

The cover features a dramatic background with a fountain pen in the foreground and a university gate in the distance under a sunset sky. A large circular graphic contains the journal's title.

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LEGALITY OF ARBITRATION AND CONCILIATION ACT (ACA), UNDER
THE 1999 CONSTITUTION

By

Kudirat Magaji W. Owolabi*

Abstract

An efficient system of dispute resolution is highly necessary for economic viability and sustainability of economies. However, despite the rising profile of arbitration as an alternative means of commercial disputes resolution, Nigeria continues to contend with the issue of proper construction of the provisions of the 1999 Constitution in respect of legislative competence to make laws on the subject matter of arbitration. The constitutionality of the Arbitration and Conciliation Act (ACA) is in doubt due to the fact that arbitration is not mentioned under the legislative competence of either the National Assembly or the State House of Assembly under the 1999 Constitution. The ACA had been promulgated as a military decree under the military regime in 1988. The Federal Military Government (FMG) promulgated the Constitution (Suspension and Modification) Decree No. 1 of 1984, FMG (Supremacy and Enforcement of Powers) Act No. 13 of 1984 and the Constitution (Suspension and Modification) Act No. 107 of 1993 which gave the FMG unlimited power to legislate procedurally and territorially. The constitutional debate centres around whether the current Nigerian Constitution of 1999 clearly determines which legislature, as between the Federal and State, has the legislative competence to enact a framework on arbitration legislation. Therefore, this article investigates the constitutionality of the continued application of the ACA as federal legislation.

Keywords: Arbitration, legality, Arbitration and Conciliation Act, Nigerian 1999 Constitution and Legislative Competence

1. INTRODUCTION

The Arbitration Ordinance of 1914 was the first arbitration statute that applied to the whole of the territory now known as the Federal Republic of Nigeria.¹ Based on the English Arbitration Act of 1888, the 1914 Ordinance was passed on 31st December 1914, after the amalgamation of the northern and southern parts of Nigeria.² The 1914 Ordinance was subsequently re-enacted as the Arbitration Ordinance of 1958, and

1. Arbitration Ordinance No 16, 1914

2. A A Asouzu (1994) 'Developing and Using Commercial Arbitration and Conciliation in Nigeria' Lawyer Bi- Annual J. 1(1), 67

appeared as Chapter 13 in the Laws of the Federation of Nigeria and Lagos 1958. Each of the regions formally adopted the Arbitration Ordinance of 1958 into their own laws. For instance, it was enacted by the western region as the Arbitration Law, Chap 18, laws of the Western Region of Nigeria 1959, and subsequently by Lagos State as the Arbitration Law Chapter 10, Laws of Lagos State 1973.³

The above legal framework continued in force until the 14th of March 1988 when the Arbitration and Conciliation Decree No 11 of 1988 was enacted by the Federal Military Government. Three significant features of the new regime introduced by the Decree are: first, it applies as a federal enactment throughout the territory of the Federal Republic of Nigeria, and superseded all State arbitration legislations.⁴ This was possible because of the unitary legislative arrangements under the military regime, according to which the Federal Military Government was competent to legislate on any subject for the entire Federation, including the States. Second, it included for the first time in the history of arbitration legislation in Nigeria, provisions on international commercial arbitration, indeed the overall framework of the Decree consisted of a mix of provisions which existed for domestic arbitration under the previous arbitration legislation and provisions which were applicable to international commercial, inspired by UNCITRAL Model law on International Commercial Arbitration and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958.⁵ Third, the new legislation contained provisions on Conciliation, a form of Alternative Disputes Resolution (ADR) for which there had, hitherto, been no legislative framework.

On the 29th of May 1999, a new constitutional and democratic regime emerged in Nigeria founded upon the Constitution of the Federal Republic of Nigeria 1999. An important aspect of the new constitutional arrangement is the distribution of legislative powers among the Federal and State legislatures. While the Federal Government had exclusive competence to make laws on matters itemised in the Exclusive legislative list, the State Governments had legislative competence in respect of matters that were not in the Exclusive or Concurrent lists. Although, arbitration is not in the Exclusive and Concurrent lists.

The constitutionality of the ACA became an issue with the creation of the Nigerian Federal Constitution of 1999. This is because; the ACA had been promulgated as a military decree under the military regime in 1988.⁶ The Federal Military Government

³ See Supplementary to The Nigerian Government Gazette Vol. 1, No 66, Aug. 27, 1914; Supplement to the Nigerian Government Gazette No 92, Dec. 10 1914. The Ordinance was introduced as a Bill in the Legislative Council by the then Colonial Attorney-General of Nigeria, R.M Combe. The Colony of Lagos was created in 1862, and in 1863, the main body of English law was introduced in the territory

⁴ F A Ajayi (1960), 'The Interaction of English Law with Customary Law in Western Nigeria:

II' J. of Afri. L., 4 (2) 98-114, 110

⁵ J O Orojo & M A Ajomo (1999) *Law and Practice of Arbitration and Conciliation in Nigeria*.

1st edn, Mbeyi & Associates Nig Ltd, Nigeria. 6

⁶ P O Idornigie (2015) *Commercial Arbitration Law and Practice in Nigeria*. Lawlords, Nigeria.

The Arbitration and Conciliation Decree was re-christened as an Act under the Revised Edition (Laws of the Federation) Decree No.21, 1990.

(FMG) promulgated the Constitution (Suspension and Modification) Decree No.1 of 1984, FMG (Supremacy and Enforcement of Powers) Act No. 13 of 1984 and the Constitution (Suspension and Modification) Act No. 107 of 1993 which gave the FMG unlimited power to legislate procedurally and territorially.⁷

The FMG's decrees were held as the supreme law of the country and any statute (including the Constitution) that was inconsistent with a Federal Decree,⁸ would, to the extent of such inconsistency be null and void.⁹ The 1999 Constitution, on the other hand, in Section 1(3) changed the legal status of such decrees by stating that, any piece of legislation that is inconsistent with the Constitution will to the extent of the inconsistency be null and void. In order to preserve the existence of legislations promulgated under the military regime, Section 315¹⁰ of the Constitution states that, legislations that existed before the Constitution was made will remain as existing law.

7 J O Orojo & M A Ajomo (1999) *Law and Practice of Arbitration and Conciliation in Nigeria*. 1st edn, Mbeyi & Associates Nig Ltd, Nigeria. 6

8 Or a Military Governor's Edict for the States

9 AA Olawoyin (2015) 'Constructing the Road to Arbitral Prevalence: The Arbitration Law of Lagos State 2009 in Perspective', *Int'l Arb Law*, 2, 34

10 This development is under the new democratic dispensation

11 Constitution of the Federal Republic of Nigeria 1999, Section 315. (1): Subject to the provisions of this Constitution, an existing law shall have effect with such modifications as may be necessary to bring it into conformity with the provisions of this Constitution and shall be deemed to be -

(a) an Act of the National Assembly to the extent that it is a law with respect to any matter on which the National Assembly is empowered by this Constitution to make laws; and

(b) a Law made by a House of Assembly to the extent that it is a law with respect to any matter on which a House of Assembly is empowered by this Constitution to make laws.

(2) The appropriate authority may at any time by order make such modifications in the text of any existing law as the appropriate authority considers necessary or expedient to bring that law into conformity with the provisions of this Constitution.

(3) Nothing in this Constitution shall be construed as affecting the power of a court of law or any tribunal established by law to declare invalid any provision of an existing law on the ground of inconsistency with the provision of any other law, that is to say-

(a) any other existing law;

(b) a Law of a House of Assembly;

(c) an Act of the National Assembly; or

d) Any provision of this Constitution.

(4) In this section, the following expressions have the meanings assigned to them, respectively -

(a) "appropriate authority" means -

(i) the President, in relation to the provisions of any law of the Federation.

(ii) the Governor of a State, in relation to the provisions of any existing law deemed to be a Law made by the House of Assembly of that State, or

(iii) any person appointed by any law to revise or rewrite the laws of the Federation or of a State;

(b) "existing law" means any law and includes any rule of law or any enactment or instrument whatsoever which is in force immediately before the date when this section comes into force or which having been passed or made before that date comes into force after that date; and

(c) "modification" includes addition, alteration, omission or repeal.

(5) Nothing in this Constitution shall invalidate the following enactments, that is to say -

(a) the National Youth Service Corps Decree 1993;

(b) the Public Complaints Commission Act;

(c) the National Security Agencies Act;

(d) the Land Use Act,

and the provisions of those enactments shall continue to apply and have full effect in accordance with their tenor and to the like extent as any other provisions forming part of this Constitution and shall not be altered or repealed except in accordance with the provisions of section 9 (2) of this Constitution.

(6) Without prejudice to subsection (5) of this section, the enactments mentioned in the said subsection shall hereafter continue to have effect as Federal enactments and as if they related to matters included in the Exclusive Legislative List set out in Part I of the Second Schedule to this Constitution.

Section 315(1) of the 1999 Constitution preserves the validity of the Decree as an existing law, and provides that the Decree remains valid as a law enacted by the Federal and State legislatures to the extent of their respective competence.¹²

This paper involves an analysis of the constitutional basis of the ACA against the backdrop of the existing constitutional theories, with an arguments and interpretative tools that have been advanced as justification for the enactment of the ACA by the Federal legislature. As a consequence, the paper also considers the potential implications of the constitutional doctrine of covering the field as applied in *Compagnie Generale De Geophysique V Jackson Etuk*¹³

2. LEGISLATIVE COMPETENCE

One of the cardinal features of modern system of government is the existence of separate organs of government, each playing specific roles in accordance with certain powers conferred on it by the Constitution. In Nigerian system of government, like any other common law jurisdiction, the legislative arm is saddled with the functions of law-making, the executive implements the law while the judiciary carries out the functions of interpretation of laws and settlements of disputes¹⁴

The Nigerian Federal system of government features three tiers of government: the Federal, State and the Local government.¹⁵ Each tier has its own legislative body with powers to make laws as created under the Constitution. The law making power is the constitutional preserve of the legislatures. In exercising law making power however, regards need be had to issues of legislative competence which in turn determines the validity of the laws made under a particular process. In a country with a federal structure, an overlap could be envisaged in the laws made by the Federal and State legislatures. This will definitely be resolved in the light of the interpretation of the provisions of the constitution which confers the law-making powers in determining the competence of the exercise of such power.

One important point is that a power to legislate cannot arbitrarily exercised by the legislatures of any tier of government. The competence of a legislative body to make laws is circumscribed and jealously guarded by the constitutional provisions. In this regard, the National Assembly is empowered to make laws on items in the Exclusive Legislative

¹² Constitution 1999, Section 315

¹³ (2000) 1 NWLR [Pt. 853] 20

¹⁴ Constitution of the Federal Republic of Nigeria 1999(as amended), Sections 4,5 and 6

¹⁵ Constitution of the Federal Republic of Nigeria 1999(as amended), Sections, 2, 3 and 7

list to the exclusion of Houses of Assembly of States¹⁶, as well as on items in the Concurrent Legislative List.¹⁷ The Houses of Assembly of States are precluded from legislating on items falling within the Exclusive legislative list.¹⁸ In strict term however, the States' Houses have powers to make laws on 'any matters not included in the Exclusive Legislative List' and any matter included in the Concurrent Legislative List.¹⁹

Consequently, where any law is made in the exercise of the power of any legislative house, in a manner which is inconsistent with the extent created by the Constitution, such exercise of power will be incompetent and the law so made would be declared a nullity by a court of competent jurisdiction.²⁰ The constitutional allocation of legislative powers has a significant bearing on the legality or validity of statutes where there is a transgression by either of the recognised legislative bodies into the realm of the legislative authority of the other.²¹ Arbitration is not explicitly mentioned in the Exclusive or Concurrent Legislative Lists of the Second Schedule to the 1999 Constitution.²²

The inductive reasoning behind the argument of the exclusive legislative competence of the National Assembly on the subject matter of arbitration can be summarised in the following terms:

- (a) Item 62 of Pt I of Schedule 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.
- (b) Item 68 contains a broad provision for 'any matter incidental or supplementary to any matter mentioned elsewhere in the List.'

It is pertinent at this junction to examine the nature of arbitration for ease analysis of the legislative competence of the Federal legislature on arbitration.

a. Nature and Form of Arbitration

Arbitration is a form of alternative disputes resolution method in which disputes between parties are heard and settled by neutral persons chosen by the parties. The dispute between the parties is settled by a third party or a body of third parties, after hearing the cases of the

16 See Second Schedule, Pt I to the 1999 Constitution containing 68 items

17 Constitution of the Federal Republic of Nigeria 1999(as amended), Sections 4(2), (3) and (4)

18 See Second Schedule Pt II to the 1999 Constitution containing 30 items

19 Constitution of the Federal Republic of Nigeria 1999(as amended), Section 4(7)

20 AA Olawoyin. (2015) 'Constructing the Road to Arbitral Prevalence: The Arbitration Law of Lagos State 2009 in Perspective', *Int'l Arb Law*, 2 , 36; *Bribery Commissioner v. Ranasinghe* (1965) A.C 172, 193

21 *Ibid.* 36

22 AA Olawoyin.. (2009), 'Charting New Waters with Familiar Landmark: The Changing Face of Arbitration Law and Practice in Nigeria' *J. of Int'l Arb.*, 26(3) 373, 377-378

parties in a judicial manner.²³ Simply put, it is the voluntary submission of a dispute to persons of the disputing parties' choice for a binding decision. The decision reached by the arbitrators is called an award and it is enforceable by the courts. Though, the arbitration proceedings are said to be conducted in a judicial matter, the rule applicable to its proceedings are less stringent than the rules applicable in the conventional courts.

Arbitration can be classified into commercial,²⁴ investment²⁵, maritime²⁶, industrial²⁷ and customary²⁸ arbitration. This article is specifically on commercial arbitration, therefore there are two forms of commercial arbitration: domestic and international.

Commercial arbitration in Nigeria is primarily governed by the Arbitration and Conciliation Act (ACA). The preamble of the Act reads:

An Act to provide a unified legal framework for the fair and efficient settlement of commercial disputes by arbitration and conciliation, and to make applicable the New York Convention on the Recognition and Enforcement of Arbitral Awards to any award made in Nigeria or in any contracting State arising out of international commercial arbitration.

Similarly arbitration is defined in Section 57 of the Act as 'a commercial arbitration whether or not administered by a permanent arbitral institution and commercial.'²⁹

23 P O Idornigie. (2015) *Commercial Arbitration Law and Practice in Nigeria*. Lawlords, Nigeria

24 Commercial is define as all relationship of a commercial nature including any trade transaction for the supply of goods and services, distribution agreement, commercial representation or agency, factoring, leasing, investment, financing, banking, insurance, exploitation agreement or concession, joint ventures and other form of industrial or business co-operation, carriage of goods or passengers by air, sea, rail or road.

25 The term investment arbitration refers to arbitration between government agencies and an investor. This is distinguish form commercial arbitration which is essentially involves private parties

26 Maritime refers to anything relating to or involving ships, shipping, navigation or seamen. The practice of maritime arbitration has not been common as other types of arbitration. This is because most arbitration clauses in maritime contracts try to exclude the jurisdiction of the Nigerian courts, whether the subject matter of the claim or any of the parties is within the jurisdiction of the Nigerian courts notwithstanding. However, the enactment of the Admiralty Jurisdiction Act (AJA) has tried to provide remedy (ineffective in our opinion) to the above mentioned situation. Equally, the emergence of the Maritime Arbitration Association of Nigeria in 2005 can be said to be bringing new fire and impetus to the promotion of maritime arbitration in Nigeria.

The Trade Disputes Act enjoins parties to find ways of amicable settlement of disputes apart from the Act.

27 Industrial arbitration is the submission of industrial or trade disputes to the industrial arbitration panel in accordance with the provisions of Trade Disputes Act.

28 This is voluntary submission of disputes to traditional rulers, chiefs and elders for amicable settlement. The range of dispute settled in this matter includes chieftaincy matters, sale of land under the customary system, family matters etc. the procedure is usually flexible as the goal is not the handing down of strict legal rules and decisions, rather, the amicable settlement of the dispute between the parties. However, the binding effect of such decisions will depend on the acceptance of the parties.

29 Arbitration and Conciliation Act 2004, Cap A18, Section 57

ACA has 56 Sections, which is divided into three parts and four schedules. Part I deals with: Arbitration agreement; composition of arbitral tribunal, jurisdiction of arbitral tribunals, conduct of arbitral proceeding, making of award and termination of proceedings, recourse against award; recognition and enforcement of awards. Part II deals with conciliation. And part III deals with provisions relating to international commercial arbitration and Conciliation.

ACA is the only federal or national law governing commercial arbitration in Nigeria, though some States within the Federation have their own arbitration laws.³⁰ However, the importance of an arbitral regime that is responsive to the needs of commercial men in terms of speed and finality of the process is an indispensable component in maintaining the state at the forefront of economic development in Nigeria. Therefore the legality of such law is crucial.

b. Legality/Constitutionality of the ACA

The constitutionality of the ACA is in doubt due to the fact that arbitration is not mentioned under the legislative competence of either the National Assembly or the State House of Assembly.³¹ The legislative competence of the National Assembly³² is contained in the 'exclusive' and 'concurrent' lists in the 1999 Constitution. The State Houses of assembly have their legislative competence listed out under the 'concurrent lists' and 'residual list'.³³ It is generally recognised and accepted that subject areas which do not fall within the exclusive or concurrent legislative lists are residual matters within the exclusive legislative competence of the Houses of Assembly of the States.³⁴

One of the ways in which arbitration may fall within the legislative competence of the National Assembly is under Item 62(a) of the exclusive list which gives the National Assembly the power to legislate on trade and commerce, international trade and trade between States within the Nigerian Federation.³⁵ Item 31 of the same list deals with the

30 See Lagos State Arbitration Law 2009, No 16.

31 Bamodu G. 'A Field not covered: Arbitration and the Nigerian Constitution'. Available at: <https://www.businessdayonline.com/a-field-not-covered-arbitration-and-the-nigerian-constitution-1/> (Accessed on 15 June, 2017).

32 The Arbitration and Conciliation Act is considered, under Section 315 of the 1999 Constitution (Nigeria) as an Act of the National Assembly since it was the product of the highest legislative body during the military regime, i.e., the Supreme Ruling Council.

33 The legislative capacity of the local governments is not given in the 1999 Constitution (Nigeria), constitutional law authorities in Nigeria refer to matters that are not mentioned in the exclusive and concurrent list as the "residual list". It is under this category that the legislative competence of the local governments lie, sometimes exercised concurrently with the State Governments.

34 Constitution of the Federal Republic of Nigeria 1999, Section 4 (7); See also Attorney General Ondo State v. Attorney General of Federation [2002] 9 N.W.L.R (Pt. 772); Attorney General of Lagos State v. Attorney General of the Federation [2003] 12 N.W.L.R (Pt.833)1.

35 AA Amazu. (2000), 'Arbitration and Judicial Powers' M.I.L.B.Q, 3 19-48. 35; Idornigie PO. (2000), 'The Doctrine of Covering the Field and Arbitration Laws in Nigeria', Arb. Int'l, 66(1), 193, 196

implementation of treaties on matters referred to in the exclusive list. Item 68 on the same list gives the National Assembly the power to make laws with respect to any matter incidental or supplementary to the matters mentioned in the exclusive list. By implication, it was argued that since the ACA applies only to commercial matters and is therefore incidental to trade and commerce and enacted the New York Convention, it would fall under the legislative competence of the National Assembly.³⁶ Hence it was inferred that the National Assembly has legislative competence by virtue of the combined items 62 and 68 of Pt 1 of Schedule 2 to the 1999 Constitution,³⁷ though there have been a number of views expressed on the issue by some commentators.

The argument above may not stand the test of close judicial scrutiny. It is in fact a similar argument to that which was rejected by the Supreme Court in *Chief Gani Fawehinmi & Ors v. General Ibrahim Babagida & Ors.*³⁸ The Tribunal of Inquiry Act 1966 was promulgated by then Federal Military Government for the entire Federation under the enabling powers conferred on it at the relevant time. And this was accepted as an existing law pursuant to Section 315 of the 1999 Constitution and deemed to be an Act enacted by the National Assembly for the Federal Capital Territory only. One of the issues for determination in the case was whether the 'incidental and supplementary' powers under the Schedule to the 1999 Constitution were wide enough to enable the National Assembly to enact a legislation for the whole Federation in terms of the Act. The Supreme Court was not convinced by the arguments which was premised on the fact that the enactment of a Tribunal of Enquiry Act was incidental or supplementary to the expressly stated subject matters in the Exclusive Legislative list.

This point is further underscored by the provisions of Part III of the Second Schedule which significantly weakens the argument above where clause 2 thereof provides that 'in this Schedule, references to incidental and supplementary matters includes, without prejudice to the generality, references to the jurisdiction, powers, practice and procedures of courts of law.'

³⁶ Ibid.

³⁷ There are four clear elements which can be easily distilled from the Nigerian and foreign authorities on the doctrine of covering the field. First, the subject matter in question should be one in which both the federal legislature and the state legislature have concurrent legislative competence. 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. Third, where the state law is in *parimaterial* with the federal law, the state law is merely invalid or inoperative while the federal law is in existence. The state law is not void. Fourth, where the state, however contains provisions, which are inconsistent with the federal law, those provisions will be void to the extent of such inconsistency.

³⁸ (2003) F.W.L.R [Pt. 146]835

Olawoyin reinforced the position 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 especially when Nigeria is defined in Section 2 of the 1999 Constitution as "one indivisible and indissoluble Sovereign State".³⁹ And 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."⁴⁰

Okeyi and Amucheazi argue that:

the Arbitration Act, though an existing law under Section 315 of the 1999 Constitution, cannot continue to have effect as a Federal legislation applicable throughout the Federation with regard to the arbitration of disputes relating to intra-state trade and commerce as the settlement of intra state commercial disputes is not a matter on which the National Assembly is empowered by the said Constitution to make laws. It is however corrected to say that the Arbitration Act would survive as an existing law applicable to the arbitration of international and inter -state commercial disputes.⁴¹

Adaralegbe⁴² offered a different explanation for the categorization of the Arbitration and Conciliation Act under the legislative competence of the National Assembly by using the combination of Section 12(2) and 4(4) of the Nigerian 1999 Constitution and Section 10(2) of the Interpretation Act.⁴³ He is of the view that:

In addition to its powers under the exclusive and concurrent lists, Section 4(4) (b) of the Constitution grants the National Assembly the power to make laws on other matters where the provisions of the Constitution specifically empower it. Section 12(2) of the Nigerian Constitution gives the National assembly the power to make laws for the Federation or any part thereof with respect to matters not included in the Exclusive Legislative list for the purpose of implementing a treaty. From the introductory part of that law, the objective of the ACA is, in part, to give effect to and implement the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Award (New York Convention), a treaty to which Nigeria is a signatory.⁴⁴

39 AA Olawoyin. (2015), 'Constructing the Road to Arbitral Prevalence: The Arbitration Law of Lagos State 2009 in Perspective', *Int'l Arb. L. Rev.* 2, 34-46, 37.

40 Ibid.

41 Ikeyi N & Amucheazi O. (2013) 'Applicability of the Arbitration and Conciliation Act: Which Field does the Act Cover', *J. of Afri. Law*, 57 (1), 126-148, 141.

42 A G Adaralegbe. (2006), 'Challenges in Enforcement of Arbitral Awards in Capital Importing States, the Nigerian Experience', *J. Int'l Arb.* 23(5), 401-426, 406.

43 Interpretation Act Cap 123, Laws of the Federation 2004.

44 Ibid.

The argument above is very compelling for a Federal Act implementing the New York Convention on the enforcement of foreign arbitral awards, without necessarily being so as regards an all-encompassing substantive Federal law on arbitration. Aderalegbe's argument above as regards the applicability of Section 12(2) as justification for a substantive Federal law on arbitration other than a Federal law implementing the New York Convention, is premised on a fundamental flaw. The difficulty with the argument is the contention that the New York Convention prescribes the enactment of substantive laws of arbitration for contracting States. This author is of the view that the scope of the Convention is limited to the establishment of regimes for the enforcement of foreign arbitral awards and the guiding principles that would inform the recognition and enforcement of such awards. The enactment of a substantive law on arbitration does not derive its provenance from the New York Convention but from the recognition by individual countries of the desirability of giving arbitration statutory *imprimatur*. This explains why substantive laws on arbitration generally have been in existence before the New York Convention.⁴⁵ The implementation of the New York Convention, which is without doubt within the legislative competence of the National Assembly, cannot and should not be used as a justification and validation of a substantive Federal law on arbitration. The scope of the New York Convention is clearly limited to the enforcement of foreign arbitral awards.

Hence, it has been argued that the provisions of items 62 and 68 of the exclusive list of the 1999 Constitution cannot be invoked to determine legislative competence over arbitration in that they do not expressly or clearly address the matter. It is thus contended under this line of argument that the Federal legislature does not even have legislative competence over arbitration at all, that arbitration do not mentioned in the 1999 Constitution, it is entirely a residual matter left for the States' legislatures to the exclusion of the Federal legislature.

The position of the courts in relation to the ongoing debate about legislative competence over arbitration is not entirely clear. In *Stabilini Visinoni Limited v. Mallinson & Partners Limited*,⁴⁶ the Court of Appeal seemed to implicitly support a middle course. The court decided the matter before it on the basis that the parties' action and the circumstances of the particular case dictated that the extant Federal Arbitration and Conciliation Act should be applied. The court seemed to recognise that it could be open to parties to arbitration to choose to invoke the Lagos State instead. This decision in *Stabilini* sits very uneasily with

⁴⁵ see Arbitration Ordinance 1914 and Arbitration Ordinance 1922
⁴⁶ (2014) 12 NWLR [Pt.1420] 134, 175

an older decision of the same Court of Appeal in *Compagnie Generale de Geophysique v. Dr Jackson Etui*.⁴⁷ In that case, the Court of Appeal held that by ACA, the Federal legislature has covered the whole field of arbitration and that inconsistent provisions of the State law on arbitration are null and void.⁴⁸

However, if the decision in *Etui* and covering the field approach were correct, the court in *Stabling* could simply have held that the Lagos State Law of 2009 is null and void to the extent of inconsistency with the Federal legislation. The court in *Stabilini* case did no such thing, rather the court in fact commended the Lagos State legislation for making it possible for parties to arbitration within Lagos to choose either the law itself or another law, including of course Federal Law.⁴⁹ The court said this approach makes sense because arbitration is a subject area that can be said to be without borders.

However, the approach of regarding arbitration as within the phrase 'trade and commerce' in the Nigerian Constitution is consistent with the decision of the Supreme Court directly on that phrase.

In *Attorney General of Ogun State v. Aberuagba & ors*,⁵⁰ the Supreme Court noted that the mere fact that an item is not specifically included in the Exclusive list does not automatically mean that the Federal government has no legislative competence on the matter.⁵¹ Eso JSC observed that to restrict the word 'commerce' merely to buying and selling would be to restrict a general term applicable to many objects to one of its significations.⁵²

It follows that the Federal legislature has the legislative competence over arbitration at least as it concerns interstate or international trade and commerce. Even whilst holding that the Federal legislature has exclusive competence in respect of international and interstate trade and commerce, the case of *Aberuagba* acknowledged that the Federal legislature did not have complete exclusive power over trade and commerce and that state and even local governments have their respective shares to control 'trade and commerce'.⁵³ Furthermore, the Court also held, in light of item H paras 18 and 19 of the Concurrent list of the 1979 Constitution that a State legislature is competent to enact laws concerning trade and commerce within its borders and that a State legislature has competence to enact laws for the industrial and commercial development of the state.⁵⁴

47 (2000) 1 NWLR [Pt. 853] 20

48 *ibid*, 25

49 (2014) 12 NWLR [Pt. 1420] 134, 175

50 (1985) 1 NWLR [Pt. 3] 393

51 *ibid*, 395

52 *ibid*, 396

53 (1985) 1 NWLR [Pt. 3] 393

54 *ibid*

Does the ACA cover the field?

One of the ways scholars analyse the position of the ACA as against the State arbitration laws is by applying the doctrine of covering the field.⁵⁵ The effect of the application of this doctrine is that the State law is inoperative.⁵⁶ The doctrine arises where the question is whether a State Law on a Concurrent subject matter can co-exist with a Federal law on the same subject matter and 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.⁵⁷ One of the fundamental elements of the doctrine is that both levels of government (federal or state) are empowered.⁵⁸

According to Idornigie,⁵⁹ in enacting the ACA, the Federal Government of Nigeria has not covered the field of arbitration completely, exhaustively and exclusively because the Act legislates only on commercial arbitration and those States' laws dealing with non-commercial arbitration are valid. A similar opinion was expressed by Orojo and Ajomo.⁶⁰ The authors contend that, with regard to commercial arbitration, the Arbitration and Conciliation Decree, 1988 excludes any State legislative provision on the subject matter... And where arbitration is not commercial, the Decree will not apply and the State Arbitration law will apply since it covers non-commercial arbitration.

A further support to this viewpoint was expressed by Akanbi,⁶¹ who categorically argues that as between Arbitration Act and Arbitration Laws of the States, the doctrine of covering the field can only be invoked with respect to disputes arising from commercial transactions.

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,⁶² stated that the Federal government has the legislative competence over international and interstate arbitration outside the two areas within the legislative authority of the

⁵⁵ A I Chukwuemerie. (2003), 'Commercial and Investment Arbitration in Nigeria's Oil and Gas Sector' J. World Inve., 4(5), 834-887, 834; *Lakanmiv A.G. Western Nigeria* (1971) 1 UILR 201, 209; *A.G. Ogun State & Ors v A.G. Federation* (1982) 13 NSCC 1, 11-these were the first cases by which the Supreme Court established the doctrine of covering the field.

⁵⁶ A Akintoye (2002) 'The Doctrine of Covering the Field and the Blue Pencil Rule in Legislative Enactments-A judicial revalidation' NBA J. Ilorin Branch, 189-107, 192-4.

⁵⁷ See *Ogwuegbu JSC in Attorney General of Abia State v. Attorney General of the Federation* (2002) 6 NWLR [Pt. 763] 264, 463.

⁵⁸ OCJ Okocha (2002) 'The Doctrine of Covering the Field and the Limits of Legislative Powers of the National Assembly vis-à-vis the States and the Local Governments legislatures in Nigeria' 1(1), NBA J. 117-149, 118.

⁵⁹ P O Idornigie (2015) *Commercial Arbitration Law and Practice in Nigeria*. Lawlords, Nigeria. 193.

⁶⁰ J O Orojo JO & M A Ojomo. (1999) *Law and Practice of Arbitration Law in Nigeria*. Mbeyi & Associates, Nigeria. 27

⁶¹ M M Akanbi (2006) 'The Nigerian Arbitration Act 1988, s. 58 and the Doctrine of Covering the Field: C.G de Geophysique v. Etui', J. Chartered Institute Arb. 72(3), 283-287, 285.

⁶² Available at: <http://www.aluko-oyebode.com/resources/amended-report/> (Accessed on 14 September, 2017).

federating states.⁶³ On the contrary, the Committee of the Lagos State set up in 2007 for the proposed law of Lagos State Arbitration Law opined that arbitration is a residual matter within the legislative competence of the States.⁶⁴ In the Lagos Committee's opinion:

The authority of the Lagos State House of Assembly to enact a law on Arbitration is an exercise subject to review under the well-known *principle of pith and substance*, a legal doctrine developed in Canadian (Federal) constitutional interpretation to determine under which head of power a given legislation falls.⁶⁵

In reviewing the mechanics of this doctrine of 'pith and substance',⁶⁶ the critical question to be posed is whether it has any relevance and applicability in the particular context of legislative competence in respect of arbitration in Nigeria. It would then become evident that the reliance on the pith and substance doctrine, in this context, is also no more than 'a contrived solution' which, with respect, has no place in the interpretation of the 1999 Constitution. The Lagos Committee Report did not give any detailed analysis of the applicability of the doctrine in the particular context of arbitration laws.⁶⁷ It is therefore doubtful whether the doctrine will apply in specific situations where the legislative power is implied residual and not explicitly expressed as is the case under Nigerian Constitutional law jurisprudence.⁶⁸ The reliance on the doctrine of pith and substance on the subject matter of arbitration lacks any justifiable legal basis and further befuddles a clear position on the legislative competence of the States in the context of arbitration. Olawoyin⁶⁹ states as follows:

The concept of arbitration in all facets (international or domestic) is a residual matter within the legislative competence of the States under section 4 (7) of the 1999 Constitution. The desire for a Federal arbitration Act dealing with international commercial arbitration seems driven more by sentiments rather than sound legal principle. The proposal by the National

63 *ibid.* Chief Bayo Ojo was the Attorney General of the Federation at the material time.

64 Available at : <http://www.aluko-oyeode.com/files/amended%20report.pdf> (Accessed on 28 October, 2017)

65 Lagos State Committee Report, 24.

66 The thrust of the doctrine is that Parliament or a State legislature should keep within the domain assigned to it and not trespasses into the domain reserved to the other, and the law made by one which trespasses or encroaches upon the field assigned to the other is invalid. The doctrine introduces a degree of flexibility into the otherwise rigid scheme of distribution of power. The reason behind the rule is that if every legislation were to declare invalid however slight or incidental the encroachment of the other field, then the power of each legislature will be drastically circumscribed to deal effectively with the subjects entrusted to it.

67 the Doctrine of Pith and Substance was discussed in Chap. 3, para 10-13, 24-28 of the Committee Report

68 A.A. Olawoyin. (2009) 'Charting New Waters with Familiar Landmarks: The Changing Face of Arbitration Law and Practice in Nigeria', J. Int'l Arb, 26(3) 373, 384-385. It is conceded that the residual list may be regarded in substance as an 'unwritten Exclusive Legislative List' for the states.

69 *Ibid.*

Committee for uniform laws on arbitration for the States is desideratum. However, such laws should encompass not only domestic arbitration but also international commercial arbitration. There is no superior argument against the right of a State to legislate in respect of the relations between a resident of that State and a foreign resident. There is similarly no legal prohibition against State High Courts, for example, implementing a Federal Act domesticating the New York Convention in Nigeria. It is submitted that the proposed Federal bill should be the uniform States law on arbitration. Such a regime would put arbitration law and practice on a sound inviolable legal premise that is required for the future development of ADR in the Nigerian legal environment. It could not have been the intention of the framers of the Constitution that a liberal interpretation be adopted to take away the legislative competence of the States under the Constitution. There is clearly no compelling evidence that a substantive Federal Act on arbitration rather than uniform states laws on arbitration would serve the interest of the Constitution and best carry out its objective.

3. CONCLUSION

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 New York, Paris or London, as a result of certain questionable situations (such as this issue) that still obtain with respect to the practice of arbitration in Nigeria.

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. The 1999 Constitution needs to be amended to explicitly include arbitration within the legislative competence of either of the National Assembly or House of Assembly. Pending the time for amendment to effect an explicit provision for arbitration in one of the lists, the Nigerian court needs to address this very pressing issue on ground, by making a definite pronouncement on what should obtain in this circumstances.

In the first instance, arbitration is actually part of and encompassed within the phrase 'trade and commerce' and it is surprising that the debate has mostly focused on whether

arbitration is 'incidental' to trade and commerce. Arbitration itself is a big business and is widely so regarded. It is not merely a disputes resolution mechanism but indeed a veritable business sector that many countries and cities wish to encourage and develop for revenue generation purposes.

In light of the conceptual consideration of arbitration as a business sector in its own right as well as the embracing approach to the interpretation of 'trade and commerce' by the Supreme Court of Nigeria, it is entirely appropriate to conclude that arbitration is encompassed within the phrase 'trade and commerce' in items 62 of the exclusive legislative list of the 1999 Constitution. It follows that at least the federal legislature has legislative competence over arbitration at least as it concerns interstate or international trade and commerce.