreement and then turn around to try and seemingly enforce terms of that same agreement that it had, by itself and on its own initiative, terminated. With the contract being dead, the clause on arbitration is just as dead as the dodo! It, too, is no longer capable of being enforced. You cannot possibly keep any of the organs of a corpse alive in that same body that is no more. And, of course, this arbitration clause cannot exist in isolation of the contract through which it was made. In the particular circumstances of this case, there is no longer an arbitration agreement to be activated because there is no longer a contract to be performed." (Emphasis supplied).*

The Court thereafter concluded as follows:

> *"With both sides in agreement that the contract made by them is dead, it again stands to reason that this contract is no longer "operative". Certainly, the court cannot force them to turn back the clock; it cannot act on the basis of what is no more. It will not be retroactive in its directives or pronouncements as this will be absurd. To do that would not meet the justice of the situation, nor do justice to the case at hand.*

Therefore, for the Defendant, which had itself terminated the contract, to run around and seek to rely on a clause in that terminated contract in a manner that suggests that the contract is still alive and to be performed, is for it to act in an unfair, unconscionable way, in my respectful view. This, the court of equity will not allow.

I had deliberately, mindfully, said that the contract was "no longer operative" when describing the present circumstance of the management agreement that forms the subject matter of this suit. I did so in order to draw our attention to the word "inoperative" in Section 5(1) of the Arbitration and Mediation Act 2023, which is that provision of the law upon which the Defendant has derived standing to file this application."

The ruling of the Honourable Court in this case is a practical interpretation of the provisions of section 5 of the Act, and it provides a landmark clarification on what constitutes an inoperative agreement and how it impacts arbitration clauses/ agreements contained therein. The Court's position is basically that a contract that is terminated is inoperative, and the arbitration clause contained in such an inoperative contract is unenforceable.

The implication of the Court's view is that a party who is desirous of taking advantage of the arbitration clause in an agreement must pursue or initiate such arbitration rather than terminate the agreement. It goes without saying that a person who terminates a contract out of grievance or when a dispute arises has effectively taken a remedial position. This understanding provides the rationale for the Court's position, which is that a party who sought a remedy by putting an end to an agreement cannot turn around to insist that the adverse party can only seek remedy by complying with the terms of the same agreement that it terminated.

Put differently, if the party who seeks to enforce the arbitration clause in an agreement believes that disputes arising from the agreement ought to be resolved by arbitration, his prior act of termination of the agreement must be treated as a disregard for the arbitration clause and should not be allowed to insist on its enforcement. Thus, when an aggrieved party terminates a contract without making recourse to the arbitration agreement himself, he cannot complain that the other party did not have recourse to the arbitration agreement when the grievance shifted. This is even more so as the termination renders the contract inoperative by virtue of section 5 of the Act, which prevents the court from referring matters before it to arbitration when it finds that the contract is inoperative.

The position of the Court in this case would apply mutatis mutandi to other related findings, such as void contracts and contracts that are incapable of being performed.

A summary of the effect of this decision is that if an aggrieved party terminates a contract containing an arbitration clause without first exploring resolution through the arbitration clause in the contract, then: (i) the contract would be deemed inoperative; (ii) the arbitration will be unenforceable as it would not survive the

terminated contract. Essentially, the Court will not allow the party who terminated the contract to insist on arbitration, since he himself did not honour the arbitration agreement.

Significance of Tripzapp's Case on the Doctrine of Severability of Arbitration Clauses.

The decision of the Court in the Tripzapp's Case has a far-reaching implication on the doctrine of severability of arbitration agreements under the Nigerian arbitration jurisprudence. It qualifies or limits the blanket operation of the doctrine of severability. Hence, arbitration agreements will no longer be treated by a court as independent from the main contract and will not survive the main contract if that main contract is void, inoperative or incapable of being performed.

This portends that when a party to a contract subject of arbitration terminates the contract before exploring arbitration, the arbitration agreement becomes inoperative and would not survive the terminated contract. This clearly limits the blanket and mechanical reliance of contracting parties on the independent nature of arbitration clauses. Therefore, a contracting party who does not honour an arbitration agreement himself (but rather terminates the contract) would be foreclosed from insisting on arbitration. Similarly, a party who desires to enforce an arbitration agreement should first honour the agreement by setting the arbitration in motion - and not terminate the contract, as he would have lost the opportunity of insisting on arbitration if the adverse party decides to approach the court.

From a general viewpoint, the decision in Tripzapp's case (which is a practical application of the new position of the law as provided under section 5 of the Act) is grounded in equity. The Court simply deemed it inequitable for a contracting party who has disregarded the arbitration agreement by terminating it to turn around and insist on its enforcement when the adverse party institutes an action in court in respect of the contract. Essentially, the termination of the contract would be viewed equitably as consequential termination of the arbitration agreement. The excerpt of the ruling set out below aptly encapsulates the equity perspective that undergirds the Court's decision to wit:

> *Therefore, for the Defendant, which had itself terminated the contract, to run around and seek to rely on a clause in that terminated contract in a manner that suggests that the contract is still alive and to be performed, is for it to act in an unfair, unconscionable way, in my respectful view. This, the court of equity will not allow.*

Conclusion

The principle that arbitration agreements are independent from the main contract is no longer blanket as it now admits exceptions such as instances where the contract is void, inoperative and incapable of being performed. The Court in the Tripzapp's case has put this new law contained in Section 5 of the Act into practical application, and its decision would serve as a precedent until the appellate courts consider and decide the point.

The Claimant in Tripzapp's case, who successfully opposed the application for stay of proceedings pending arbitration, was represented by Abe & Asotie LP, led by Joshua Abe (the head of the Firm's Dispute Resolution Practice). At Abe & Asotie LP, we have robust experience in representing corporate organizations and individuals in Nigerian courts, given our outstanding experience in dispute resolution.

AUTHORS

Joshua Abe
Partner
+2348036033651
joshua.abe@abeandasotie.com

Kehinde Sanuade
Associate
+2349063899171
kehinde.sanuade@abeandasotie.com

For further inquiries and guidance, please book a consultation with Abe & Asotie LP

info@abeandasotie.com

+234 706 525 5012, +2348036033651

Lagos Court of Arbitration Building,
1a Remi Olowude Street, Okunde Bluewater Scheme,
Maruwa, Lekki Phase 1, Lagos State.