The Role of the Court in Arbitration, Under the Arbitration and Conciliation Act 2004

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ABSTRACT

In the art of sophisticated dispute resolution the strategic fusion of the available means of dispute resolution is indispensable, it will be naÃ¨ve to think otherwise. The various issues with regards the high litigation rates and expensive access to justice are a problem for policymakers and a nightmare for litigants and this has made people opt for an alternative means to dispute resolution. As arbitration grew worldwide, it began to gain the preference of most businessmen in Nigeria as a way of settling their dispute and the attitude of the courts began to change to a positive one towards arbitration. An attempt at a strategic fusion of arbitration and litigation to resolve disputes has been reiterated by the court in a plethora of cases. This essay examines the role the courts have played and continue to play a supportive role in ensuring that arbitration process in Nigeria is strengthened and empowered to perform its role in dispute resolution. It clarifies the functions of the court stipulated by the law on arbitration to deal with arbitration matters and the doctrinal bedrock of the functions and constraints on the tribunal and court in arbitral proceedings. This essay recommends the amendment of the Act in order to incorporate some emerging trends in other jurisdictions and the expansion of arbitral powers to enable the arbitral tribunal better deliver justice to the arbitral parties with confidence.

***Keywords**: Role of court, Arbitration, Arbitral tribunal, Challenges, Enforcement.*

Introduction

One would expect that a party having chosen arbitration as a faster means of disputes resolution will be free entirely from the intervention of court, invariably eliminating delay, but that is usually not the case. In fact, a party who agrees to refer dispute to arbitration chooses a private system of justice and this, in itself, raises issues of public policy. The 1999 Constitution of the federal Republic of Nigeria sets up the court system and vests in them the right to determine controversies between persons in Nigeria. Access to court is therefore a fundamental right of every Nigerian citizen[1]. The key word â€œentitledâ€ in *Section 36(1)**[2]* implies that such right can be waived. Parties can therefore waive their constitutional rights to courts and choose arbitration. In other words, a party to an agreement with an arbitration clause has the option to either submit to arbitration or have the dispute decided by court[3]. It is also observed that under our Arbitration and Conciliation Act, there are sections providing for courts intervention in arbitration.

Though, arbitration may depend upon the agreement of the parties, it is also a system built on law and which relies upon law to make it effective both nationally and internationally. It is therefore a true statement that courts can exist without arbitration, but arbitration cannot exist without the courts.

Arbitration[4] is described as a commercial arbitration whether or not administered by a permanent arbitral institution. The section also goes ahead to define the word â€œcourtâ€ as the High Court of a state, the High Court of the Federal Capital territory, Abuja or the Federal High court. It is a proceeding in which a dispute is resolved by an impartial adjudicator whose decision the parties to the dispute have agreed, or legislation has decreed, will be final and binding.

In the case of *NNPC v Lutin Investment Limited**[5]*, arbitration was thus defined as â€œthe reference of a dispute or difference between not less than two parties, for determination after hearing both parties in a judicial manner by a person or persons other than a court of competent jurisdiction.â€

The use of the words â€œjudicial mannerâ€ were rightly placed as although arbitration is a mechanism of Alternative Dispute Resolution it remains the most formal and is the most closely related to litigation. Arbitrators and judges are alike but in different formats. One acts in a private process (the arbitrator) while the other in a public process (the judge). However, both are in the business of resolving disputes between parties in accordance with the law. They can therefore be said to render complementary services.

The Roles of the Court

The court has a lot of roles it plays in an arbitration proceeding as stipulated under the *Arbitration and Conciliation Act*, [6] it plays its roles at the beginning of the proceeding, during arbitration process and at the end of the arbitral process. The role of the court in an arbitration can conveniently be divided into three phases:

1. Before the formation of the arbitral tribunal
2. During the arbitration; and
3. After the conclusion of the arbitration.

Before the Formation of the Arbitral Tribunal

Here, the role of the court is contained in Section 4(1) (2)**[7]**. The court plays its role in the following situations: the enforcement of the arbitration agreement, the establishment of the tribunal and challenges to jurisdiction.

Â Enforcement of the Arbitration Agreement

A party to an Arbitration agreement may decide to institute proceedings in court, rather than explore arbitration as agreed by parties. If the other party agrees, the court action will proceed. Where the defendant insists on his right to have the matter resolved by means of arbitration, the courtâ€™s responsibility is to ensure that the partiesâ€™ agreement is enforced by referring them to arbitration. The court will therefore be obliged at the application of one of the parties to stay any proceedings before it in order to refer the matter to arbitration. The above position is reflected in Section 4(1) (2) respectively as follows:

(1)- Â Â Â Â A Court before which an action, which is the subject of an arbitration agreement is brought shall, if any party so requests not later than when submitting on the substance of the dispute, order a stay of proceedings and refer the parties to arbitration.

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

There are cases where parties, notwithstanding the provision of an arbitration clause, institute their matters in court for determination. The Arbitration and Conciliation Act***[8]***empowers the Court to stay proceedings and preserve the rest pending to the arbitral tribunal[9]. An arbitration clause in an agreement generally does not oust the jurisdiction of the court or prevent the parties from having recourse to the court in respect of dispute arising therefrom. This can be seen in the case of *Lignes Aeriennes Congolaises (L.A.C) v. Air Atlantic Nigerian Limited (A.A.N) (2006)****[10]***, where it was stated that Section 36[11]which implies the right of parties to a dispute to seek redress from the court of law, can be waived. In other words, a party to an arbitration clause has the option to either submit to arbitration or have the dispute decided by the court.[12]

When parties do not insert the Scott Avery Clause[13] *ab initio* in their contract agreement, the court, after reviewing the dispute, has the right to refer the parties to a multi-door court house or an institution or better still allow the parties to enjoy *adhoc* arbitration.

The Establishment of the Arbitral Tribunal

Where the parties have failed to make adequate provision for the constitution of an arbitral tribunal and there are no applicable institutions or other rules such as the UNCITRAL[14] Rules, the intervention of the court is usually required. Section 7[15]provides for intervention of court to appoint an arbitrator where parties fail to agree. However, despite provision of Section 7(3) (b)[16], a Lagos High Court declined jurisdiction to appoint an umpire or third arbitrator in a case where the arbitration clause provided for only two arbitrators and one of them refused to participate in the proceedings at center stage.

Challenge to Jurisdiction

Jurisdiction is the heart and soul of a case, no matter how well a case is conducted and decided if the court had no jurisdiction to adjudicate, the whole exercise would amount to a nullity and render efforts to be in vain[17]. Under *Kompetenz/Kompetenz* where the court or arbitral tribunal may have competence or jurisdiction to rule as to the extent of its own competence on an issue before it, the tribunal has the power to rule on questions pertaining to its own jurisdiction. As seen in Section 12, [18]the final decision on jurisdiction rests with the court as a dissatisfied party may choose to apply to court. This shows that there is concurrent control of arbitration by the court and the arbitration tribunal on the question of jurisdiction, there is also the danger of parties using the issue of jurisdiction to cause unnecessary delay particularly when there is an application before the court. In the arbitral proceeding, a plea that the arbitral tribunal does not have jurisdiction may be raised not later than the time of submission of points of defense Section 12(3a). In the remarkable case of *Nigeria National Petroleum Corporation v CLIFCONig Ltd****[19]****, there was* a challenge of the jurisdiction of an arbitral tribunal to render an award on the basis of an arbitral clause contained in a contract which had been substituted by a new agreement having no arbitration clause. The Supreme Court unanimously dismissed the appeal on the basis that the appellant NNPC, failed to raise the jurisdictional objection before the arbitral tribunal in compliance with the provisions of the Arbitration and Conciliation Act[20].

The arbitral tribunal before whom an application challenging jurisdiction is pending has the discretion to decide immediately, take submissions and issue interim award on jurisdiction or join issue with substantive claim. The danger here is that the time of the parties must have been wasted if the tribunal finds at the end of the proceedings that it had no jurisdiction in the first place. The essence of this is to ensure that the arbitration process is not rendered irrelevant and unattractive within our jurisdiction by unnecessary interventions by the courts.

The Role of the Court During Arbitration

In arbitration, the absence of enforceability of the arbitratorâ€™s awards makes the arbitration process no different from mediation or negotiation where the third partyâ€™s decision is nonbinding. Under arbitration, the procedures are less formal than litigation but not as informal as other ADR mechanisms.

The involvement of the court in arbitral proceedings is what constitutes the formality of the arbitration process, the court gets involved in the appointment of arbitrators, in securing the attendance of the disputants and also in the enforcement of the arbitral awards. Though, arbitration may depend upon the agreement of the parties (Arbitration Clause)[21] it is also a system built on law and which relies upon law to make it effective both nationally and internationally. It is therefore a true statement that courts can exist without arbitration, but arbitration cannot exist without the courts, there is therefore a need to define where the involvement of the court in arbitration begins and ends.

One of the disturbing challenges of the growth of arbitration in Nigeria is the seeming undue interference with

arbitration. This trend has reoccurred with the *Crestar decision* by the Lagos Division of the Court of Appeal, granting anti-arbitration injunction against an international commercial arbitration proceedings with a seat in London and the other several decisions with respect to â€œtax related mattersâ€. Without prejudice to the binding effect of these decisions until set aside, these pronouncements no doubt create some uncertainty in the perception for the continuous use of arbitration by local and international investors. This is perhaps another clarion call for the countryâ€™s arbitration laws to be tinkered with some level of certainty.

It is also observed that under our Arbitration and Conciliation Act, there are sections providing for the courtâ€™s intervention in arbitration.

Role of the Court in Appointment of Arbitrators

The role of the court in the appointment of arbitrators is stated under Section7.[22] By virtue of Section 7(2)[23], it is clear and understood that the role of the court in the appointment of arbitrators is limited, in the sense that, the court can only appoint arbitrators on the request of either of the parties, on the grounds that; either or both parties or the two arbitrators fail to appoint the arbitrators needed for the dispute settlement. Where the parties have failed to make adequate provision for the constitution of the arbitral tribunal, and there are no applicable institution or other rules (such as the UNCITRAL Rules), the intervention of the court is usually required**.** Also, where parties fail to agree on the appointment of an arbitrator, the court is permitted to intervene.[24]

Also by virtue of Section7(3)[25], where a party or both parties fail to abide by the appointment procedure stated or where the arbitrators fail to abide by such procedures or where Â a third party(an institution inclusive) fails to act in accordance with his duties in the procedure stated, then any of the parties to the dispute can then make a request to the court to appoint an arbitrator for them on the condition that there was no alternative means provided for under the parties appointment procedures.

It is important to note that the interference by the court in the appointment of arbitrators is for the purpose of full attainment of justice, as the essence of arbitration being an ADR mechanism is for the purpose of privacy and easy access to justice. The absence of an arbitrator who is the dispenser of justice renders the arbitration process irrelevant, hence the involvement of the court in the appointment of arbitrators when the parties or the chosen arbitrators fail to appoint an arbitrator. The involvement of the court in the appointment of arbitrators for an arbitral proceeding according to Section 7[26] is solely on the request of the parties involved in the arbitration process.

Challenging Arbitrator(s) through the Court

The procedure for challenging an arbitrator is governed by the provision of Section 9.[27] Parties may by their agreement make provisions as to the procedure to follow in challenging an arbitrator[28]. It is only when there are no such provisions made in the partiesâ€™ agreement that the challenge procedures as provided for in the act is followed.

As provided for in Section 8 (3) (a) (b)[29], there are two grounds upon which an arbitrator may be challenged, they are: lack of impartiality or independence and lack of the qualification as agreed upon by the parties.

The section provides:

An arbitrator may be challenged-

1. If circumstances exist that give rise to justifiable doubts as to his impartiality or independence; or
2. If he does not possess the qualifications agreed by the parties.

Assisting in Taking Evidence for Use in Arbitration

The Act[30] and the Arbitration Rules contain minimal procedural provisions on the rules of evidence.[31] In Nigeria, the substantive law of Evidence in legal proceedings is the Evidence Act**[32]** but by virtue of section 1(2) (a)[33], the Evidence Act is not strictly applicable to arbitral proceedings.Â However, the general rules of evidence like fair hearing, natural justice, equal treatment of parties and full opportunity of parties to present their case, rule against hearsay evidence, etc. are applicable to arbitral proceedings by virtue of the provisions of the Act and case law.Â With the agreement of parties, an arbitral tribunal may adopt any other rules of evidence which it considers appropriate.Â Article 24(2) of the Arbitration Rules[34] provides that the tribunal may at any time during the arbitral proceedings, require the parties to produce documents, exhibits, or other evidence within such a period of time as the arbitral tribunal shall determine.Â Section 20(6)[35] provides that any party to an arbitral proceeding may issue out a writ of *subpoena ad testificandum* or *subpoena ducestecum* i.e. for the purpose of compelling attendance of a witness to give oral testimony or to produce documents. An arbitral tribunal has authority to order the disclosure of documents (including third party disclosure) but this power is however limited to the extent that no person can be compelled under any writ of subpoena to produce any document which he could not be compelled to produce on the trial of an action.

By virtue of Section 23(1)[36], a Court is able to intervene to compel the disclosure of documents.Â Section 23(1) provides that the Court or judge may order that a writ of *subpoena ad testificandum* or of *subpoena ducestecum* be issued to compel the attendance before any tribunal of a witness wherever he may be within Nigeria.Â Thus, where under *Section 20(6) or* Article 24(3) of the Arbitration Rules, any person refuses to produce documents requested by a party or by the tribunal, the court can compel the disclosure or production of documents. The Act and the Rules do not provide detailed rules of taking evidence in arbitral proceedings. However, Articles 24 and 25 of the Arbitration Rules contain general provisions on written and oral testimony. The arbitral tribunal is free to determine the admissibility, relevance, materiality and weight of the evidence offered. In practice, where witnesses give evidence by written statements, it dispenses with the need for examination-in-chief; witnesses simply adopt their written statements and are presented for cross examination and re-examination.Â The International Bar Association Rules of evidence contains

and is often resorted to for a detailed procedure in taking evidence. For example, Article 8.2 of the IBA Rules on the order of presentation of witnesses. Also, according to Section 20(6)[37], which provides that â€œno person can be compelled under any writ of subpoena to produce any document which he could not be compelled to produce on the trial of an actionâ€ it appears that the general rules on privileged documents will apply in arbitration.

The Role of the Court After Arbitration

The court plays certain roles after the arbitration proceeding which include the setting aside of an award, recognition and enforcement of arbitral award.

Setting Aside of an Arbitration Award

Section 29[38] makes provision for an application for setting aside of an arbitral award. It provides for the conditions for the setting aside of an arbitral award. A party who is aggrieved by an arbitral award shall within three months from the date of the award or in a case falling within Section 28 of the Act from the date of the request for additional award may by way of an application for setting aside, request the court to set aside the award. It further provides that the court may set aside an arbitral award if any of the parties making the application furnishes proof that the award contains decisions on matters which are beyond the scope of the submission to arbitration.[39]

After receiving an arbitral award and any of the parties to the dispute is not comfortable with it, the party can write an application to the court to set aside the award on the grounds stated in the Act.

In the recent case of *AGIP v. NNPC & Anor*[40] in the Court of Appeal of Nigeria. The parties entered into a Production Sharing Contract (â€œPSCâ€) which provided that any dispute as to its interpretation or performance should be referred to arbitration. They disagreed on the interpretation and performance of the PSC, and the Appellant and 2nd Respondent issued a Notice of Arbitration against the 1st Respondent. The arbitral tribunal was appointed, the parties participated in the proceedings, and a partial award was made in favour of the Appellant and 2nd Respondent. The Court of Appeal noted that it is unusual for the courts to grant an injunction to restrain the completion of an arbitral award. Unanimously allowing the appeal, it held as follows:

> â€œSection 34 of the Arbitration and Conciliation Act (ACA) Cap A.18, Laws of the Federation of Nigeria, 2004 states specifically that â€œA court shall not intervene in any matter governed by this Act except where so provided in this Act.â€

In my humble view, since it is crystal clear that the courts are generally reluctant to intervene in the award of arbitral proceedings except in special circumstances as prescribed by the law, it appears to me that the courts will not encourage the grant of injunction to prevent the conclusion of the proceedings of an arbitral panel especially when an aggrieved party has the right to seek redress in court to set aside the Arbitral Award as provided by Sections 29, 30 and 48 of the Act.â€ A court is not permitted by law to order that the outcome of arbitration be reported to it. Arbitration cannot be treated the same as negotiations for out-of-court settlement. The Abuja Court of Appeal considered whether a court can appoint an arbitrator on its own volition and order parties to report the outcome of the arbitral proceedings to the court.

In *Backbone Connectivity Network Nigeria Ltd v Backbone Technology Network Inc.*,[41] the respondents sued the appellants in the Federal High Court seeking various reliefs. The appellants applied to the court for an order directing a stay of proceedings in respect of disputes between the second appellant and the second respondent and requested that the parties be referred to arbitration pursuant to the arbitration agreement between them. After hearing the parties, the Federal High Court ordered a stay of proceedings and directed the parties to nominate one person each to form an arbitral tribunal. The trial court, on its own volition, appointed a third arbitrator and adjourned the suit pending a report on the outcome of the arbitration.

The appellants appealed to the court of appeal the Federal High Courtâ€™s order directing the parties to report the outcome of the arbitration to court and the appointment of the third arbitrator without the partiesâ€™ request. The Abuja Court of Appeal allowed the appeal and set aside the orders of the Federal High Court. It held that the Federal High Court had no business ordering the parties to appoint arbitrators without a request from the parties and, worse still, appointing a third arbitrator on its own volition. The lower courtâ€™s action amounted to intervention in a matter governed by the Arbitration and Conciliation Act, which is forbidden under Section 34 of the Arbitration and Conciliation Act.

Recognition and Enforcement of Arbitral Award

An award which cannot be enforced at the end of the day is useless. The successful party in arbitration expects the award to be performed without delay and that is a reasonable expectation. As stated earlier once the award has been rendered, the arbitral tribunal usually has nothing to do with the dispute unless on exceptional grounds as stated above. The losing party has some options;

1. He may simply carry out the award voluntarily
2. He may use the award as a basis for negotiating a settlement.
3. He may challenge the award through application to set aside.
4. He may resist any attempt by the winning party to obtain recognition or enforcement of award.

Where a court is asked to enforce an award, it is asked not only to recognize the legal force and effect of the award, but also to ensure that it is carried out by using such legal sanctions as are available. In Nigeria, once an award is registered in the court, it becomes enforceable as a judgment of that court[42]. Arbitration awards can also be enforced in most countries of the world provided that those countries are signatories to the *Geneva Convention on the Execution*

of Foreign Arbitral Awards or the *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*. *Article 1.1of the New York Convention* provides that:

> This convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a state other than the state where the recognition and enforcement of such awards are sought and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the state where their recognition and enforcement are sought.

Despite the above provisions, a party may request the court to refuse recognition or enforcement of award. *Section 32*[43] provides that any of the parties to an arbitration agreement may request the court to refuse recognition or enforcement of the award. These are the same grounds for setting aside. If the courts in one country refuse recognition or enforcement, one can go to another county which may recognize and enforce the award**.**

Recommendation

One major problem we have right now is the absence of a clear provision of which courts has jurisdiction in arbitral matters. Also, one would state that it is important to make arbitration process in Nigeria work efficiently. In achieving this goal, not only should the courts act with speed but disputants who originally agreed to be bound by arbitration decision should assist the process. A situation of having the disputants run to court for every little application and bringing in unnecessary applications aimed at stalling the arbitration will not help matters.

Legal practitioners representing parties in arbitration should know the difference between arbitration and litigation and learn to let go of litigation mentality whilst in arbitration. There is need to know that at the end of the various attempts to slow down the process, not only the parties suffer, but the process itself and the business activities resulting into an epileptic economy.

The law should be amended to enable arbitration award to be enforced directly without leave of court. In amending the Act, a section requiring any application to the court in respect of matter which is subject of arbitration to be sanctioned by the arbitral tribunal should be inserted. This will give the arbitral tribunal an opportunity of seeing those applications and determining their relevance.

It is desirable that some of the above recommendations be taken seriously and that all parties work together to preserve the value that arbitration adds to the economy.

Conclusion

It is sometimes said that the relationship between national courts and arbitral courts is one of partnership. The relationship between courts and arbitral tribunals is one of constant shifts and changes. It is one in which each has a different role to play at different times. In essence, one would say that the real issue here is to define the point where the reliance of arbitration on national courts begins and where it ends. The court can intervene only in specific instances permitted under the Arbitration and Conciliation Act, such as to grant a stay of proceedings, set aside an award, remove an arbitrator for misconduct and recognize and enforce an award. The courts and arbitration have a symbiotic relationship in resolving disputes. Ordinarily, as reinforced by the Arbitration and Conciliation Act, the courts can be expected to hold parties to their bargains to arbitrate their disputes. That role is an incident of the judicial function of enforcing rights and obligations according to law. At the same time, the courts can also be a source of certainty and guidance for arbitrators on the construction of standard form agreements used in trade and commerce.

Finally, the courts have their own, distinct, powers to refer matters before them to arbitration.

In the words of Redfern & Hunter;

> â€˜It is sometimes said that the relationship between national courts and arbitral tribunal is one of partnership. If so it is not a partnership of equals. Arbitration may depend upon the agreements of the parties, but it is also a system built on law and which relies upon that law to make it effective nationally and internationally. National courts exist without arbitration but arbitration could not exist without the courts.*â€™* ***[44]***

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References

[1] CFRN 1999 (as amended) S.36.

[2]*Ibid.*

[3]*L. A. C Â v. A .A .N ltd* (2006) 2 NWLR Pt 963, Pg 49. *Ariori v. Elemo* (1983) 1 SCNLR 1

[4]The Arbitration and Conciliation Act LFN 2004 Part IV, S. 57.

[5](2006) 2 NWLR (Pt. 965) 506.

[6]ACA, LFN 2004 C.18.

[7]ACA (n.5)

[8] *Ibid* C 18.

[9] The court has jurisdiction subject to *Section 5 of theArbitration and Conciliation Act* which provides that if any party to an arbitration agreement commences any action with respect to any matter which is the subject of an arbitration agreement, any party to the arbitration agreement may at any time after appearance and before delivering any pleadings or taking any other steps in the proceedings, apply to the court to stay the proceedings. The court may if it is satisfied that there is no sufficient reason why the matter should not be referred to arbitration in accordance with the arbitration agreement; and that the applicant was at the time when 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.

[10] (2006) 2 NWLR pt. 963, page 49

[11]Â CFRN 1999 (as amended).

[12] See also the case of *Ariori v. Elemo* (1983) 1 SCNLR 1

[13] Scott Avery Clause means a contract between two parties that they will submit any dispute between them to arbitration before taking any court action.

[14] United Nations Commission on International Trade LAW 2010.

[15] ACA, LFN 2004 C.18.

[16]*Ibid.*

[17] *Ibid,* S.12 (1).

[18] ACA, (n.5).

[19](2011) LPELR-SC 233/2003 .

[20] ACA, S.12 (3), (n.5)

[21]Â ACA S. 1, (n.5).

[22]*Ibid.*

[23]*Ibid.*

[24] *Ibid,* s. 7.

[25] *Ibid.*

[26]*Ibid.*

[27]*Ibid.*

[28] *Ibid* S. 9(1).

[29] *Ibid.*

[30]*Ibid.*

[31]*Ibid* S. 20.

[32]Evidence Act, LFN (2004) C. E14.

[33]*Ibid.*

[34] ACA, (n.5) Article 24(3).

[35] Ibid S. 20(6).

[36]E A S. 23(1).

[37]ACA, (n.5).

[38] Ibid S.29.

[39] *Ibid,* S. 29 (2).

[40] (2014) 6 CLRN.

[41] (2015) 14 NWLR pt. 1480, Page 511.

[42]ACA, (n.5) section 31. Section 51 of the Act also provides for recognition of awards made in other countries.

[43] ACA, (n.5) See also section 52(1). The circumstances under which a court will refuse to recognize and enforce an award are provided under section 52(2) of the Act.

[44] Alan Redfren and Martin Hunter*, â€˜Law and Practice of International Commercial Arbitrationâ€™* (Sweet & Maxwell 2004)