The Battle for Legislative Competence between the Arbitration and Conciliation Act of Nigeria 1988 and the Lagos State Arbitration Law 2009

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ABSTRACT

An efficient system of dispute resolution is highly necessary for economic viability and sustainability of national economies. However, despite the rising profile of arbitration as an alternative means of commercial disputes resolution, Nigeria still continues to contend with the issues arising with respect to the proper construction of the provisions of the 1999 Constitution in respect of legislative competence to make laws on the subject matter of arbitration; the various perspectives that exist as to perceived divisions between international and interstate commercial arbitration and intrastate domestic arbitration with respect to the Constitutional Law principle of "the doctrine of covering the field"; and the uncertainty that continues to remain as a result of the absence of any definitive pronouncement by the Nigerian Supreme Court. All these issues continue to have the unwanted effect of portraying arbitration as a less attractive option for settlement of disputes in Nigeria.

1.0 INTRODUCTION

It is well settled that owing to the nature of human beings and the number of activities engaged into, dispute and conflicts are

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inevitable[1]. Different commercial and legal expectations, cultural approaches, political ramifications and geographical situations are all sources of disagreement and dispute between contracting parties[2]. The diversity and complexity with which commercial transactions are conducted, coupled with the high demand for commodities and services in an extremely populated and fast-paced country like Nigeria translates into disputes being considered a norm and a part and parcel of everyday commercial dealings. This has therefore brought about an obvious need for an adequate, efficient and reliable mechanism for the resolution of these disputes whenever they arise; and as a result, concerted efforts have over time been made by the commercial community to model a dispute resolution mechanism to meet the demands of individuals, firms and companies doing business on the shores of Nigeria and the world at large.

Ordinarily, the first point of call for nearly every disputant in Nigeria is the traditional court system of litigation. However, concerns over cost and delays in litigation procedures, together with increasing globalization have led to more flexible means of resolving disputes which provide alternatives to court-based litigation governed by the law and procedure of a particular state or country. This is because the quick and fair resolution of commercial disputes is an indispensable requirement for stability and growth in any economy.

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[1] A. T. Bello, "Why Arbitration Triumphs Litigation: Pros Of Arbitration" *Singaporean Journal of Business Economics, And Management Studies* (2014) Vol.3, NO.2, p. 1

[2] J. D. M. Lew, L. A. Mistelis, S. M. Kroll, *Comparative International Commercial Arbitration*; (Kluwer Law International: 2003), p. 1 (para 1-2)

Apart from the fact that businessmen and women prefer private resolution of their disputes to exposure to the machinery available in the glare of the regular courts, there is the advantage that settlement through ADR tries to achieve an expeditious resolution of the conflict between the parties by reducing hostility and antagonism while saving business relationships and encouraging a continued cordiality between the parties. These are made largely possible because the procedure provides greater room for compromise than litigation.[3]

Arbitration is therefore a procedure for the settlement of disputes, under which the parties agree to be bound by the decision of an arbitrator whose decision is, in general, final and legally binding on both parties.[4] It is the reference of a dispute by parties thereto for settlement by a person or tribunal of their own choice, rather than a court.[5] The Arbitration process is relatively informal when compared to what obtains in the traditional court process and the parties have more control over the process.

One of the primary reasons for parties' agreement to resolve their dispute by arbitration is to avoid delay and reach a very

[3] E. R. Oddiri, Paper on Alternative Dispute Resolution; Presented at The Annual Delegates Conference of the Nigerian Bar Association (August 2004) http://www.nigerianlawguru.com/articles/arbitration/ALTERNATIVE%20DISPUTE%20RESOLUTION.html (accessed 12 May 2017)

[4] J. O. Orojo & M. A. Ajomo, *Law and Practice of Arbitration and Conciliation in Nigeria,* (Mbeyi & Associates (Nig.) Ltd: Nigeria: 1999), p. 3

[5] F. Ajogwu, *Commercial Arbitration in Nigeria: Law and Practice, 2nd Edition,* (Center for Commercial Law Development (CCLD), Lagos, Nigeria: 2013), p. 5

expeditious conclusion of their discord.[6] Hence, the most important features and advantages of arbitration include: the speedy and swift determination of disputes, party autonomy, confidentiality and privacy, flexibility and simplicity of procedure, and the fact that it in many cases results in preservation of good business and personal relations.

However, certain situations of complexities may be seen to arise in certain instances with respect to the importance of the ingrained and essential feature of party autonomy in arbitration on the one hand; and the issue of the doctrine of covering the field in federal legal systems (which Nigeria practices) on the other.

This article highlights the major issue of the doctrine of covering the field that arises with respect to the federal system of government practiced in Nigeria as is linkable to the laws which govern arbitration, and the resultant issues that have arisen in settlement of such disputes; concluding that the position that arbitration is a matter for state legislature, is the more preferred view; and imploring that the uncertainty on this issue be resolved along those lines as soon as possible.

[6] Around the world with Bola Ajibola; Produced on behalf of Magna Curia Chambers, Faculty of Law, Obafemi Awolowo University, (National Institute for Planning and Administration (NIEPA): 2007) p. 207

2.0 THE BATTLE BETWEEN THE ACA AND THE LSAL ARISING FROM THE DOCTRINE OF COVERING THE FIELD

2.1 OVERVIEW

Nigeria is a Federation comprising the Federal Government, 36 states and the Federal Capital Territory;[7] and as is the case with all other countries that adopt the Federalist structure of governance, there is typically an allocation of legislative power and competence between the federal government and the component states that form such Federation.

The structural allocation of legislative competence in Nigeria's federal system of governance requires the National Assembly to make laws for the entire Federation while the component states have State Houses of Assembly that make laws for each state.[8]

The doctrine of covering the field is peculiar to constitutional democracies that practice Federalism as a form of governance where legislative competence are typically shared between federal or central governments and the federating states or provinces.[9]

In the Constitution, the Lists typify the separation of legislative competence in a Federal structure of governance. The Exclusive Legislative List is the List of subject matters in which the federal

[7] See 1999 Constitution of the Federal Republic of Nigeria, Cap. C23, LFN 2004; Act No. 24, 5 May 1999 (as amended), s. 2 (hereinafter 1999 CFRN)
[8] See 1999 CFRN, s. 4
[9] A. A. Olawoyin, "Constructing the Road to Arbitral Prevalence: The Arbitration Law of Lagos State 2009 in Perspective", *International Arbitration Law Review,* page 40

legislature has exclusive reserve to enact laws; the Residual Legislative List is with respect to the exclusive reserve of the state legislature to enact laws; while the Concurrent Legislative List contains the subject matter areas in which the federal and the constituent states have concurrent legislative competence to enact laws.

This doctrine applies in respect of areas of legislative competence in the Concurrent List and only "arises where the issue is whether a State Law on a concurrent subject matter can co-exist with a federal law on the same subject matter where the latter expressly or impliedly evinces an intention to cover the whole field, or to provide a complete statement of the law governing the matter."[10]

As opined by the Nigerian Supreme Court in *Attorney General of Abia State* v. *Attorney General of the Federation,*[11] where the doctrine of covering the field applies, it is not necessary that there should be inconsistency between the Act of the National Assembly and a law passed by a House of Assembly. The fact that the National Assembly has enacted a law on the subject is enough reason for such law to prevail over the law passed by a State House of Assembly, but where there happens to be an inconsistency, the state law is void to the extent of the inconsistency.

[10] See Ogwuegbu JSC in *Attorney General of Abia State* v *Attorney General of the Federation* (2002) 6 NWLR (Pt.763) 264, 463 who drew extensively from US and Australian authorities

[11] Ogwuegbu JSC in *Attorney General of Abia State* v. *Attorney General of the Federation* (2002) 6 NWLR (Pt.763) 264, 389

Four clear elements have been highlighted as being easily distilled from the Nigerian (and even foreign) authorities on the doctrine: First, the subject matter in question should be one in which both the federal legislature and the state legislature have concurrent legislative competence.[12] Secondly, a clear intention on the part of the federal legislature to express by its enactment, completely, exhaustively or exclusively what the governing law should be on the particular subject matter.[13] Third, where the state law is *in pari materia* with the federal law, the state law is merely invalid or inoperative while the federal law is in existence.[14] The state law is not void.[15] Fourth, where the state law, however contains provisions, which are inconsistent with the federal law, those provisions will be void to the extent of such inconsistency.[16]

2.2 THE TWO PRINCIPAL ARBITRATION LAWS AND THE IMPORTANCE OF DETERMINING THE QUESTION OF VALIDITY OF THE LAWS

Although certain other states have enacted their own arbitration laws, The Arbitration and Conciliation Act (ACA)[17] and the Lagos State Arbitration Law (LSAL)[18] are currently the two principal arbitration laws in Nigeria. The LSAL is a significant enactment because of the huge volume of trade and commerce that take

[12] Olawoyin, supra note 9, page 40
[13] *Ibid*
[14] Olawoyin, supra note 9, page 41
[15] *Ibid*
[16] *Ibid*
[17] *Arbitration and Conciliation Act* (ACA), 1988 Cap. A18, Laws of the Federation of Nigeria (LFN), 2004 (hereinafter: ACA)
[18] *Lagos State Arbitration Law* (LSAL) No. 10, Laws of Lagos State 2009 [Hereinafter: LSAL]

place in Lagos as the economic nerve centre of Nigeria and its leading commercial hub; and the Law applies to all arbitral proceedings within Lagos, except where parties have expressly agreed that another Arbitration Law will apply.

While the innovations introduced in the LSAL are very laudable, the success of the Law is however subject to its being legally valid under Nigerian law, as invalidity of the law under which arbitration is undertaken is a ground for an appropriate Nigerian court to set aside a resultant arbitral award, refuse to recognise it or to invalidate the arbitration agreement.

There have been varied opinions on the issue of validity or otherwise of Arbitration Laws in the statute books of the federating states of Nigeria. The opinions are essentially based on the interpretation and application of the provisions of the 1999 Constitution on which authority as between the federal government and the federating states has the power to legislate on arbitration; and also bringing to fore a dichotomy of jurisdiction based on international, interstate and intrastate criteria.

As stated earlier, in the Constitution, both the federal government and the states are authorised to legislate on matters in the Concurrent List. The question that lawyers have therefore sought to answer is whether, by enacting the ACA, the federal government has covered the field of arbitration and the LSAL is thereby void.

The Exclusive and Concurrent Legislative Lists, through which the Constitution primarily sets out the respective legislative competences of the legislatures, do not expressly mention arbitration. This raises the question of whether legislative competence over arbitration is addressed in the Constitution at all or whether it is addressed as part of or incidental to another heading mentioned expressly. With respect to this issue, the necessary provisions as regards legislative competence over arbitration are contained in items 62, 62(a) and 68 of the 1999 CFRN:

- Item 62 of Pt I of Sch.2 to the 1999 Constitution (the Exclusive Legislative List) makes provision for the subject matter of "trade and commerce, and in particular trade and commerce between Nigeria and other countries including import of commodities into and export of commodities from Nigeria, trade and commerce between the States."

- Item 68 contains a broad provision for "Any matter incidental or supplementary to any matter mentioned elsewhere in this List."

As arbitration is not listed in any of the Legislative Lists; opinions on whether these provisions cover legislative competence over arbitration remain polarised.[19] The prevalent interpretation holds that in light of item 68, arbitration is incidental or supplementary

[19] G. Bamodu, "*A Field Not Covered: Arbitration and the Nigerian Constitution (1)" available at* https://www.businessdayonline.com/a-field-not-covered-arbitration-and-the-nigerian-constitution-1/ (accessed 12 May 2017)

to trade and commerce in item 62; accordingly, the federal legislature has exclusive competence over interstate and international commercial arbitration; however, states' have legislative competence over "intra-state arbitration" – as a residual matter falling within their exclusive competence.[20] An opposing argument is that items 62 and 68 of the Exclusive List of the 1999 Constitution cannot be invoked to determine legislative competence over arbitration as they do not clearly address the matter.[21]

Numerous views are held by writers[22] on this topic. On the one hand, Fidelis Nwadialo has, in his book, stated that the ACA applies throughout the Federation and lays down both the law of and procedure for arbitration proceedings and that accordingly, it has, by implication repealed the provisions relating to arbitration in the High Court Laws and the rules on arbitration proceedings contained in the various sets of the High Courts' Rules.[23]

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[20] In a similar vein, the National Committee, constituted in 2005 by the Attorney-General of the Federation to make recommendations on the reform of arbitration and ADR laws of Nigeria, stated that the federal government has legislative competence over international and interstate arbitration while arbitration outside the two areas is within the legislative authority of the federating states.

[21] Bamodu, *supra* note 19

[22] See P.O. Idornigie, "The Doctrine of Covering the Field and Arbitration in Nigeria" (August 2000) *66 Arbitration 193*; M.M. Akanbi "The Nigerian Arbitration Act 1988 s.58 and the Doctrine of Covering the Field: *C G de Geophysique* v. *Etuk*" (August 2006) *72 Arbitration 3*; F. Nwadialo, *Civil Procedure In Nigeria* (MIJ Professional Publishers Ltd.: Lagos,1990) pp. 871-872; Chukwuemerie "Commercial and Investment Arbitration in Nigeria's Oil and Gas Sector" (2003) *A journal of World Investment* 834.

[23] U.H. Azikiwe and F. Onyia - Udo Udoma & Belo-Osagie, *The European, Middle Eastern and African Arbitration Review 2013: Nigeria* (31 October 2012) http://globalarbitrationreview.com/insight/the-european-middle-eastern-and-african-arbitration-review-2013/1036748/nigeria (accessed 12 May 2017)

In the opinion of Mr. Paul Obo Idornigie, in enacting the ACA, the federal government of Nigeria has not covered the field of arbitration "completely, exhaustively and exclusively", because the Act legislates on only commercial arbitration, and that state laws dealing with non-commercial arbitration are valid.[24] This is also the view held by Orojo and Ajomo.[25] Muhammed Mustapha Akanbi, also categorically stated that as between the Arbitration Act and the arbitration laws of the states, the doctrine of covering the field can only be invoked with respect to disputes arising from commercial transactions.

In apparently rejecting the opinions that wholly or partially favour the ACA, the Committee of the Lagos State, set up in 2007, opined that the power to legislate on arbitration is residual having not been listed in the Legislative Lists in the Constitution and reserved, therefore, for the federating states.[26]

Olawoyin is however of the view that the doctrine of covering the field, strictly speaking, has no role to play in resolving any argument about legislative competence to enact laws on the subject matter of arbitration or the validity of such laws";[27] stating categorically also that this position applies to either side of the jurisprudential divide in Nigeria on legislative competence in respect of the subject matter of arbitration.

[24] *Ibid.* at 25
[25] Supra note 4, p. 27
[26] Supra note 25
[27] Olawoyin, supra note 9, p. 41

He is of the firm opinion that the intention in *Item 62* suggests a primary reference to "trade and commerce between Nigeria and other countries" and this should not, without more, be read to mean "trade and commerce between the residents or citizens of Nigeria and residents or citizens of other countries" especially when Nigeria is defined in s.2 of the 1999 Constitution as "one indivisible and indissoluble Sovereign State";[28] stating that the same applies to the inter-state argument as reference is made to "trade and commerce between the States" and not "trade and commerce between the residents and citizens of the component states of the Federation."

As things stand at present, all the divergent issues on ground have not been laid to rest, as the position of the courts in relation to the ongoing constitutional debate about legislative competence over arbitration is not entirely clear.

In the case of *Stabilini Visinoni Limited* v. *Mallinson & Partners Limited,*[29] the Court of Appeal appears to have favoured a middle course. Whilst it decided the particular case on the basis that the circumstances dictated that the ACA should be applied, the court seemed to recognise that it was open to arbitration parties (in Lagos) to choose to invoke the Lagos Law instead.

This clearly sits uneasily with the earlier decision in *Compagnie Generale de Geophysique v. Etuk,*[30] *per Ekpe JCA,* in which the same court held that by the ACA the federal legislature has "covered

[28] Ibid, p. 37
[29] [2014] 12 NWLR (part 1420) 134, 175.
[30] [2004] 1 NWLR (part 853) 20

the field" of arbitration and that 'inconsistent' provisions of state legislation on arbitration are null and void.

It has been stated that, the leading judgment regrettably simply applied the doctrine of covering the field without any thorough analysis and justification for the application of the doctrine. It would seem that there was an assumption that the doctrine simply applied when a Federal Act and a state law on the same subject matter are in existence;[31] while in fact the Arbitration Act ought to be declared invalid under the current constitutional dispensation and be struck down under s. 315(2) of the 1999 Constitution;[32] as it is the states that have legislative competence to enact laws on all facets of arbitration (international, interstate or intrastate).[33]

The *Stabilini* court, on the other hand, rather commended the Lagos legislation for making it possible for parties to choose either that law itself or another law – including the ACA. The court said this *"makes sense because arbitration is a subject area that can be said to be 'without borders'"*. No exact pronouncement was made by the Supreme Court in that case with respect to the matter; and it is as a result of this that there is therefore currently a need for a judicial pronouncement in this regard by the Supreme Court to put the matter to rest.

The uncertainty stemming from the dual regimes of laws will not augur well for the advancement of arbitration practice as a viable

[31] Olawoyin, supra note 9, p. 42
[32] *Ibid*, p. 43
[33] *Ibid*

alternative to litigation, as the entire process may be bogged down with the genre of jurisdictional challenges witnessed in *Compagnie Generale De Geophysique.*[34]

3.0 CONCLUSION AND RECOMMENDATIONS

According to the *International Court of Arbitration (ICC) Bulletin,* it was recorded that Nigeria rose from an average of 2 arbitrations per year between the years 1991 – 1999 to 23 in 2000.[35] This goes to show that significant progress has been made in the growth and development of ADR in Nigeria, and that Nigeria definitely possesses the hallmarks for an international centre for commercial arbitration.

However, a lot still needs to be done as regards the improvement of arbitration practice in Nigeria. Despite Nigeria's acknowledged economic endowment in terms of natural resources, and the infrastructure currently being put in place to encourage international arbitration, the country has thus far failed to attract the sort of attention and recognition accorded to famous western seats such as London, New York, and Paris,[36] as a result of certain questionable situations (such as this issue) that still obtain with respect to the practice of arbitration in Nigeria.

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[34] *Ibid*, p. 12

[35] According to the report, Nigeria and South Africa were the African countries with the most number of involvements in international arbitration proceedings in the ICC between 1999 and 2009, however Egypt was the most frequently chosen venue for arbitration proceedings conducted in Africa.

[36] D. Ufot, "The challenges of arbitrating in Africa: the Nigerian experience" 2012, available at http://www.internationallawoffice.com/Newsletters/Arbitration-ADR/Nigeria/Dorothy-Ufot-Co/The-challenges-of-arbitrating-in-Africa-the-Nigerian-experience (accessed 12 May 2017)

The English courts in the case of *IPCO (Nigeria) Ltd* v. *Nigerian National Petroleum Corporation (2005)*[37], stated as follows:

> *…the mill of justice can grind very slowly in Nigeria. In particular, Nigeria is not yet geared towards arbitration in the manner which meets the international standards it agreed to when adopting the New York Convention.*

Disputes are incidents of trade and commerce; Society therefore benefits if disputes are properly analysed, categorized and processed. The truth however is that if arbitration is not well-handled, it may lose its hall-mark of speedy resolution of disputes.[38]

The law regulating arbitration in Nigeria needs to be motivated by the need to ensure that the legal framework for the conduct of arbitral proceedings remains responsive to the needs and requirements of the users, and is modern, suitable and relevant to the socio-economic circumstances of the state, and meets contemporary international standards.

An emerging economy such as Nigeria must therefore ensure that to attract investment to attain the desired level of infrastructural development, an effective dispute resolution framework must be put in place such that investors will be sufficiently comfortable to invest in the country with the knowledge that in the event of a

[37] *IPCO (Nigeria) Ltd*. v. *Nigerian National Petroleum Corporation* (2005) EWHC 726

[38] E.O.I. Akpata ; West African Book Publishers Ltd, The Nigerian Arbitration Law in Focus, 1997, p. 13

dispute, these will be 'fairly' resolved according to their agreements.[39]

As proposals for new arbitration legislation are still going through parliamentary processes, it is considered that a future federal arbitration legislation should not repeal or jeopardise state arbitration legislation. Rather, it should follow the approach of the Lagos State legislation which was commended by the Court of Appeal in providing that parties to arbitration arising out of an interstate or international transaction have the choice to select as between the federal legislation and an appropriate state arbitration legislation. This approach is most suitable for advancing the causes of attracting trade and investment to Nigeria generally, of attracting arbitration business to Nigeria and specific Nigerian states, and for advancing the long pursued goal of presenting Nigeria as an arbitration friendly jurisdiction and viable arbitration centre.

Worthy of note is the fact that a key doctrine underlying and running through arbitration is the doctrine of party autonomy. One aspect of this is that the parties are free to choose the law(s) governing the various aspects of the arbitration including especially the *lex arbitri.*[40] In order to make Lagos and Nigeria an attractive arbitration venue, it is necessary to therefore demonstrate that if parties to arbitration wish to invoke the Lagos

[39] T. Aderemi, Perchstone & Graeys, "Nigeria: Arbitration In Emerging Markets: Current Challenges" available at http://www.mondaq.com/Nigeria/x/233848/Arbitration+Dispute+Resolution/Arbitration+In+Emerging+Markets+Current+Challenges (accessed 12 May 2017)
[40] Bamodu, supra note 19

State Arbitration Law as the *lex arbitri*, the Nigerian legal system will respect that choice.[41]

Candide-Johnson and Shasore have said that: "the Constitution of Nigeria does not allow any legislature to remove this right to contract and therefore, just as two Nigerian may choose to arbitrate in New York under Argentinean law, so can a Canadian and Argentinean doing business in Abuja agree that any dispute between them will be referred to arbitration in Lagos under the regime for arbitration in AL [Arbitration Law] 2009. The motive for their choice will not be constitutional lists but the efficacy of the dispute resolution mechanism within the territory for which Lagos has legislated.[42]"

Until clear judicial pronouncements are made by the courts or decisive action taken by the National Assembly along the lines suggested above, there will continue to be a duality of arbitration regimes with the Arbitration Act covering areas of domestic arbitration that older and new Arbitration Laws of the states also cover.[43]

Therefore, pending such a time where the Constitution is amended to the effect of an explicit provision for arbitration in one of the lists (the residual list being the better and more advantageous option); the Nigerian Court needs to address this very pressing issue on ground, by making a definite

[41] *Ibid.*
[42] C.A. Candide-Johnson & O. Shasore, *Commercial Arbitration Law and International Practice in Nigeria*, (Lexis Nexis Publishers: 2012), p.21
[43] Olawoyin, supra note 9, p. 40

pronouncement on what should obtain; as at this particular point in time, the jurisprudential "American Realist" perspective of the law being what the judges say it to be is highly necessary to ensure a certain level of certainty of the law.