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SECTION 58 OF THE NIGERIAN ARBITRATION AND CONCILIATION ACT AND THE DOCTRINE OF COVERING THE FIELD: A REVISIT

By

Abdulrazaq Adelodun Daibu* and Ahmad Tahir Daramola**

Introduction

Section 58 of the Arbitration and Conciliation Act[1] has provoked a lot of controversy. One school of thought has interpreted the section in the light of the constitutional doctrine of covering the field.[2] This school of thought is of the view that states cannot validly legislate on arbitration in view of the fact that a federal law, that is, ACA, has covered the field of law on that subject matter. The contention of scholars in this school is that arbitration laws made by states must be struck down in favour of the ACA. Their argument is hinged on the vexed fact that the ACA contemplates an intention to cover the field. Another school of thought argued that the doctrine of covering the field do not in any way affect arbitration in Nigeria.[3] They further argued that the doctrine of covering the field with regards to arbitration law is fundamentally defective and will not hold water. It must be stated that at the time of writing this article, there is no decision of the Nigerian Supreme Court on the provision of section 58 of the ACA, especially as it relates to the applicability or otherwise of the doctrine of covering the field.

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[1] Cap. A.19 Laws of the Federation of Nigeria 1990 now Cap. A18 *Laws of the Federation of Nigeria 2004* herein after referred to as the "ACA" was passed during the military regime as a Decree in 1988 and is deemed to be an Act of the National Assembly by virtue of Section 315 of the Constitution of the Federal Republic of Nigeria 1999(as amended). The ACA is stated to apply throughout the federation of Nigeria. See generally Daibu A. A. " The Lagos State Arbitration Law and the Doctrine of Covering the Field: A Review" The Gravitas Review of Business and Property Law (2015) vol.6 No1 p. 44-46; Emilia O. "A Critique of the New 2009 Arbitration Law of Lagos State" Apogee Journal of Business, Property & Constitutional Law (2010) vol. 2 No. 5 p. 1 available on line at http://eprints.soas.ac.uk/12580/ accessed 8th may, 2015; Akanbi M.M. "The Nigerian Arbitration Act 1988 s.58 and the doctrine of covering the field: C.G.de Geophysique v Etuk" Arbitration (2006) vol. 72 No.3p. 283; Bukar B.A, "Mandatory and Other forms of Arbitration under Some Selected Oil, Gas and Investment Legislation in Nigeria" *OGEL*, (2010) available at http://www.ogel.org accessed 13th December, 2015; Okorie D. "Does the Regime of Statutory Arbitration of Investment Disputes in Nigeria Negate the Sanctity of Party Autonomy in relation to the Agreement of Parties to Arbitrate? Available on line at http://www.dundee.ac.uk/cepmlp/gateway/?news=31248 accessed 26th April 2016; Akanbi M.M. "Challenges of Arbitration Practices under the Nigerian Arbitration and Conciliation Act of 1988: Some Practical Considerations" Arbitration (2012) vol. 78 No. 4 p. 325; Orojo J. O. and Ajomo M. A. *Law and Practice of Arbitration and Conciliation in Nigeria (* Mbeyi & Associates Nig. Ltd. Lagos 1999*)* p. 166.

[2] Idornigie P. O."The Doctrine of Covering the Field and Arbitration Laws in Nigeria" Arbitration (2000) vol. 66 No. 3 pp.193 - 198; Chukwuemerie "Commercial and Investment Arbitration in Nigeria's Oil and Gas Sector" (2003) pp. 4-13; Akanbi M.M. "The Nigerian Arbitration Act 1988 S.58 and the doctrine of covering the field: C.G.de Geophysique v Etuk" pp. 283-287 ;Nwadialo F., Civil Procedure in Nigeria (MIJ Professional Publishers Ltd. Lagos 1990) p. 871 -872; Daibu A. A. " The Lagos State Arbitration Law and the Doctrine of Covering the Field: A Review" p.44.-53.

[3] Olawoyin A. A. "Constructing the Road to Arbitral Prevalence : The Arbitration Law of Lagos State 2009 in Perspective" International Arbitration Law Review (2015) vol. 18 No.2 pp.34-46

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In the light of the above, this article seeks to contribute to this important but neglected area of law with a view to promoting effective practice of arbitration in Nigeria.

The Doctrine of Covering the Field

The doctrine of covering the field is a constitutional law doctrine applicable in a federal system of government with respect to items listed on the concurrent legislative list in which both the federal and the state or federating unit has power to make laws.[4] Under the Nigerian Constitution, the doctrine is to the effect that a state House of Assembly cannot legislate on a matter in the concurrent list where the National Assembly has already made a law on the subject matter, as the constitution evinces an intention for such a field to be within the exclusive jurisdiction of the federal legislature thereby providing a complete statement of law on the subject matter.[5]

The doctrine originated in the United States in the *locus classicus* case of *Houston v. Moore*[6] where the expression 'covering the ground' was used, it was later adopted and applied in Australia in the case of *Ex parte McLean.*[7] In that case, section 109 of the Australian Constitution which is *in pari material* with the section 4(5) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) was in contention before the court.[8] The court held that where the parliament of the commonwealth and the parliament of a state both legislate on the same subject matter and it appears that that of the commonwealth law expressly intended to completely govern a particular matter, the state law upon the same subject matter becomes inconsistent.[9]

The inconsistency it was argued does not merely arise as a result of two laws which are susceptible to simultaneous obedience but depend on the intention of the legislature which must be stated clearly that the enactment of a particular law has envisaged an intention to cover the field.[10] Thus when a federal enactment is intended to completely govern the subject matter, it

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[4] In a federal and democratic constitution such as Nigeria constitution, there are designated fields each sphere of governments can legislate upon and they are clearly defined as the concurrent legislative list which both the constituent states' Assemblies and the National Assembly can legislate, the exclusive legislative list which borders on items within the exclusive preserve of the National Assembly and the residual list which only the state House of Assembly can legislate upon to the exclusion of the National Assembly. See part II of the second schedule, part I of the second schedule and section 4 (7) of Constitution of the Federal Republic of Nigeria 1999 (as amended) respectively.

[5] *Attorney General of Abia State v. Attorney General of the Federation* (2002) 6 NWLR (Pt. 763) 264 at 431-435, 463-465, 475

[6] *Houston v. Moore (1820)5 wheat 1*

[7] *Ex parte McLean* (1930)43 CLR 472 at pp.483-485

[8] Section 109 of the Australia Constitution provides as follows: "when a law of a state is inconsistent with the law of the commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid."

[9] *Ex parte McLean* (1930)43 CLR 472 at pp.483-485

[10] Daibu A. A. "The Lagos State Arbitration Law and The Doctrine e of Covering The Field: A Review" p. 48.

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becomes inconsistent for the state legislature to legislate on the same subject matter.[11]

Conflict of Ratios

The Nigerian Supreme Court justices appeared not to agree on the status of a law enacted by a state when the National Assembly has already envisaged an intention to cover the field. In *AG Ogun State v. AG Federation,*[12] Fatai-williams CJN, was of the view that to invalidate the state law for its inconsistency will not sufficiently portray clarity or precision of language.[13] Idigbe JSC on the other hand held the view that when it appears that the provisions have sufficiently covered the field in contention by providing what the law should be for the entire federation, the state law on the same subject matter becomes inconsistent law and the federal law must prevail.[14]

Eso JSC, however, took a view which appears to be more clear and safe. The learned Jurist's view is to the effect that where the two legislations are *in pari materia*, the state legislation is in abeyance and becomes inoperative for the period the federal legislation is in force.[15] It is not void because if for any reason the federal legislation is repealed, the state legislation which is in abeyance is revived and becomes operative until there is another Federal legislation that covers the field.[16]

The position of Eso JSC seems to have found support in the latter case of *A.G Abia State v. A.G Federation*[17] when the Supreme Court was called upon to nullify the Electoral Act 2001 on grounds of inconsistencies with the Constitution of the Federal Republic of Nigeria 1999 and held as follows:

> *In my respectful view, where the doctrine of covering the field applies there is no inconsistency in the strict sense of that word. To be inconsistent, the two legislations that are the federal legislation and that of the state must be mutually repugnant or contradictory of each other so that both cannot stand. The acceptance of the establishment of the one implies the abrogation or abandonment of the other....The doctrine however, renders the paramount legislation predominant and the subordinate legislation goes into abeyance and remains operative. Where of course,*

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[11] Ibid. see also the cases of Lakanmi v. A.G Western Nigeria & Ors. (1971) UILR 201 or(1970) 6 NSCC 143; A.G. Abia State v A.G Federation (2002) 6NWLR (pt763)264

[12] *AG Ogun State v AG Federation (1982)13NSCC1 or (1982)3 NCLR 166*

[13] Ibid at p. 11

[14] Ibid at p. 27-28

[15] Ibid at p. 35

[16] Ibid

[17] *A.G. Abia State v. A.G Federation* (2006) 6 NWLR(Pt.763) 264

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there is obvious inconsistency, the subordinate legislation is void.[18]

It is submitted that the reasoning above is the correct interpretation of section 4 (5) of the 1999 Constitution (as amended).[19] While section 4 (2) gives exclusivity and validity to the National Assembly to legislate on the matters set out in Part I of the second Schedule to the Constitution, section 4(4) and (7) (b) gives power concurrently to the National and House of Assembly of a state to legislate on matters listed in Part II of the Second Schedule to the constitution to the extent prescribed in the second column opposite thereto.

The question now is whether the section 58 of the ACA has covered the field so that the states can no longer make laws on arbitration? We will now proceed to discuss the various schools of thought and then take an informed stance.

Pro-Covering the Field: An Over-Stretched Interpretation of the Law

Those who hold the view that section 58 of the ACA has covered the field in arbitration matters put forth some strong arguments. The crux of their argument is that Arbitration Laws made by states are void to the extent of their inconsistency. Chukwuemerie who is one scholar in this category argues that by virtue of the principle of covering the field, the arbitration laws of the states have been impliedly repealed.[20] His submission finds judicial backing in the opinion of Olagunju JCA, in the Court of Appeal decision in the case of *C.G. de Geophysique v Etuk*,[21] where the learned jurist stated that:

> *In any case, any scepticism about implied repeal of all State Laws on arbitration created by section 35 of the Act is put to rest by the force of the prevailing legal order at the time the Arbitration and Conciliation Act was promulgated which placed the Decree of the Federal Military Government above the Constitution as manifested between the twin prime legislations of the period, namely, Constitution (Suspension and Modification) Decree and Federal Military Government (Supremacy and Enforcement of Powers) Decree Nos. 1 and 13 of 1984, respectively, now Caps. 64 and 137 of the Laws of the Federation of Nigeria 1990. Between them they prowled the legislative field and backed into corner the State legislations that*

[18] Per Ogundare JSC in *A.G. Abia State v. A.G Federation* (2006) 6 NWLR(Pt.763) 264 at p. 435

[19] Provides that any law enacted by the House of Assembly of a state is inconsistent with any law validly made by the National Assembly, the law made by the National Assembly shall prevail, and that other Law shall to the extent of the inconsistency be void.

[20] See Chukwuemerie A. 'Commercial and Investment Arbitration in Nigeria's Oil and Gas Sector' (2003) 4(5) Journal of World Investment 834.

[21] *C.G. de Geophysique v Etuk* (2004) 1 NWLR (Pt. 853) 20 at 54, 55.

became emasculated and are confined to limited areas where they operated on sufferance ... as a corollary, any existing State law on the subject matter became obsolete and is by implication repealed by operation of law.

Idornigie[22] holds a similar view when he contends that it is implicit from the provisions of the ACA that there is an intention to cover the field on all commercial arbitrations throughout the country. He however contends that since arbitration restricts arbitration to commercial arbitration, the arbitration laws of the states are still valid in respect of non-commercial arbitration in that even though the Federal Government through the National Assembly evinced an intention to cover the field, it has not done so completely, exhaustively and exclusively. Consequently, the State laws dealing with non-commercial arbitration are therefore, valid in so far as they are not inconsistent with the ACA, despite its provision that it covers all arbitration in Nigeria.[23]

According to the learned author, under the doctrine of covering the field, the ACA is deemed to have impliedly repealed or kept in abeyance the existing laws on arbitration save the areas not expressly, exclusively and comprehensively covered by the Act.[24]

Akanbi[25] seems to have agreed with this line of reasoning when he stated that there is nothing in the ACA to suggest an intention to repeal the Arbitration Laws of states with respect to non-commercial arbitration and that there is no general intention by the ACA to cover the field. The mere concurrence of the Federal law with the States laws on the subject he argues does not automatically imply a repeal of the States Laws.[26] Daibu[27] undertook similar stand to the effect that item 62(a) of the second schedule of the Constitution of the Federal Republic of Nigeria 1999 (as amended) mentions "trade and commerce" while item 68 of that schedule also provides for "any matter incidental or supplementary to any matter mentioned elsewhere in the exclusive list" implying that arbitration is incidental to trade and commerce.[28]

Idornigie[29], Akanbi[30] and Daibu[31] arguments are not substantially different from that of Asouzu.[32] In fact these scholars all rely on Asouzu whose view

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[22] Idornigie P. O."The Doctrine of Covering the Field and the Arbitration Laws in Nigeria" pp. 195-197

[23] See Idornigie P. O. 'The Legal Regime of International Commercial Arbitration' (PhD Thesis, University of Jos 2002) pp. 43, 44; Idornigie P. O. 'The Doctrine of Covering the Field and Arbitration Laws in Nigeria' pp. 193-198

[24] Idornigie P. O. 'The Doctrine of Covering the Field and Arbitration Laws in Nigeria' pp. 193-198. See also Idornigie P. O., Commercial Arbitration Law and Practice in Nigeria (Nigeria Institute of Advanced Legal Studies, Abuja 2015) pp. 399- 402.

[25] Akanbi M.M. "The Nigerian Arbitration Act 1988 s.58 and the Doctrine of Covering the Field: C.G. de Geophysique v Etuk" p. 286

[26] Ibid at p. 285

[27] Daibu A. A. "The Lagos State Arbitration Law and The Doctrine of Covering The Field: A Review" p. 47-48

[28] Ibid

[29] Idornigie P. O. 'The Doctrine of Covering the Field and Arbitration Laws in Nigeria' pp. 193-198

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is to the effect that in the ACA, 'arbitration' means 'commercial arbitration', while 'commercial' means 'all relationships of a commercial nature including any trade transaction.'[33] According to them a look into the Exclusive list shows that Item 62 mentions 'trade and commerce', also thereafter Item 68 provides for 'any matter incidental or supplementary to any matter mentioned elsewhere in the exclusive list.[34] Consequently, they submit that it is only the National Assembly that has exclusive power to make laws regulating commercial arbitration in Nigeria. The reason being that section 4(2) of the 1999 Constitution empowers the National Assembly to the exclusion of the Houses of Assembly of States to make laws with respect to any matter under the Exclusive legislative list.

What is clear however is that under Constitution of the Federal Republic of Nigeria 1999 (as amended), 'arbitration' is neither on the Exclusive legislative list nor is it on the Concurrent legislative list and as such some scholars have argued that it should be a matter within the residuary legislative which is within the competence of the states.[35] A careful analysis of the reasons canvassed by the apostles of the application of the doctrine of covering the field shows that the argument is based on an over stretched application of the doctrine. The argument that items 62(a) of the Constitution and 67 of ACA refer to commercial arbitration just by the mere mention of 'commerce' and 'any matter incidental or supplementary to any matter mentioned elsewhere in the exclusive list' is too generous in nature for the following reasons:

Firstly, the doctrine of covering the field can only arise upon the concurrence of legislative powers by the National Assembly and the House of Assembly of a state. It is our view that the combined reading of the provisions of section 4(5) of the 1999 Constitution and subsections 4 and 7(b) of the Constitution portends that inconsistency as it relates to covering the field can

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[30] Akanbi M. M. 'The Nigerian Arbitration Act 1988 s.58 and the Doctrine of Covering the Field: C.G. de Geophysique v Etuk' p. 284.

[31] Daibu A. A. 'The Lagos State Arbitration Law and the Doctrine of Covering the Field: A Review' pp. 48-49

[32] Asouzu A. A. Arbitration and Judicial Power' in Nweze C.C. (ed), *Justice in the Judicial Process: Essays in Honour of Honourable Justice Eugene Ubaezonu, JCA*(Fourth Dimension Pub, Enugu 2002) 362.

[33] Section 57 of the ACA.

[34] See the Second Schedule to 1999 Constitution of Nigeria; see Asouzu A.A, 'Considering arbitration as an Incident of Trade and Investment in an African Setting' (Paper presented at the Annual Conference of the African Society of International and Comparative Law, Kampala 1994) 163; Asouzu A. A. Arbitration and Judicial Power' in Nweze C.C. (ed), *Justice in the Judicial Process: Essays in Honour of Honourable Justice Eugene Ubaezonu, JCA*(Fourth Dimension Pub, Enugu 2002) 362.

[35] Orojo J. O. and Ajomo M. A., *Law and Practice of Arbitration and Conciliation in Nigeria* (Mbeyi & Associates, Lagos 1999) P. 25; Chukwuemerie A. 'International Commercial Arbitration and the UNCITRAL Model Law under written Federal Constitutions: Necessity versus Constitutionality in the Nigerian legal framework' in Chukwuemerie (ed), *Studies & Materials in International Commercial Arbitration* (Law House Books, Port Harcourt 2002) p. 103. Olawoyin A. A. 'Constructing the Road to Arbitral Prevalence: The Arbitration Law of Lagos State 2009 in Perspective' p.43

only arise from the concurrent legislative list.[36] Covering the field does not arise from matters in the exclusive or the residual lists but on matters in the concurrent list which is not the case herein because arbitration is clearly not in the concurrent legislative list. Olawoyin seems to support this view when he stated that for the doctrine of covering field to be applicable, the subject matter in question should be one in which both the federal legislature and the state legislature have concurrent legislative competence.[37]

Secondly, a clear intention on the part of the federal legislature to express by its enactment, completely, exhaustively or exclusively with the governing law should be on the particular subject matter.[38] The word 'arbitration' did not appear anywhere in the concurrent list. Therefore the question of covering the field could not have arisen in respect of the law of arbitration.

Also, the reading of arbitration into item 62(b) and 67 of Part II of the second schedule of the Constitution is against the well-established tenets of interpretation of statutes which is to the effect that it is better to adhere to the wordings of a statute in their literal and ordinary signification when there is no manifest absurdity.[39] Lord Bramwell[40] opine correctly in our humble view that it is infinitely better to adhere to the words of an act of parliament and leave the legislature to set it right than to alter those words according to one's notion of an absurdity.[41] This article contends that if it is conceded that the doctrine of covering the field can arise from the exclusive list, the mere mention of commerce do not translate to commercial arbitration. It will be rather too liberal to adopt such an interpretation of item 62(b) and 67 of the part II, second schedule of the 1999 constitution.

Going by the principle of constitutional division of legislative powers by the different spheres of government in a constitutional democracy like Nigeria, when an item is not mentioned in the concurrent or exclusive list, the House of Assembly of the state has the power to legislate on such matters.[42] This list is called residual list in constitutional law.[43] Residual matters are not listed in the constitution. The House of Assembly of a state has exclusive power to

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[36] Section 4(5) provides that if any law enacted by the House of Assembly of a State is inconsistent with any law validly made by the National Assembly, the law made by the National shall prevail, and that other law shall to the extent of the inconsistency be void.

[37] Olawoyin A. A. "Constructing the Road to Arbitral Prevalence: The Arbitration Law of Lagos State 2009 in Perspective" p. 40.

[38] Ibid at pp. 34-46.

[39] This interpretative method is known as the literal rule. The Literal Rule of interpretation of statue is a development of common law courts. See the English case of *Hess v the State* (1895) 2 O.R c 112. See also the Nigerian cases of A. G. Bendel State v. A. G. Federation & Ors. (1982) 3 NCLR 1; Tukur v. Government of Gongola State (1989) 4 NWLR (Pt. 117) 517 at 547; Buhari v. Obasanjo (2005) 13 NWLR (Pt. 941) 1at pp. 207, 274; A. G. Abia State v. A. G. Federation (2005) 12 NWLR (Pt. 940) 452 at pp. 503, 5i6; JVC Professional Products (U K) Ltd. V. Famuyide (1238) 4 NWLR (Pt. 1238) 572 at 587;

[40] *In the case of Black-Clawson Int'l v. Paper work* (1952) AC 189 at191.

[41] See also a recent decision of the Supreme court in Nyesom v. Peterside (2016) 1 NWLR (Pt. 1492) 71 at 112

[42] See section 4(7) of the Constitution of the Federal Republic of Nigeria 1999 (as amended). See also the cases of A. G. Abia State v. A. G. Federation (2006) 16 NWLR (Pt. 1005) 265 at 380; A. G. Ondo State v. A. G. Federation (2002) 9 NWLR (Pt. 772) 222; A. G. Lagos State v. A. G. Federation (2003) 12 NWLR (Pt. 833) 1

[43] Niki Tobi JSC in A. G. Abia State v. A. G. Federation (2006) 16 NWLR (Pt. 1005) 265 at 380

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legislate on residual matters.[44] Assuming without conceding that the ACA has intended to cover the field, this article further contends that such provision will be at variance with the provisions of the constitution. The supremacy of the constitution over and above all other laws is now settled and any such law that is inconsistent with the constitution is void to the extent of its inconsistency.[45]

Review of the Case of *Compaigne Generale De Geophysique v Dr. Jackson D Etuk*[46]

The case of Dr Jackson D. Etuk has not helped to still the tide over the legislative competence of the Houses of Assemblies on the law of Arbitration. In that case the appellant (defendant in the lower court) rented the property of the respondent (plaintiff) for a period of two years in 1992. There was an arbitration clause in the tenancy agreement to the effect that any dispute that may arise between the parties shall be referred to an arbitration comprising of two independent estate valuers to be agreed upon by the parties. Certain disputes arose between the parties and the appellant yielded up possession before the expiration of the term of the tenancy in 1994. The respondent discovered thereafter that the building was in serious state of despair and the respondent incurred some expenses in restoring the building. Rather than proceed to arbitration, the respondent took out a writ of summons against the appellant in the High Court for damages. In the process, the High Court granted a stay of proceedings in favour of arbitration following which the problem of choosing an arbitrator occurred. When the appellant refused at some point to participate in the choice of an arbitrator, the respondent proceeded to appoint his nominated arbitrator as the sole arbitrator pursuant to the Arbitration Law Cap 12 Laws of Cross River State.[47]

The thrust of the matter before the Nigerian Court of Appeal was whether the lower court was right in applying s.7 of the Cross River State Arbitration Law rather than s.7(2) (b) of the ACA in dismissing the appellant's motion to set aside the arbitral award. Ektpe JCA held that s. 58 of the ACA evinced an intention to cover and apply to domestic commercial arbitration and international commercial throughout the federation.

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[44] Daibu A.A, 'The Lagos State Arbitration Law and The Doctrine of Covering The Field: A Review p. 49

[45] See section 1 (3) of the Constitution of the Federal Republic of Nigeria 1999 (as amended). See also the cases of Obasanjo v. Yusuf (2004) 9 NWLR (Pt. 887) 144 at 183; Timothy v. Oforka (2008) 9 NWLR (Pt. 1091) 204 at 213; Oloruntoba- Oju v. Dopamu (2008) ALL FWLR (Pt. 411) 810 at 833; Nigeria Army v. Yakubu (2013) 8 NWLR (Pt. 1355) 1 at 26.

[46] *C. G. De Geophysique v. Etuk* (2004) 1 NWLR (pt. 853) 20

[47] Section 7(1)(b) of the Law provides as follows:"(1) where a submission provides that the reference shall be to two arbitrators , one to be appointed by each party then , unless the submission expresses a contrary intention... (b) if , on such a reference, one party fails to appoint an arbitrator, either originally or by way of substitution as aforesaid, for seven clear days after the other party, having appointed his arbitrator, has served the party making default with notice to make appointment, the party who has appointed an arbitrator may appoint the arbitrator in the reference and his award shall be binding on both parties as if he had been appointed by consent."

Ekpe JCA, while accepting in one breath that the ACA and the Cross River State Arbitration Law were existing laws under the constitution employed the doctrine of covering the field. He then concluded that the ACA has covered the whole spectrum or field of arbitration and conciliation and should prevail over the Arbitration Law of Cross River State, Cap 12 applicable in Akwa Ibom State.[48]

Unfortunately, the lead judgement just applied the doctrine of covering the field without any elucidation and justification for the application of the doctrine. Arguably, the first element of covering the field –concurrence of legislative competence of both the National and state Houses of Assemblies – is missing in the context of arbitration.[49]

Olagunju JCA's supporting judgement raises more conceptual problems and further reinforces the doubt about the correctness and reliability of the decision.[50] His lordship further contention that the ACA, being a legislation made under Decree No. 1 of 1984, repealed by implication all state laws on arbitration subject to the exception in section35 (b) of the ACA and that the state did not have enough legislative room to manoeuvre with regards to the fact.[51] He further held that the editorial note of the 1990 revised edition of the Laws of the Federation of Nigeria captioned 'List of Acts printed' in Vol. 1 of those Laws indicated that the ACA was promulgated under Decree No. 1 0f 1984 and item 67 of the Exclusive legislative list in Part 1 of the second Schedule to the Constitution of the Federal Republic of Nigeria, 1979. Item 67 being a matter classified as 'incidental or supplementary to any matter mentioned in the preceding items 1-66 of the Exclusive legislative list and defined by paragraph 2 of part III of second schedule to the constitution , 'arbitration which is not expressly mentioned in any of the 66 items has thereby become catapulted into a legislative item within the exclusive Legislative List upon which the states can no longer legislate thereby impliedly repealed State Laws on arbitration is without prejudice to any agreement that incorporates the use of the moribund State Laws which would continue to be enforced or observed by virtue of sub-sections 6(1)(b) and (c) of the Interpretation Act, Cap 192 of the Laws of the Federation of Nigeria 1990.[52]

The comments of Olagunju JCA need some appraisal. First, his lordship's argument on the implied repeal is not *in tandem* with the basic elements of covering the field. Olawoyin opines that if the assertion was correct, the issue of covering the field would not arise in respect of an action that arose in 1994. Secondly, as expressed earlier in this article, the doctrine of covering

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[48] *C. G. De Geophysique v. Etuk* (2004) 1 NWLR (pt. 853) 20 at 49
[49] Olawoyin A.A. "Constructing the Road to Arbitral Prevalence : the Arbitration Law of Lagos State 2009 in Perspective"p. 41
[50] Ibid
[51] *C. G. De Geophysique v. Etuk* (2004) 1 NWLR (pt. 853) 20 at 54-55
[52] *Ibid*

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presupposes a co-existence of both the federal Act and state law, the relevant provisions of the state law (not its entirety) will be void only to the extent of the inconsistency. His lordship's suggestion that the entire state law has been repealed subject only to the saving in either s.35 of the ACA or s.6 of the Interpretation Act is with respect misplaced.[53] Thirdly, if it is conceded that by virtue of item 67 of the 1979 constitution, arbitration became elevated to the exclusive legislative list, it follows that the National Assembly has exclusive power to legislate on the subject matter. The state law therefore would have to cease to exist, not on the basis of covering the field but on the basis of the division of legislative competence in the constitution.[54]

The Anti-Covering the Field: A More Persuasive Perspective

It has been submitted that the reliance on the doctrine of covering the field in order to repeal, invalidate and or to put in abeyance the state arbitration laws on the ground that arbitration falls within the exclusive list and thus grants the federal legislature the power to cover the field is not only misplaced but also a fallacious assumption that the doctrine apply when a Federal Act and a State Law on the same subject matter are in existence.[55] This view according to a scholar fails to recognise one of the key elements of the doctrine of covering the field which is concurrent legislative competence on the subject matter.[56] And since arbitration is not expressly listed in both the exclusive legislative list and the concurrent legislative list, it becomes a residual matter and therefore only the State Houses of Assembly have the legislative competence to legislate on same.[57] Therefore, it is the ACA that ought to be declared invalid and struck down by virtue of sections 4 (7) (a) (c) and 315(2), (3) (a) (b) (d) of the Constitution of the Federal Republic of Nigeria 1999 (as amended).[58]

Before the doctrine of covering the field can be invoked, it must be shown that the Federal law and the State law both touch on the same subject matter and that the Federal law covers or is intended to completely cover the subject matter.[59] By a plethora of the Supreme Court decisions, the elements for applicability of the doctrine of covering the field have been consistently held to be: First, the subject matter in question should be one in which both the federal and the state legislature have concurrent legislative powers. Secondly,

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[53] See Ikeyi and Amucheazi, Applicability of the Arbitration and Conciliation Act: which Field Does the Act Cover? (2013) 57(1) *Journal of African Law* 126, 141

[54] Olawoyin A. A. "Constructing the Road to Arbitral Prevalence : the Arbitration Law of Lagos State 2009 in Perspective" p. 42

[55] Ibid at p.43

[56] Ibid at 42

[57] Daibu A.A, 'The Lagos State Arbitration Law and The Doctrine of Covering The Field: A Review p. 49

[58] Olawoyin A.A. "Constructing the Road to Arbitral Prevalence : the Arbitration Law of Lagos State 2009 in Perspective" p. 43

[59] Akanbi M.M. "The Nigerian Arbitration Act 1988 S.58 and the doctrine of covering the field: C.G.de Geophysique v Etuk" p. 283, 287; Idornigie P. O."The Doctrine of Covering the Field and Arbitration Laws in Nigeria" pp.193, 198; Daibu A. A. " The Lagos State Arbitration Law and the Doctrine of Covering the Field: A Review" p. 50.

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there must be 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 part of the subject matter. Thirdly, 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. The state law is not void. 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.[60]

It is contended that this reasoning is more in line with constitutional doctrine of covering the field as espoused by foreign and domestic authorities. It is obvious that if the following analysis is to be taken strictly, the doctrine of covering the field has no place in resolving argument about legislative competence to enact laws on the subject matter of arbitration or the validity of such laws.[61] Thus, the argument that the National Assembly has legislative competence by the virtue of a combined and generous reading of items 62 and 68 of part 1 of second schedule to the 1999 Constitution (without any specific reference to arbitration) presupposes that arbitration is a matter under the exclusive list. [62] This article contends that this proposition do not square up with the first element of the doctrine of covering the field. The first element of the doctrine is also missing in the contention that the state has exclusive power to legislate on arbitration. The doctrine of covering the field in relation to the law of arbitration in Nigeria do not find a place in relation either way.

From the above analysis, it is clear that arbitration is neither listed in the Exclusive Legislative List nor in the Concurrent Legislative List as correctly admitted by even the proponents of the doctrine of covering the field, thus making it a residual matter and therefore exclusively within the State's legislative competence. Hence, the fact that section 57 of the ACA defines Arbitration as "Commercial Arbitration" cannot grant the Federal Government, a power it does not have in the Constitution.[63] This is not helped by "commercial" meaning "all relationships of a commercial nature, including any trade transaction" as contained in the ACA because if the Federal Government has no jurisdiction to legislate on arbitration, it cannot have the power to legislate on "commercial arbitration", which is simple an aspect of the wider field of "arbitration" in which it has no jurisdiction. The

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[60] See the cases of Lakanmi v. A.G Western Nigeria & Ors. (1970) 6 NSCC 143; *A.G. Ogun State v. A.G. Federation* (1982) 3 N.C.L.R. 166 or (1982) 13 N.S.C.C. 1; A.G Abia State v.A.G Federation (2002) 6 NWLR (Pt.763) 264; A. G. Lagos State v. A. G. Federation (2003) 12 NWLR (Pt.831) 1; A. G. Abia State v. A.G. Federation (2006) 16 NWLR (Pt. 1005) 265; A. G. Federation v. A. G. Lagos State (2013) 16 NWLR (Pt.1380) 249 at 306; INEC v. Musa (2003) NWLR (Pt.806)72; Military Governor, Ondo State v. Adewumi (1988) 3 NWLR (Pt. 82) 280.

[61] Olawoyin A. A. "Constructing the Road to Arbitral Prevalence : the Arbitration Law of Lagos State 2009 in Perspective" pp. 40- 41

[62] Ibid

[63] See Prof. Itse Sagay, SAN 'Forward' The Jurist (2015) vol. 20, p.viii.

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ACA has managed to survive because it was enacted by Decree under a Military Regime, when Decrees were superior to the Constitution.

Conclusion and Recommendations

This article examines the effect of section 58 of ACA vis-a-vis the doctrine of covering the field in Nigeria. The article review the various arguments for and against the applicability or otherwise of the doctrine of covering the field and found that contrary to the general misconception that ACA has covered the whole spectrum of commercial, the doctrine of covering the field find no place in arbitration law in Nigeria. The article that section 58 of the ACA does not admits of the doctrine of covering the field. The law of arbitration is not found anywhere in the concurrent list and therefore the first element of the doctrine of covering the field – co-existence of competence of both Houses of Assemblies and the National Assembly to legislate on the subject matter is clearly absent. State laws on arbitration can therefore stand since arbitration is not in the exclusive and concurrent legislative list by sound constitutional principles; it is a residual matter which House of Assemblies of states can freely legislate upon. Therefore, in the face of strict legal scrutiny and interpretation, the ACA would fail the test and become accordingly void to the extent of its inconsistency with the constitution. At best, the ACA should be consigned to the Federal Capital Territory, Abuja and no more. It is therefore suggested that section 58 of ACA be amended to read: 'this Act applies to the Federal Capital Territory'. This is because the National Assembly has power to legislate on matters among other things in the Federal Capital Territory Abuja.

Another conclusion reached is that arbitration thrives on the principle of party autonomy. Parties are free to choose the law they are to apply without being necessarily prejudiced. It is therefore submitted that parties to arbitration are free in essence to choose any arbitral law that would suit their purpose.[64] Parties' freedom to choose the law that regulate their arbitration should not be muzzled in any way since arbitration thrives on party's autonomy.

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