



Second issue

Interrogating the Legislative Power of a State House of Assembly to Enact Arbitration Law in Nigeria

By

N.O.A. Ijaiya Ph.D., Faculty of Law, University of Ilorin, E.A. Adesina, Department of General Studies, Lagos State Polytechnic, Ikorodu Lagos

Olufemi Abifarin Ph.D., Faculty of Law, Edo University Iyamho, Edo state Nigeria

Abstract

Nigeria as a federation has constitutionally divided legislative powers between the federation and the federating units called states. However, in spite of the clear division of legislative powers in the constitution, the states do encroach on the legislative power of the federation while the federation too sometimes encroaches on the legislative power of the states. This paper analyses the constitutional power of both the states and the federation with a view to enlightening them to adhere strictly to the constitutional distribution of legislative jurisdiction. The paper started with the constitutional establishment of the National and state legislature, it stated the power to each tier of government in law making its constitutional limitations in law making, using

arbitration law as an example of state encroachment on federal legislative power. The paper concluded by distinguishing between industrial arbitration and customary arbitration and that while the National Assembly can legislate on Industrial arbitration only State can legislate on customary arbitration and other alternative dispute resolution methods like mediation, negotiation, renegotiation etc. since they are not specifically mentioned in the Exclusive and Concurrent Legislative Lists in the Constitution.

Introduction

Since 1999, when democratic governance was restored in Nigeria, various States Houses of Assembly have been making laws to regulate Commerce, industries, education, health, housing, ICT etc. but some of these laws are violating the provisions of the Constitution in the sense that it is either the House of Assembly did not understand the dynamics of a federation or they are simply lazy to the extent that the power to make such law or not.[1]

This phenomenon is not peculiar or limited to the Houses of Assembly of the States but the National Assembly also fall into the same error, thinking that it has absolute and unregulated power to make law for the federation.[2] This error of judgement has led to the National Assembly making laws that are struck down by the Court for lack of Jurisdiction while making the law.[3]

In fact, we have pointed out elsewhere that the State House of Assembly in Nigeria have no power to make law on pension and gratuity, health Insurance, labour and trade unions, cooperative societies etc.[4] A critical perusal of the Constitution, especially the exclusive legislative list also shows that the states lack capacity to make law on industrial disputes and industrial arbitration. This paper is expected to interrogate this issue with a view to correcting the erroneous belief of the States and advise such States that have enacted such law to annul the law by repealing it or by restricting itself to its Stated Jurisdiction in the Constitution on law making.

Our interrogation seeks to answer the following question: what is arbitration? Is there any distinction between industrial arbitration and customary arbitration? What is the constitutional jurisdiction of the National Assembly and States House of Assembly with respect to arbitration? What are the legal implications of Exclusive, Concurrent and residual legislative lists in a federation like Nigeria and what are the legal implication of non-compliance with the list by any tier of

government in exercising its law-making power? What is the position of other alternative dispute resolution methods that are not mentioned both in the Exclusive and Concurrent Legislative Lists in the Constitution?

Arbitration in Nigeria

Prior to the introduction of English law to Nigeria by the British Colonialist, customary arbitration was in operation in Nigeria. This was administered in the acephalous or chiefly communities by the rulers while in acephalous or republican communities by the comma of elders or nominated elders as the case may be. This continued until the introduction of Arbitration Ordinance of 1914 which was based on the English Arbitration Act of 1889. It was initially made applicable to Lagos and later extended to other parts of the country in 1958.[5]

The 1914 Ordinance obviously became unsuitable to deal with many of the new situations that were appearing, and this led to a call for a more modern and suitable legislation on arbitration. Happily, this came in 1988 through Arbitration and Conciliation Act, 1988 which was based largely on the UNCITRAL Model Law on International Commercial Arbitration and the UNCITRAL Model Rules. Apart from the 1914 Act that has been made applicable to Lagos, Lagos State now" has the Lagos Court of Arbitration and it is empowered by statute to function as an international arbitral institution. This is in addition to the existing Lagos Regional Centre for International Commercial Arbitration pioneered by the Asian African Legal Consultative Committee (AALCC) Regional Centres for Arbitration which has other centres in Kuala Lumpur and Cairo. These centres are intended to provide facilities for settling international commercial disputes undertaken in Asia and Africa. The centre which was inaugurated in 1989 started operation in 1999.[6] The Lagos State government has also gone further to create the Lagos Multi Door Court House[7] and citizens mediation and conciliation centre.[8]

Although arbitration and litigation share some common features because of their adversarial and rancorous tendencies, arbitration has become accepted as a viable alternative to litigation. Even though it seems that arbitration under the general law is yet to take its proper place in the country's growing economy as a dispute settlement.

Meaning and essence of Arbitration

The Arbitration and Conciliation Act[9] that formally introduced arbitration into the country did not give useful definition of arbitration. The Act in section 57 (1) simply defines arbitration in the following way: "Commercial arbitration Whether or not administered by a permanent arbitral institution". This definition is unhelpful and when he set out.[10] The reference to commercial arbitration only means that not only does the Act apply to commercial disputes only, it also gives the impression that only commercial disputes can be subject of arbitration under the Act.[11] This definition rules out customary arbitration and other arbitration matters falling outside commercial transaction. But in practice, since the enactment of the Act, other disputes other than commercial disputes have been resolved by arbitration in Nigeria.[12] We shall therefore have recourse to other works for working definition of arbitration.

Halsbury Laws of England, defines arbitration as the reference of a dispute or difference between not less than two parties for determination after hearing both sides in a judicial manner, by a person other than court of competent jurisdiction.[13]

While Stroud's Judicial Dictionary relying on Collins v. Collins[14] defines arbitration as a reference to the decision of one or more other persons either with or without an umpire of a particular matter in difference between the parties.[15]

Berstein, view arbitration as a situation where two or more persons agree that a dispute between them shall be decided in legally binding way by one or more impartial persons in a judicial manner that is, upon evidence before him or them, the agreement is called an arbitration agreement, when, after a dispute has arisen, it is put before such person or persons for decision, the procedure is called an arbitration and the decision when made is called an award.[16]

As pointed out above, arbitration is a mechanism for resolution of disputes between two or more persons under which they agree to be bound by the decision to be given by neutral third party (the arbitrator) according to law or if so agreed, other consideration after a fair hearing, such a decision being enforceable in law.

It has been argued that an exercise is not arbitration, strictly so called, if it does not answer to this definition, notwithstanding that, it

is described as arbitration. Thus, an arbitration board appointed not to settle a dispute but to determine the value of certain companies is not arbitration within this definition.[17]

A person or persons to whom a reference to arbitration is made is called an arbitrator or arbitrators. His or her decision is called an award.[18] If it is provided that in the event of a disagreement between the arbitrators, the dispute is to be resolved by a third person normally referred to as an umpire, the decision of an umpire is also called an award.[19] However, the current Nigerian arbitration statute makes no provision for an umpire, but for a third party who unlike an umpire, cannot alone hand down an award.

Is Arbitration part of ADR process?

Before going further in this research work, it is pertinent at this juncture to discuss the raging controversy with regard to the status of arbitration. In recent times, it has been doubted whether arbitration can be described as an ADR method.[20]

The general stand on the issue is fluid, in that opinions are divided. Arbitration has some of the features of ADR properly so called and some of the features of adjudication through court process. Some of these are autonomy of the parties in choosing the arbitral tribunal, informality, confidentiality and absence of antagonism which leaves the parties in arbitration with the opportunity to resume business relations with little or no disruption after the award has been rendered.[21]

On the other hand, are weighty arguments against classify in arbitration as an ADR process. Arbitration is said to be closer to litigation in approach. In the first place, an agreement to enter into arbitration will be enforced by the courts whereas an agreement to enter into an ADR process will not be. Secondly, in arbitration, the outcome is determined in accordance with an objective standard, i.e. the applicable law. In mediation, for example, any outcome is determined by the will of the parties. This is why it is often said that mediation is an interest based procedure.[22] Thirdly, in arbitration, a party's task is to convince the arbitral tribunal of its case on the other hand, in mediation, for example, since the outcome must be accepted by both parties and is not decided by the mediator, a party's task is to convince or compromise with the other side.[23]

6. While the language of the constitution does not change, the changing circumstances of a progressive society for which it was designed yield new and fuller import to its meaning.
7. A constitutional provision should not be construed so as to defeat its evident purpose.
8. Under a constitution conferring specific powers, a particular power must be granted, or it cannot be exercised.
9. Delegation by the National Assembly of its essential legislative function is precluded by the constitution.
10. Words are the common signs that mankind make use of to declare their intention one to another and when the words of a man express his meaning plainly, distinctly and perfectly, there is no occasion to have recourse to any other means of interpretation.
11. The principles upon which the constitution was established rather than the direct operation or literal meaning of the words used measure the purpose and scope of its provision and,
12. Words of the constitution are not to be read with stultifying narrowness.^[72]

Rule 8

Under a constitution which confers specific powers, a power which is not specifically granted cannot be exercised. This generally accords with the "ultra vires rule" and particularly with the "expression uniusest exclusion alterius" the latter being to the effect that "express mention of one thing excludes the others". The Court of Appeal recently followed this principle in *Obi v. I.N.E.C*^[73] where Fabiyi JCA said:

Where a statute mentions specific things or persons, the intention is that those not mentioned are not intended to be included. This principle of law is encapsulated in the maxim expression uniusest exclusion alterius which means that the express mention of one thing excludes the others.^[74]