Legislative Competence over Arbitration in Nigeria: Towards Resolving the Constitutional Controversy

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Legislative Competence over Arbitration in Nigeria: Towards Resolving the Constitutional Controversy

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A constitutional controversy on which of Nigeria's federal or state legislatures has legislative competence over arbitration has the potential to deter interest in arbitration in Nigeria. This article identifies considerations, which have been mostly overlooked, from the conceptual understanding of arbitration, the Nigerian Constitution and judicial decisions to conclude that both the federal and state legislatures have constitutional legislative competence over international and interstate commerce arbitration.

1. Introduction

In recent years, there has been considerable interest in presenting Nigeria as a jurisdiction favourably disposed towards international arbitration and which provides a fair and efficient dispute resolution mechanism alternative to the traditionally slow judicial process.[1] In general, the perception of a jurisdiction as a desirable location for arbitration is in part dependent on the environment of the legal system of that jurisdiction regarding willingness to respect the choice of the parties to resolve their dispute by arbitration and the efficient provision of judicial support within the operative legal framework.[2]

On the whole, the trend of judicial developments in relation to arbitration suggests that the Nigerian courts are indicating a favourable disposition towards arbitration in Nigeria. This has at various times been welcomed and heralded by those interested in the development of arbitration in Nigeria and the establishment of Nigeria as a major and important venue for the arbitration concerning, especially, disputes arising out of international business transactions.[3] On the other hand, a brewing constitutional debate as to whether either the federal or state legislatures have legislative competence in respect of arbitration has the potential to deter parties who may be contemplating or compelled to arbitration proceedings in Nigeria.

The constitutional debate arises from the fact that arbitration is not specifically mentioned in the legislative lists of the Nigerian Constitution of 1999[4] which ordinarily set out the respective legislative powers of the federal and state legislatures.[5] The most critical question which arises is whether the federal legislature has competence to enact arbitration legislation at all because if legislative competence over arbitration is not provided for in the constitution, it would be a "residual"[6] matter and only for state legislatures to legislate upon. This would raise questions over whether the current federal Arbitration and Conciliation Act[7] is constitutional and whether the federal government can follow through with suggestions that it should enact a new and more modern federal arbitration legislation. On the other hand, there is a contradictory line of thought that the Arbitration and Conciliation Act has "covered the field" of arbitration thereby leaving no scope for state arbitration legislation. This would have the consequence that, for example, the more recent Arbitration Law of Lagos State[8] would be inapplicable.

This article explores the various possible conclusions on the interpretation of the provisions of the Nigerian 1999 Constitution that may have a bearing on legislative competence over arbitration. It identifies a range of considerations that have so far been overlooked in the extant debate, in both literature and case law, arising from the conceptual understanding of arbitration, the provisions of the Constitution, and previous judicial decisions of the

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[1] See further, e.g. B. Ogundipe, "Developing Nigeria into an International Arbitration Centre", paper delivered at the 2nd Conference of the Nigerian Bar Association's Section on Business Law, 13 March 2007; A. Rhodes-Vivour, "Arbitration and Alternative Dispute Resolution as Instruments for Economic Reform", paper delivered at the maiden Conference of the Nigerian Bar Association's Section on Business Law, Abuja, 27–29 March 2006.

[2] See, e.g. K. Gough, "Judicial Supervision and Support for Arbitration and ADR", paper presented at the IBL Construction Law Summer School, September 2006, para 1.7, *http://www.39essex.com/judicial-supervision-and-support-for-arbitration-and-adr-september-2006-karen-gough/* [Accessed 13 January 2016].

[3] See, e.g. B. Fagbohunlu, A. Euba & H. Abdulkareem, "The Principle Of Limited Court Intervention Survives In Nigeria … But How Far Will The Courts Go?", Kluwer Arbitration Blog, 2 August 2013; D.U. Ufot, "Arbitration Practice Area Review", *http://whoswholegal.com/news/analysis/article/32446/arbitration-practice-area-review* [Accessed 13 January 2016].

[4] Constitution of the Federal Republic of Nigeria 1999.

[5] The Exclusive Legislative List of the Nigerian Constitution sets out legislative powers that are exclusive to the federal legislature. The Concurrent Legislative List on the other hand sets out matters on which either or both of the federal and state legislatures have legislative competence subject to the provisions of the Constitution. See Pts I and II respectively of the Second Schedule to the Nigerian 1999 Constitution. See further *Attorney General of Ogun State v Aberuagba* (1985) 1 NWLR (part 3) 395 at 405.

[6] Although the 1999 Constitution itself does not employ the expression, it is common in Nigerian literature to refer to matters on neither the exclusive nor concurrent list as being on the "residual list". This has been noted by the Nigerian Supreme Court in *Attorney General of Abia State v Attorney General of the Federation* (2006) 16 NWLR (part 1005) 265 at 380 where Niki Tobi JSC stated: "… the Constitution of the Federal Republic of Nigeria 1999, like most constitutions, does not provide for a residual list. And that is what makes the list residual. The expression emanates largely from the judiciary, that is, it is largely a coinage of the judiciary to enable it exercise its interpretative jurisdiction as it relates to the Constitution. Etymologically, 'residual' merely means that which remains. In legislative or parliamentary language, residual matters are those that are neither in the exclusive nor concurrent legislative list."

[7] The Act was first promulgated as a decree in 1988 but later re-designated an Act. The Act also contains provisions relating to Conciliation but that aspect of the Act is outside the purpose and scope of this article.

[8] Lagos State Arbitration Law No.10 of 2009.

Nigerian courts that actually have a bearing on how the interpretation of the 1999 Constitution on legislative competence over arbitration should be approached.

The article concludes that both the federal and state legislatures can be demonstrated to have legislative competence to enact arbitration legislation operating in parallel and concurrently as alternative regimes available for parties to arbitration to select from in accordance with principles of party autonomy and freedom of choice. Accordingly, the article makes bold suggestions for alternative approaches, to those extant so far, in relation to the interpretation of the relevant provisions of the 1999 Constitution, especially those relating to legislative power on trade and commerce, and how these impinge on legislative competence over arbitration.

2. The legislative framework and the controversy over legislative competence

The principal legislation governing arbitration in Nigeria presently is the Arbitration and Conciliation Act 1988 which applies to both domestic and international commercial arbitration.[9] The focus of the Act is on commercial arbitration as it defines arbitration to mean "a commercial arbitration whether or not administered by a permanent arbitral institution."[10] It would appear naturally that the Act thus excludes forms of traditional dispute settlement sometimes referred to as "customary arbitration"[11] from its scope entirely.[12]

The Arbitration and Conciliation Act states that it shall apply throughout the Nigerian federation.[13] On the other hand, some of the constituent states of Nigeria take the view that arbitration is a matter at least also within the legislative competence of the states in that it is not listed under any of the legislative lists of the 1999 Constitution and as such is a residual matter.[14] In particular, the government of Lagos State, Nigeria's biggest commercial centre, recently enacted its generally well commended Arbitration Law to support that government's aim of establishing Lagos as a major arbitration venue in Africa.[15]

The view has been expressed by the committee[16] set up for the reform of Nigeria's arbitration laws that only the federal government has legislative competence over international arbitration and what is referred to in the committee's report as "domestic interstate arbitration" while state governments have exclusive competence over "domestic intrastate arbitration".[17] This conclusion is based on combining the provisions of items 62 and 68 on the Exclusive Legislative List of the 1999 Constitution.[18] Item 62 confers legislative competence over interstate and international trade and commerce[19] on the federal legislature while Item 68 confers the same legislature with further competence in respect of matters incidental or supplementary to those mentioned in the list. It is then argued that arbitration is an incidental matter to the trade and commerce competence of the federal legislature. On this view, a Nigerian state would be seen as only having legislative competence in respect of arbitration essentially connected solely to that state, i.e., which is not in relation to international or inter-state trade and commerce.[20]

The necessity for setting up a committee on the reform of Nigeria's arbitration laws followed concerns that the Arbitration and Conciliation Act was being invoked and occasionally applied in some manners that had a tendency to undermine arbitration agreements and proceedings. Another concern that has been widely expressed is that the Act has become dated in some respects in light of subsequent developments in technology and communications and, for example, has not incorporated the modern revisions to the UNCITRAL Model Law.[21] The committee has since proposed the enactment of two pieces of legislation to address matters of arbitration in Nigeria. The first of these proposed enactments is a "Federal Arbitration Act" which would apply in respect

[9] Part I of the Act contains provisions containing arbitration generally while Pt III contains additional provisions concerning international commercial arbitration.
[10] See s.57 of the Arbitration and Conciliation Act which defines the word "commercial" at first broadly as "all relationships of a commercial nature" and then lists a range of commercial activities as included within the definition.
[11] Customary arbitration is often taken to refer to the reference of disputes to chiefs or elders for settlement; see *Agu v Ikewibe* [1991] 3 NWLR (part 180) 385. For insight on the appropriateness of using the appellation "arbitration" which may carry particular common law or modern connotations in relation to traditional customary forms of dispute settlement, see A.N. Allott, "Customary 'Arbitration' in Nigeria: A Comment on Agu v Ikewibe" (1998) 42 *Journal of African Law* 231.
[12] It would not be right to assume, however, that such a dispute may not concern a commercial transaction as, for example, a simple sale or exchange of goods which is within the definition of "commercial" in the Arbitration Act. Strictly, only two elements are required to bring an arbitration within the purview of the Arbitration and Conciliation Act: (a) that it concerns a commercial relationship; and (b) that the relevant arbitration agreement is in writing as required by s.1 of the Act. Cf. *Williams v Williams* [2014] 15 NWLR (part 1430) 213 where an arbitration clause in a "family agreement" concerning an estate was treated as falling within the scope of the Arbitration and Conciliation Act. Interestingly, in a different context, the Nigerian Court of Appeal in holding that a notice of arbitration does not have to be signed by a legal practitioner said that "arbitration is not limited to the legal community". See *Stabilini Visinoni Ltd v Mallinson & Partners Ltd* [2014] 12 NWLR (part 1420) 134 at 172, per Augie JCA.
[13] See s.58 of the Arbitration and Conciliation Act 1988.
[14] See, e.g. the Lagos State Arbitration Reform Committee Report of February 2008; see further A. Rhodes-Vivour, "The Federal Arbitration Act and the Lagos State Arbitration Law: A Comparison", *http://www.drvlawplace.com/pages/publications.php* [Accessed 13 January 2016].
[15] Lagos State Arbitration Law No.10 of 2009. In addition, Nigerian constituent states have historically had an arbitration law on their statute books; this point is discussed in further detail later in this article.
[16] National Committee on the Reform and Harmonisation of Nigeria's Arbitration and ADR Laws, inaugurated by Nigeria's Attorney General in 2005.
[17] See Amended Report of the National Committee on the Reform and Harmonisation of Nigeria's Arbitration and ADR Laws 2008, *http://www.aluko-oyebode.com/files /amended%20report.pdf* [Accessed 13 January 2016].
[18] These provisions are discussed in extensive detail later in this article.
[19] It is considered that the use of the expressions "interstate arbitration" and "intrastate arbitration" has at least a potential if not tendency to confusion and to be conflated with the related but separate issue of legislative power in respect of "interstate trade and commerce". The latter is critical in the discussion of the extent of the legislative power of either the federal or state governments in respect of arbitration. Where relevant, this article will employ the alternative phrases: "interstate commerce arbitration" and "intrastate commerce arbitration".
[20] It is to be noted immediately that this view is not shared universally and there have been expressions of support for the position of states such as Lagos State that Nigerian constituent states also at least, if not exclusively, have legislative competence in respect of international commercial arbitration. See, e.g. A.A. Olawoyin, "Constructing the Road to Arbitral Prevalence: The Arbitration Law of Lagos State 2009 in Perspective" (2015) 2 *International Arbitration Law Review* 34.
[21] UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006; see further, Report of the National Committee on the Reform and Harmonisation of Nigeria's Arbitration and ADR Laws 2008, especially at pp.3–5.

of international arbitration and arbitration disputes concerning interstate commerce. It would also apply in respect of transnational matters such as the recognition and enforcement of foreign arbitral awards and serve as the implementation tool for Nigeria's obligations under international instruments such as the New York Convention on the Recognition and Enforcement of Foreign Awards.[22] The other proposed enactment is a "Uniform States Arbitration Law" which would be recommended for adoption by the states and would only cover arbitration disputes outside the scope of international arbitration and those connected with interstate commerce.

As neither of the two recommended statutes has yet been passed into law, both the Arbitration and Conciliation Act and extant state arbitration laws "remain" on the statute books.[23] It is noteworthy that constituent parts of Nigeria, initially as regions and subsequently as states,[24] have historically had their own arbitration laws.[25] These were most often invoked and applied by state courts to determine whether to stay proceedings in respect of a dispute over which the concerned court had territorial and subject matter jurisdiction. The state laws of arbitration as well as the then federal Arbitration Act[26] all derived from the old Arbitration Ordinance 1914.[27] The result is that there was essential uniformity, on substantive provisions, of the arbitration laws applicable in different parts of Nigeria. On the other hand, these laws tended to focus only on arbitrations conducted within the particular territory for which they were enacted. They did not clearly address international commercial arbitration and did not address the important issue of enforcement of foreign awards.[28]

As the Arbitration and Conciliation Act has always existed side by side with the various arbitration laws of Nigerian constituent states, the introduction of a more modern arbitration law by Lagos State would at first sight appear not to be controversial.[29] Further, the Arbitration and Conciliation Act did not expressly repeal the extant state arbitration laws. This is significant considering that one of the Act's stated aims is "to provide a unified legal frame work for the fair and efficient settlement of commercial disputes by arbitration and conciliation". Considering the private nature of commercial arbitration and the doctrine of party autonomy, it is reasonable to conclude that the Arbitration and Conciliation Act is to be interpreted as making a unified regime available but that it does not necessarily make it mandatory. On this view, parties to an arbitration proceedings being held within the territory of a particular state would have the option to choose between the regime of the state's law on arbitration or the federal "unified" regime of the Arbitration and Conciliation Act.

The suggestion that parties are free to choose between the arbitration law of the state in which the arbitration is being held and the federal legislation necessarily has to address the questions about whether, and to what extent, either of the federal or state legislatures have legislative competence to enact arbitration legislation. In particular, questions arise where the dispute has connections beyond the state in which the arbitration proceedings are conducted. This may be because at least one of the parties is not resident in the state concerned or, more importantly, because the dispute arises out of a transaction with connections to another state or country. In this respect, the distinction(s) between an arbitration connected entirely with one state only ("intrastate commerce arbitration"), an arbitration connected with interstate commerce ("interstate commerce arbitration"), and an international commercial arbitration becomes significant. The key concern is primarily with the constitutional legitimacy of a state arbitration law, like the Lagos State Arbitration Law, which seeks to extend its application to international arbitration and interstate commerce arbitration—unlike the older state arbitration laws. This is because legislative competence in respect of international and interstate trade and commerce is allocated exclusively to the federal legislature under the

[22] It is not in dispute that the power to implement Nigeria's treaty obligations, including treaty obligations relating to arbitration, lies with the federal government. It has been observed, for example, that despite the Lagos State Law, enforcement of foreign awards even in Lagos State would still probably have to be sought under the Arbitration and Conciliation Act; see E. Onyema, "A Critique of the New 2009 Arbitration Law of Lagos State" (2010) 2(5) *Apogee Journal of Business, Property & Constitutional Law* 1. Also not in dispute is that it is the federal legislature that has the competence to enact arbitration legislation for the Federal Capital Territory (Abuja) in light of s.299(a) of the 1999 Constitution.

[23] The line of argument that the promulgation and enactment of the Arbitration and conciliation Act has resulted in the implied repeal of the pre-existing state arbitration laws is addressed later in this article.

[24] Historically, the legislative competence of constituent parts of Nigeria reflects the evolution of Nigeria into a federation; initially Nigeria started out with strong regional governments with wide legislative competence in the respective regions and a weak centre. It subsequently evolved into a federation of states in which much of the legislative competence previously vested in the regions was ceded to the centre. See, e.g. per Sowemimo CJN in *Aberuagba* (1985) 1 NWLR (part 3) 395 at 430.

[25] Representative examples include the Arbitration Law of Cross Rivers State 1981 and the Arbitration Law of Akwa Ibom State, cap 15 of the Laws of Akwa Ibom State of Nigeria (Revised edition, 2000).

[26] The federal version of the old arbitration laws applied in Lagos when it was federal territory and the central government had legislative competence to enact laws for it.

[27] The colonial era Arbitration Ordinance of 1914 in turn was based on the old English Arbitration Act of 1889.

[28] *Murmansk State Steamship Line v Kano Oil Mills Ltd* (1974) 2 SC 1; (1974) All Nigeria Law Report 893; [1974] 3 ALR (Comm) 1.

[29] The application of a state's arbitration law has been uncontroversial historically where the proceedings concern a dispute that is connected essentially with only that state, e.g. in that both parties are resident or present in the state and the subject matter of the dispute is located within the state or that the cause of action arose within the state. There are examples in the case law of the courts applying state arbitration laws in such circumstances; see, e.g. *Kano State Urban Development Board v FANZ Construction Co Ltd* (1986) 5 NWLR (part 39) 74. The enforcement of an award within the same state under whose law the arbitration was conducted in those circumstances is also typically under the state's arbitration law and its rules of court, as the older state arbitration laws usually provide that an award may be enforced as a judgment of the court; see, e.g. s.13 of the Arbitration Law of Cross River State. In being treated as a judgment of one state's court, an award may ordinarily be enforced in another state in the same manner in which judgments of the first state's courts are enforced in another, e.g. under the Sheriffs and Civil Process Act, cap S6, Laws of the Federation of Nigeria 2004.

1999 Constitution.[30] On the other hand the question has been raised whether arbitration falls within that legislative competence at all.[31]

Where an arbitral dispute involves parties from two or more states of Nigeria or otherwise has connections to more than one state, a fair starting point would be to determine whether the parties agreed on the state in whose territory the arbitration is to be conducted. While it may be the case that the parties wish the arbitration to be conducted under the arbitration law of that state, this cannot in fact be presumed under the current legal regime where the Arbitration and Conciliation Act is expressly stated to apply throughout the federation. Indeed, an approach has emerged in the literature[32] and in one significant judicial decision[33] to treat all matters concerning arbitration, even when only connected with one state, as falling to be determined solely under the Arbitration and Conciliation Act.

The constitutional questions about legislative competence over arbitration—especially since the enactment of the Lagos State Arbitration Law—have not been resolved fully or addressed sufficiently by the Nigerian courts. The central constitutional issue about legislative competence over arbitration, as between the federal and state governments, has been raised in two cases that came before the Nigerian Court of Appeal. In the first of the two cases the court concluded that the Arbitration and Conciliation Act prevailed over state arbitration laws—at least where there is inconsistency. Some of the judicial pronouncements in the case also suggested that the advent of the Arbitration and Conciliation Act resulted in the implied repeal of states' arbitration laws and essentially that legislative competence over arbitration lies with the federal government to the exclusion of state governments. In the later of the two cases, the court decided not to address the constitutional issue of legislative competence as it was not necessary in its view for the determination of the particular case. On the other hand, the approach and decision of the Court of Appeal in the later case does not appear compatible or consistent with the decision in the earlier case. It is necessary to examine these decisions in considerable detail.

3. A field covered or not — incompatibility of two decisions of the Court of Appeal

In *Compagnie Generale de Geophysique v Dr Jackson D Etuk*,[34] the Court of Appeal invoked the doctrine of "covering the field" to hold that even one of the older state arbitration laws must be rendered invalid if and to the extent that it contains provisions different from those of the Arbitration and Conciliation Act on a particular matter. The dispute in the case concerned alleged breaches of a tenancy agreement relating to a property situated in Akwa Ibom State. The agreement contained a clause referring disputes to arbitration by two independent arbitrators. Following the dispute and a stay of ensuing judicial proceedings, each party rejected the other's nominated arbitrator and asked for a substitute. The claimant landlord nominated a substitute arbitrator but the respondent tenant did not respond. After six months the claimant filed a notice in court of his intention to appoint his nominated arbitrator as sole arbitrator failing a response from the respondent within seven days; the service of the notice was effected through court bailiffs. When the respondent did not respond once again, the claimant proceeded to appoint his nominated arbitrator as sole arbitrator. The appointed sole arbitrator invited both parties but the respondent did not put up a representation. Finally, the arbitrator found in favour of the claimant. The respondent challenged the claimant's attempt to enforce the award and argued that, instead of unilaterally appointing a sole arbitrator, the claimant should have approached the courts for the appointment of the arbitrator(s) under s.7 of the Arbitration and Conciliation Act. The claimant replied that the Arbitration Law of Cross River State (then applicable to Akwa Ibom) and not the federal legislation applied.

At this point, it is important to note that there is a significant difference between the relevant provisions of the Arbitration and Conciliation Act and the corresponding provisions in the Arbitration Law of Cross River State. Section 7 of the Arbitration and Conciliation Act provides that if the parties cannot agree on the appointment of an arbitrator or if two arbitrators are unable to agree on a third, the appointment shall be made by the court on the application of any of the parties. On the other hand, s.7 of the Arbitration Law of Cross River State provides, inter alia, that if a submission provides for two arbitrators and one party fails to appoint an arbitrator, the other party who has appointed his own arbitrator can, after seven clear days' notice, appoint his own arbitrator as sole arbitrator. It does not require a recourse to the court for the appointment of the arbitrator(s).

The trial judge concluded that the Arbitration Law of Cross River State was the law governing the arbitration and granted the enforcement of the award. On appeal, the Court of Appeal recognised that the Arbitration and Conciliation Act did not expressly repeal the arbitration

[30] This matter is discussed further in extensive detail late in this article.
[31] See Olawoyin, "Constructing the Road to Arbitral Prevalence: The Arbitration Law of Lagos State 2009 in Perspective" (2015) 2 *International Arbitration Law Review* 34; see also A.A. Olawoyin, "Charting New Waters with Familiar Landmarks: The Changing Face of Arbitration Law and Practice in Nigeria" (2009) 26(3) *Journal of International Arbitration* 373.
[32] See, e.g. P.O. Idornigie, "The Doctrine of 'Covering the Field' and Arbitration Laws in Nigeria" (2000) 66(3) *Journal of the Chartered Institute of Arbitrators* 193.
[33] *Compagnie Generale De Geophysique v Dr Jackson D Etuk* [2004] 1 NWLR (part 853) 20.
[34] *Etuk* [2004] 1 NWLR (part 853) 20.

laws of the various states.[35] In the lead judgment, Ekpe JCA held that s.7 of the Arbitration Law of Cross River State is "null and void" for being inconsistent with s.7 of the federal Arbitration and Conciliation Act. In reaching this conclusion, Ekpe JCA applied the doctrine of "covering the field"[36] to the effect that where both federal and state legislatures have competence on a subject and it appears that a federal legislation intends to cover the entire field of the subject matter, the federal legislation prevails over an inconsistent state legislation.

In his concurring judgment, Olagunju JCA went beyond the conclusions of Ekpe JCA. While agreeing with the lead judgment that the doctrine of covering the field means that the Arbitration and Conciliation Act prevails over inconsistent state legislation, Olagunju JCA held further that the Act actually impliedly repeals all the state laws on arbitration. He took into account that the Act was first promulgated as a decree under a military government which then had overriding legislative competence for the entire federation.[37] On the other hand, he also seemed to suggest, somewhat contradictorily, that state arbitration laws could continue to be applied[38] as long as they were not inconsistent with the federal legislation.[39]

The supporting judgment of Olagunju JCA cannot be taken to represent the decision of the Court of Appeal to the extent that it goes beyond the lead judgment.[40] It is suggested that ultimately the *Etuk* case only stands for the proposition that a state's law on arbitration is only invalid to the extent of inconsistency[41] with the Arbitration and Conciliation Act. According to the judgment, only inconsistent provisions are "null and void" although the federal statute still "prevails" even in the absence of inconsistency.[42]

The reasoning and conclusions of both the leading judgment of Ekpe JCA and the supporting judgment of Olagunju JCA in *Etuk* are questionable and difficult to support and it is not surprising that they have already been subjected to trenchant criticism.[43] It is dubious whether the doctrine of covering the field relied upon by the court was properly invoked in the circumstances of even the particular case. First, the court did not demonstrate that, let alone how, the federal legislature had intended to "cover the whole field of arbitration" through the enactment of the Arbitration and Conciliation Act. The court seemed to take the existence per se of federal legislation on the subject as covering the field. Ekpe JCA simply stated essentially as a matter of opinion without preceding analysis: "I am of the opinion that the Arbitration and Conciliation Act, 1990 has covered the whole spectrum or field of arbitration and conciliation …."[44] In taking this approach, Ekpe JCA did not appear to pay sufficient attention to the terms of an earlier decision of the Nigerian Supreme Court nor to the full impact of dictum which he actually quoted from that earlier case.

In respect of the doctrine of covering the field in Nigerian law, Ekpe JCA quoted from the judgment of Idigbe JSC in *Attorney General of Ogun State v Attorney General of the Federation*.[45] In that judgment, the Nigerian Supreme Court said clearly that the application of the doctrine requires that it must appear that the federal legislation intends to cover the entire field of the subject matter. This is reflected specifically in the dictum that Ekpe JCA quoted where, critically, Idigbe JSC stated:

> "If no general intention to cover the field on the subject can be gathered from the federal law, then the mere concurrence of the two laws i.e. the federal and state laws on the subject is not *so ipso* an inconsistency although the detailed rules in the provisions of both laws may lead to different results on the same facts".[46]

The approach of Ekpe JCA on the doctrine of covering the field is, arguably, at variance with the principles set out by the Supreme Court in *Attorney General of Ogun*

[35] *Etuk* [2004] 1 NWLR (part 853) 20 at 48, per Ekpe JCA with whom the other two members of the court agreed.
[36] For this doctrine, Ekpe JCA relied on Supreme Court decisions in *Attorney General of Ogun State v Attorney General of the Federation* (1982) 3 NCLR 166, and *Attorney General of Abia State v Attorney General of the Federation* (2002) 6 NWLR (part 763) 264.
[37] *Etuk* [2004] 1 NWLR (part 853) 20 at 54–55.
[38] In fairness, it appears that he intended to confine this possibility to causes of action which arose or relate to arbitration agreements made before the coming into force of the federal legislation.
[39] For his conclusion, Olagunju relied on two previous judgments of the Supreme Court. However, the Supreme Court decisions cannot be taken to support a general proposition that repealed arbitration legislation continued to have relevance *after* being repealed. In the first of the two cases, *A Savoia Ltd v Sonubi* [2000] 15 NWLR (part 682) 589, the Supreme Court, as with the lower courts, applied the Arbitration Law of Lagos State in dismissing a challenge to an arbitral award made pursuant to that law. Significantly both the award, made in 1985, and the proceedings concerning its enforceability long predated the promulgation of the federal Arbitration and Conciliation Act. In the second case, *Araka v Ejeagwu* [2000] 15 NWLR (part 692) 684, although the agreement containing the relevant arbitration clause was made in 1975, before the promulgation of the Arbitration and Conciliation Act, the arbitration proceedings were commenced in 1994 under the federal legislation which had then come into force.
[40] First, Olagunju JCA himself concurred with the lead judgment which was more restricted in scope. Secondly, Thomas JCA who was the third member of the court simply concurred with the lead judgment without delivering a reasoned supporting judgment.
[41] In this sense, "inconsistency" is being used to mean that the respective legislations have provisions which differ; this "inconsistency" does not even mean, strictly, that the legislation cannot exist side by side with only one of them being applicable on a particular occasion.
[42] *Etuk* [2004] 1 NWLR (part 853) 20 at 48–49.
[43] See Olawoyin, "Constructing the Road to Arbitral Prevalence: The Arbitration Law of Lagos State 2009 in Perspective" (2015) 2 *International Arbitration Law Review* 34; N. Ikeyi & O. Amucheazi, "Applicability of the Nigeria's Arbitration and Conciliation Act: Which Field Does the Act Cover?" (2013) 57(1) *Journal of African Law* 126.
[44] Surprisingly, Ekpe JCA did not even overtly rely on the fact that s.58 of the Arbitration and Conciliation Act provides that it shall apply throughout the federation. On the other hand he acknowledged clearly that the Act did not expressly repeal pre-existing state laws on arbitration.
[45] *Attorney General of Ogun State* (1982) 3 NCLR 166; (1982) 1–2 SC 13.
[46] This passage was quoted by Ekpe JCA in *Etuk* [2004] 1 NWLR (part 853) 20 at 48–49.

State v Attorney General of the Federation.[47] In the latter case, the Supreme Court introduced the doctrine of covering the field[48] into Nigerian jurisprudence because of its application in Australia in respect of Australian constitutional provisions which had been used as the basis for the setting out of exclusive and concurrent legislative lists in Nigeria's 1954 Constitution.[49] When addressing the issue of covering the field in the lead judgment, Fatayi-Williams CJN relied on dictum in the Australian case of *Ex p. Mclean*.[50] In that case Dixon J said that, under the concerned Australian provisions, once the Parliament of the Commonwealth enacted legislation with the intention "to express by its enactment, completely, exhaustively, or exclusively" the law governing a particular matter, it is "inconsistent" for the law of a state to govern the same matter. He also said expressly, however, that

> "if it appeared that the Federal law was intended to be supplementary to or cumulative upon State law, then no inconsistency would be exhibited in imposing the same duties or in inflicting different penalties."

Fatayi-Williams CJN adopted the propositions set out by Dixon J in *Ex p. Mclean* except for the use of the word "inconsistency" in the particular context; he preferred to confine himself to saying that it is more appropriate to invalidate a state legislation where an identical federal legislation had "covered the whole field" of the subject matter.[51] Idigbe JSC agreed with Fatayi-Williams' conclusion on the doctrine of covering the field and that the legislation in issue showed the intention of the former military government which promulgated it to cover the entire field.[52] He stated with emphases that the government "evinced a *clear intention* in the said Act … to deal *exhaustively* and *exclusively*, by that enactment with the aspect of public order …."[53] The intention of the government to cover the field for the entire federation by the legislation in issue was readily obvious inter alia from the fact that the legislation specifically repealed all other legislation, including all state legislations, concerning its subject matter.[54] This is a significant difference from the legislation before the court in *Etuk* since the Arbitration and Conciliation Act had patently not expressly repealed other extant arbitration legislation.

It is disappointing that Ekpe JCA in *Etuk* did not elaborate beyond opinion or assertion that the Arbitration and Conciliation Act had covered "the whole spectrum or field of arbitration". *Etuk*'s conclusion on the doctrine of covering the field has been challenged on other grounds[55] and it will be demonstrated in this article that it was wrong to have decided the case and the question of whether federal or state arbitration legislation was applicable on the basis of the doctrine of covering the field.

Tellingly, in the more recent case of *Stabilini Visinoni Ltd v Mallinson & Partners Ltd*,[56] the Court of Appeal itself[57] declined an opportunity to confirm its earlier decision in *Etuk*. While the constitutional issue of legislative competence over arbitration was raised in the *Stabilini* case, the court refused to address it in the particular circumstances of the case and stated in a unique expression of judicial economy that it would "refuse to be dragged down into a snake pit and will discountenance the arguments in that direction."[58]

In *Stabilini*, it was argued that an application brought before the High Court of Lagos State to enforce an arbitral award should have been brought by Originating Motion under rules made pursuant to the Lagos State Arbitration Law[59] and not by Motion on Notice as the applicant had done pursuant to the Arbitration and Conciliation Act. The court held that the Arbitration and Conciliation Act,

[47] See fn.36 above.
[48] The doctrine of "covering the field", though an important element of the decision, was actually not finally determinative in the particular case as it went only to establishing that the Public Order Act 1979 became an "existing law" under the 1979 Constitution and took effect as federal (and not state) legislation. The central issue for determination was whether in enacting an order for adaptation of the Public Order Act in the light of Nigeria's then transition to democracy in 1979, the President went beyond his constitutional powers.
[49] *Attorney General of Ogun State* (1982) 3 NCLR 166 at 178. The pattern of using exclusive and concurrent legislative lists has been employed in subsequent Nigerian Constitutions, including the current 1999 Constitution.
[50] *Ex p. Mclean* (1930) 43 CLR 472.
[51] *Attorney General of Ogun State* (1982) 3 NCLR 166 at 179. Also, in *Aberuagba*, the Supreme Court noted that a state legislation on a matter in the Concurrent Legislative List could be rendered invalid either on the basis of inconsistency in light of the provisions of s.4(5) of the 1979 Constitution or the basis of the doctrine of covering the field without any inconsistency as established in the previous case; see *Aberuagba* (1985) 1 NWLR (part 3) 395 at 405 and per Eso JSC at 440; but cf. Nnamani JSC at 447.
[52] Of the other members of the court, Eso JSC also agreed with the authorities relied upon by Fatayi-Williams CJN in the lead judgment; however, he preferred to confine himself to saying that if the federal government has legislated on a matter in the concurrent list, an inconsistent state legislation on the same matter is void for inconsistency; he also held that if both the federal and state legislation are *in pari materia*, the state legislation is not void but merely in abeyance and would be revived if for example the federal legislation is subsequently repealed. See *Attorney General of Ogun State* (1982) 3 NCLR 166 at 204. Irikefe and Bello JJSC agreed with the lead judgment while the supporting judgment of Udo Udoma JSC did not directly address the doctrine of covering the field.
[53] *Attorney General of Ogun State* (1982) 3 NCLR 166 at 196; all emphases as in the original judgment.
[54] Again it is to be noted that the reason for discussing the doctrine of covering the field in relation to the Public Order Act 1979 was not because there was any competing state legislation; rather it was for the purpose of determining whether it took effect as existing federal law or existing state law under Nigeria's 1979 Constitution.
[55] See, e.g. Olawoyin, "Constructing the Road to Arbitral Prevalence: The Arbitration Law of Lagos State 2009 in Perspective" (2015) 2 *International Arbitration Law Review* 34, where it is argued that if either one of the federal or state legislatures do not in the first case have legislative competence on arbitration, the doctrine of covering the field does not apply at all. See also Ikeyi & Amucheazi, "Applicability of the Nigeria's Arbitration and Conciliation Act: Which Field Does the Act Cover?" (2013) 57(1) *Journal of African Law* 126, where it is argued that the enactment of the Arbitration and Conciliation Act left no scope for the application of state arbitration laws and therefore that *Etuk* [2004] 1 NWLR (part 853) 20 should not have been decided on the basis of the doctrine of covering the field. This article does not itself agree with either of these bases for challenging the *Etuk* case on the doctrine of covering the field.
[56] *Stabilini* [2014] 12 NWLR (part 1420) 134.
[57] This time the court consisted of a different panel sitting in a different location. While the Nigerian Court of Appeal is one court, it sits in a number of different locations called "judicial divisions" with different judges in each division. *Etuk* [2004] 1 NWLR (part 853) 20 was decided in the Calabar judicial division while *Stabilini* [2014] 12 NWLR (part 1420) 134 was decided in the Lagos division.
[58] *Stabilini* [2014] 12 NWLR (part 1420) 134 at 175.
[59] Arbitration Application Rules 2009 (Lagos); as noted by the Court of Appeal, s.31 of the Lagos State Arbitration Law itself did not specify in what form an application for enforcement of an award should be brought other than that the application should be in writing. See *Stabilini* [2014] 12 NWLR (part 1420) 134 at 179.

and not the Lagos State Arbitration Law, applied in the circumstances of the case. The court took a range of factors into account including: that the arbitration agreement was made before the coming into effect of the Lagos Law; the agreement was made expressly pursuant to then extant applicable law which was the Arbitration and Conciliation Act; the notice commencing arbitration proceedings and seeking the appointment of an arbitrator clearly stated that the Act shall apply; and, the arbitrator had concluded that the Act applied.[60]

Having reached the conclusion, that the Arbitration and Conciliation Act applied in any event, the Court of Appeal in *Stabilini* did not consider it necessary to address the constitutional matter of whether either or both of states and federal legislatures had competence to legislate over arbitration. On the other hand, it is implicit that the court accepted that the parties could choose which of the extant relevant arbitration legislation they wanted to apply to the arbitration. In reaching the conclusion that the parties had chosen the Arbitration and Conciliation Act, the court stressed that even the Lagos State Arbitration Law provides that arbitration within Lagos State shall be governed by another law (i.e. other than the Lagos law) if the parties so agree. The court then noted that this "makes sense because arbitration is a subject area that can be said to be 'without borders'".[61]

As the Court of Appeal did not directly address or resolve the constitutional issue of legislative competence over arbitration in *Stabilini*, it did not overtly contradict its earlier decision in *Etuk*. On the other hand, the decision in *Stabilini* is more consistent with the approach that the Arbitration and Conciliation Act provides for a unified regime which is not necessarily mandatory. The court seemed to accept that parties to arbitration have the option to choose between a state's law on arbitration and the federal Arbitration and Conciliation Act. In basing its ultimate decision only on the factors that the parties chose the federal law and that the federal law was the applicable law at the material time, the court implicitly demonstrated that it did not exactly have confidence in its own earlier decision in *Etuk*. Otherwise, it might have been considered necessary or relevant, even if at least on the basis of obiter dictum, to address whether the Arbitration and Conciliation Act "prevails" over the Lagos Law and whether provisions of the latter are "null and void" to the extent of inconsistency with the former.

There is another important reason why it is disappointing that the Court of Appeal in *Stabilini* avoided confronting the constitutional controversy on legislative competence over arbitration. Specifically, there is a line of argument that the federal legislature does not have legislative competence over arbitration at all in light of the provisions of Nigeria's current Constitution and that it is a matter left within the legislative competence of state legislatures exclusively.[62] If this argument were to be correct, there is the danger that the application of the Arbitration and Conciliation Act is the application of a law ascribed to a legislature which does not currently have the power to make such a law. The argument is predicated on the basis that arbitration is not listed in either the Exclusive or Concurrent Legislative List of the 1999 Constitution. Accordingly, as the argument goes, arbitration would fall under the residual category and the Nigeria Supreme Court has pronounced that residual matters are within the legislative competence of state legislatures solely.[63] It would follow therefore, according to the argument, that only state legislatures can legislate on arbitration.[64]

The line of argument summarised in the immediately preceding paragraph may be contrasted with another line of argument which contends that the enactment of the Arbitration and Conciliation Act resulted in the implied repeal of pre-existing arbitration laws of various states. This line of argument assumes that the federal legislature does indeed have legislative competence over arbitration. It also raises the question whether states' arbitration laws enacted subsequent to the federal statute can stand valid in the face of the existence of the federal legislation. One manner in which this is addressed is to argue that while the federal legislature is the one with legislative competence over international arbitration and interstate commerce arbitration, states nevertheless have legislative competence but only in respect of intrastate commerce arbitration.[65]

More generally, underlying the position ascribing legislative competence on arbitration to the federal legislature is the argument that goes as follows: although arbitration is not expressly mentioned in the Exclusive Legislative List, it is incidental to "trade and commerce" as listed in item 62; according to item 62(a), the federal legislature has competence in respect of international and interstate trade and commerce; item 68 of the list confers the federal legislature with competence in relation to matters incidental to those on the list; accordingly, the

[60] Incidentally, the arbitrator appeared to have conflated the matter of the applicable law governing the substance of the dispute with that of the law governing the arbitration. In concluding that the federal Arbitration and Conciliation Act applied, the arbitrator relied in part on art.33(1) of the Lagos Chamber of Commerce Arbitration Rules which provides that the Tribunal is to apply the applicable law designated by the parties or the law determined by the conflict of laws rules which it considers applicable; see *Stabilini* [2014] 12 NWLR (part 1420) 134 at 182. That provision is however referring to the law applicable to the substance of the dispute and not the law governing arbitration.

[61] See *Stabilini* [2014] 12 NWLR (part 1420) 134 at 180.

[62] See Olawoyin, "Constructing the Road to Arbitral Prevalence: The Arbitration Law of Lagos State 2009 in Perspective" (2015) 2 *International Arbitration Law Review* 34.

[63] *Attorney General of Ogun State v Aberuagba* (1985) 1 NWLR (part 3) 395; see also *Attorney General of Lagos State v Attorney General of the Federation* (2003) 12 NWLR (part 833) 1; see also *Sir Abubakar Tafawa Balewa v Senator Chief T Adebayo* [1963] UKPC 19 (Privy Council); [1961] 1 All NLR 604 (Nigerian Supreme Court).

[64] The argument tends to acknowledge however that the federal Legislature would be able to pass a general arbitration law for and only for the Federal capital Territory which, although akin in some ways to a state, is not a state and does not have its own legislature. The argument also acknowledges that the federal legislature would be able to enact legislation to implement Nigeria's obligations under international treaties and agreements on arbitration such as, in particular, the New York Convention.

[65] See Ikeyi and Amucheazi, "Applicability of the Nigeria's Arbitration and Conciliation Act: Which Field Does the Act Cover?" (2013) 57(1) *Journal of African Law* 126.

federal legislature is competent to enact legislation on arbitration relating to international and interstate commerce. The line of argument also tends to make a concession that since item 62(a) confines the federal legislature's competence to international and interstate trade and commerce, not mentioning intrastate trade and commerce, legislative competence in relation to arbitration connected solely to a state is vested in states' legislatures.[66]

It will be demonstrated in the next section that each of the arguments summarised in the preceding paragraphs overlooks one important factor or another. It will be contended that Nigeria's federal legislature has legislative competence over international and interstate arbitration directly as a result of item 62 of the Exclusive Legislative List and not indirectly as an incidental matter under item 68 of the list. It will be further contended that the provisions of the 1999 Constitution are consistent with a conclusion that state legislatures *also* have legislative competence over international arbitration and interstate commerce arbitration.

4. Arbitration and trade and commerce: the constitutional provisions

At the heart of the controversy about legislative competence over arbitration lie a few particular provisions of Nigeria's current 1999 Constitution. The main provisions in issue[67] are items 62, 62(a) and 68 of the Exclusive Legislative List in the Second Schedule to the Constitution. The directly relevant parts of the provisions are reproduced below for the sake of clarity:

62	"Trade and commerce, and in particular —
	(a) trade and commerce between Nigeria and other countries including import of commodities into and export of commodities from Nigeria, and trade and commerce between the states"
68	"Any matter incidental or supplementary to any matter mentioned elsewhere in this list."

It is surprising that the debate on the relevance of the provisions of items 62 and 68 of the Exclusive List of the 1999 Constitution to the question of legislative competence over arbitration has centred essentially only on whether arbitration is *incidental* to "trade and commerce". In reality the primary question should be whether or not arbitration is *part of and encompassed within* "trade and commerce" in the first place. Although the 1999 Constitution does not itself define "trade and commerce" per se, it is contended that conceptually and generally, as well as in light of extant authority of the Supreme Court, arbitration is to be regarded as part of and encompassed within the phrase "trade and commerce" in the Constitution.

While arbitration is a dispute resolution mechanism, the provision of arbitration facility and service is a business enterprise and operated in a business context. Arbitration can be seen as a business from a number of perspectives: the business service provided by an institution or arbitration centre for the facilitation of arbitration; the provision of services by individual persons as arbitrators whether on their own recognition or as part of an institutional framework; and, the provision of arbitration advocacy services. In addition to all of these, there are ancillary facilities and revenue generating services that arise from attracting international arbitration to a particular location including physical facilities such as provision of the venue for the conduct of proceedings, accommodation and related comfort services, personal services such as expert witness services among others.

The distinction between arbitration as a dispute settlement mechanism and as a business service, even a business sector, has been insufficiently considered in the debate on where arbitration fits within the scheme of the Nigerian Constitution. This is surprising given that the debate has been ignited in part because of the enactment of a modern arbitration law by Lagos State with the underlying recognition of Lagos State as an important commercial centre and the aim of establishing Lagos as a leading regional and international financial centre. The defenders of the Lagos State Law tend to emphasise the importance of arbitration as a dispute settlement mechanism supporting the attraction of business and investment. On the other hand, it has also been part of the stated aims of Lagos State to make the state an attractive place for parties seeking to settle disputes by arbitration. In other words, in enacting an up to date arbitration law, the aim of Lagos State is not only to support commercial activity in Lagos State but also, and importantly in its own right, *to attract arbitration business to Lagos*.

Lagos State is not unique in seeking to attract arbitration business to its territory.[68] That objective has long been pursued by other comparable cities or locations and some of them have set up arbitration centres specifically to attract a share of the market for the

[66] As has been noted earlier, this argument underlies the reform proposal of the committee set up on the reform of Nigeria's arbitration law for two sets of arbitration legislation, that is, a federal legislation on international arbitration and interstate commerce arbitration and a uniform state arbitration law to be adopted by the states and only applicable in respect of intrastate commerce arbitration.

[67] Additionally, s.4(2) of the 1999 Constitution provides that the federal legislature has power to legislate for the peace, order and good government of the country or any part of it in respect of anything on the exclusive list—ordinarily to the exclusion of state legislatures. Notably, s.4(5) provides that a law made by a state legislature which is inconsistent with one validly made by the state legislature would be void to the extent of the inconsistency.

[68] In a comment made in respect of the Global Arbitration Review's Guide to Regional Arbitration Centres 2013, it was observed: "The impulse to create a local arbitral player seems universal in most countries, like the impulse to have a stock exchange." See, *http://globalarbitrationreview.com/regional-arbitration/directory/4/article/31485/the-gar-guide-regional-arbitration-centres-2013/* [Accessed 13 January 2016]

provision of international commercial arbitration services.[69] There are also the long established and well known arbitration centres with the concomitant reputation of their geographical bases as attractive arbitration locations.[70] At the other end, there are the aspirational cities or locations seeking to establish an arbitration centre and to be recognised as an arbitration location; for example, a recent press release issued by the Bahamas Information Services contains the following statement:

> "The Bahamas is moving ahead with its plans to become an Arbitration center. In a bid to tap into a possible lucrative sector for the country, plans are underway to set The Bahamas as a top arbitration center in the region."[71]

The Bahamas statement clearly recognises arbitration not only as a business sector but a "possible lucrative sector". In similar vein, a recent report on the UK legal services sector makes the claim that "the legal sector generates £22.6bn, or 1.6%, of the UK's gross domestic product" and attributes this in part to "the fact that more than 20,000 commercial and civil disputes are resolved through arbitration, mediation and adjudication in the UK annually."[72] Arbitration is big business[73] and it is entirely appropriate to regard arbitration conceptually as encompassed within the words "trade and commerce".

Apart from the conceptual consideration, there is also the important factor that the Nigerian Supreme Court has actually considered the phrase "trade and commerce" within the context of directly comparable constitutional provisions in Nigeria. In *Attorney General of Ogun State v Aberuagba*,[74] the matter concerned the constitutionality of a sales tax law enacted by the Ogun State Government.[75] In the circumstances, the case involved extensive discussion of item 61 of the Exclusive Legislative List of the 1979 Constitution which is essentially the same as item 62 of the same list in the 1999 Constitution. The decision of the court involved specifically the interpretation of the general provision of item 61, i.e. the words "Trade and commerce, and in particular". The court also had to consider how the words "in particular" relate to the items enumerated (a)–(f) including specifically item 61(a)—which is essentially the same as item 62(a) in the 1999 Constitution outlined earlier.

A very significant point to note about the decision of the Supreme Court in *Aberuagba* is that the court held that the mere fact that an item is not specifically included in the Exclusive Legislative List does not automatically mean that the federal government has no legislative power on the matter.[76] Reiterating that all the provisions of the constitution on an issue must be read together and not disjointly, the court held that even though "sales tax" was omitted from the Exclusive Legislative List of the 1979 Constitution, while it had been included in that list in the previous constitutions of 1960 and 1963, the federal government still had legislative competence to impose sales tax law in light of other relevant provisions of the 1979 Constitution.[77] The court held that in light of various provisions of that constitution, the federal government had legislative powers to impose tax in relation to any matter on the Exclusive Legislative List; since "trade and commerce" (international and interstate) is included in that list in item 61(a), the federal government has taxing powers in relation to trade and commerce within that scope; significantly, the court held that the sale of products is within "trade and commerce" and therefore legislative competence to impose sales tax concerning international or interstate trade and commerce was vested in the federal government.

While the majority decision in *Aberuagba* was that the words "in particular" in the general provision of item 61 of the exclusive list of the 1979 Constitution limited the legislative powers of the federal legislature to the matters enumerated as (a)–(f),[78] it was quite clear that all the members of the court considered that the phrase "trade and commerce" as such has a wide and embracing meaning.[79] In the lead judgment, Bello JSC not only held that the sale of products is within "trade and commerce" in item 61,[80] he also stated that "with the inherent control of trade and commerce goes the inherent right of taxation

[69] Examples include Cairo, Abu Dhabi, Singapore among others.
[70] Examples include London, Paris, New York, and Geneva among others.
[71] See Bahamas Information Service Press Release, 29 September 2015 [Accessed 13 January 2016].
[72] TheCityUK Legal Services Report 2015, *http://www.thecityuk.com/research/our-work/reports-list/legal-services-2015/* [Accessed 13 January 2016].
[73] As one commentator puts it: "International commercial arbitration is big business for arbitration venues. The economic benefits to a city of attracting high-value disputes, while difficult to quantify accurately, are very considerable. London, for example, handles in any given year international arbitrations with a combined value of £40-£50 billion (HK $653–817 billion). These contribute significantly to the £15 billion (HK $245 billion) value of UK legal services, amounting to over 1.5% of the country's total GDP. See R. Fernyhough, "A World of Choice: The Competition for International Arbitration Work — Part I" (2008) Asian DR 47.
[74] See fn.5 above.
[75] The Sales Tax Law 1982 of Ogun State purported to impose taxes on certain products brought into the state.
[76] See also, *Sir Abubakar Tafawa Balewa v Senator Chief T Adebayo* [1963] UKPC 19 (Privy Council); [1961] 1 All NLR 604 (Nigerian Supreme Court).
[77] The court was even ready to treat this as *implied*. For instance, Bello JSC said: "… the Federation has implied exclusive power to make sales tax law in all matters within the Exclusive and Concurrent Lists while the States have implied or residuary power to enact sales tax law on all matters outside the said lists." See *Aberuagba* (1985) 1 NWLR (part 3) 395 at 417.
[78] Eso and Karibi-Whyte JJSC dissented on this point and took the view that the words "in particular" were words of emphasis rather than words of limitation and that, accordingly, the legislative powers of the federal government in respect of trade and commerce were not limited to the matters enumerated as (a)–(f) in item 61 of the 1979 Constitution. Uwais JSC seemed to hold to this position as well though his conclusion could have been expressed with greater clarity; see *Aberuagba* (1985) 1 NWLR (part 3) 395 especially at 432, 436–438, 449–450 and 466–467.
[79] More generally, members of the court also expressed the view that the intention behind item 61 of the Exclusive Legislative List of the 1979 Constitution was "to give very wide legislative powers over Trade and Commerce to the Federal Government", *Aberuagba* (1985) 1 NWLR (part 3) 395 at 446, per Nnamani JSC. Eso and Karibi-Whyte JJSC, both of whom dissented on the construction of the words "in particular", held that the legislative power of the federal government in respect of trade and commerce even extended to intrastate trade and commerce. Karibi-Whyte JSC expressed the view that the "powers of the National Assembly with respect to trade and commerce would seem to be plenary" and further that the power of the federal government to regulate commerce "seems to be now all pervasive." See *Aberuagba* (1985) 1 NWLR (part 3) 395 at 467.
[80] *Aberuagba* (1985) 1 NWLR (part 3) 395 at 410.

on that item."[81] He then concluded that the federal government "has power to make sales tax law in all matters within the Exclusive and Concurrent Lists …."[82] In relation to the words "trade and commerce" specifically, Eso JSC noted that the American Supreme Court once interpreted the word "commerce" to include navigation and refused to confine it merely to buying and selling or interchange of commodities.[83] He observed further that Marshall CJ of the American Supreme Court noted 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."[84] Eso JSC then concluded that the words "trade and commerce" are to be taken together and that the phrase refers to "commercial intercourse."[85]

It is important to reiterate that the provisions that the Supreme Court considered in *Aberuagba* [83], i.e. item 61 of the Exclusive Legislative List of Nigeria's 1979 Constitution, are virtually identical with the provisions of item 62 of the same list in the 1999 Constitution. Accordingly, the Supreme Court's decision in that case remains valid authority for the interpretation of the relevant provisions of the 1999 Constitution unless and until the decision is overturned by the Supreme Court itself or other legislative or constitutional provisions.

The important lessons to be drawn from the *Aberuagba* case so far[86] for the present discussion of whether arbitration falls within the phrase "trade and commerce" in item 62 of the Exclusive Legislative List of the 1999 can be summarised as follows.

- Although arbitration is not mentioned specifically in the Exclusive Legislative List, this does not automatically mean that the federal government is deprived of power to enact legislation on arbitration.
- Whether the federal government has power to enact arbitration legislation depends on examining all the provisions of the Constitution that are relevant to the matter.
- The federal government has legislative power in respect of international and interstate trade and commerce in light of item 62, and specifically item 62(a), of the Exclusive Legislative List of the 1999 Constitution.
- The phrase "trade and commerce" in item 62 of the Exclusive Legislative List of the 1999 Constitution encompasses different objects and covers different elements, including but not limited to sale of products or commodities.
- If arbitration is indeed a "product" within the meaning of "trade and commerce" or one of its "objects", then the federal government does indeed have legislative power on arbitration—at least to the extent that it relates to international and interstate trade and commerce.

It has been argued earlier that the provision of arbitration service is a business service and a recognisable and potentially lucrative service sector in its own right. On that basis, it is contended that arbitration is covered within the meaning of "trade and commerce" in item 62 of the Exclusive Legislative List of the 1999 Constitution. The recognition of the embracing nature of "trade and commerce" in *Aberuagba* as encompassing specific objects and inherent elements only goes to strengthening this conclusion. It is submitted that, both conceptually and on the authority of the Supreme Court in *Aberuagba*, arbitration is covered within the provisions of item 62(a) which gives power to the federal legislature in respect of international and interstate trade and commerce. Nevertheless, whilst the foregoing analysis establishes the legislative competence of the federal legislature over arbitration, it is still necessary to address whether and to what extent Nigerian states legislatures have legislative competence in respect of arbitration.

5. Do Nigerian states have legislative competence over arbitration?

It is useful to summarise briefly the possible conclusions on whether constituent Nigerian states have legislative competence to enact arbitration legislation. For the purposes of this article, it is convenient to classify the potential conclusions according to the following categories: (a) only the states have legislative competence on arbitration—to the exclusion of the federal government; (b) states do not have legislative competence on arbitration legislation at all in the face of existing federal legislation on the same subject; (c) states only have legislative competence to enact arbitration legislation in respect of intrastate commerce arbitration; and (d) like the federal government, states *also* have legislative competence over arbitration, including international and interstate commerce arbitration.

The categorisation above has been chosen deliberately in order to address the arguments not only from the perspective of legal accuracy but also in order to highlight the arguments in progressive order of respective potential for desirable constitutional consequences. It also provides the opportunity for examination of the arguments in terms of respective potential for negative or positive impact on

[81] *Aberuagba* (1985) 1 NWLR (part 3) 395 at 410.
[82] *Aberuagba* (1985) 1 NWLR (part 3) 395 at 417.
[83] *Gibbons v Ogden* 9 Wheat (22 US 1) (1824).
[84] *Aberuagba* (1985) 1 NWLR (part 3) 395 at 435.
[85] *Aberuagba* (1985) 1 NWLR (part 3) 395 at 436. Again, it is noteworthy that some of the members of the court even held that the legislative competence of the federal government in respect of "trade and commerce under the 1979 Constitution went beyond the extent recognised in the lead judgment and by the majority. Karibi-Whyte also dissented on another point in holding, contrary to the majority, that the Sales Tax Law was an "excise duty" and thus in that sense a usurpation of federal legislative powers; especially at 464–465.
[86] Other aspects of the case are discussed later in relation to whether state legislatures have powers to enact arbitration legislation.

the growth of arbitration law and practice and the provision of arbitration service as a lucrative business sector for the Nigerian economy.

5.1 States have legislative competence to the exclusion of the federal legislature?

The conclusion with the greatest potential for alarming consequences is that which suggests that only states have legislative competence on arbitration to the exclusion of the federal government.[87] It is to be noted that this conclusion is based on a supposition that arbitration is not included in the Exclusive Legislative List of the 1999 Constitution and as such is a residual matter entirely for the sole legislative competence of the states.[88] If this conclusion were to be correct some potentially serious consequences would follow.

One of the consequences that would follow a conclusion that the federal government does not have legislative competence over arbitration under the 1999 Constitution is that the Arbitration and Conciliation Act would in fact be unconstitutional, to the extent that it is considered to be a federal legislation. As is typical under constitutional provisions and arrangements often made in Nigeria to facilitate transition from military to a democratic and constitutional government, the 1999 Constitution provides that laws which were in force under the previous military order would continue to be in force under the incoming constitution. It is significant that the relevant constitutional provision is to the effect that such an "existing law" shall take effect with necessary modification to bring it in conformity with the Constitution. It is also important to note that such an existing law is to be deemed to be either a federal enactment to the extent that it is a law on a matter within the legislative competence of the federal legislature, or a state law to the extent that it is a law on a matter within the legislative competence of the states.[89] Finally, any provision of an existing law may be declared invalid on the ground that it is inconsistent with the Constitution.[90]

If the argument that arbitration is not within the legislative competence of the federal government under the 1999 Constitution were to be correct then, in light of the constitutional provisions concerning existing laws, the Arbitration and Conciliation Act would not be capable of being deemed to be a federal enactment[91] under the 1999 Constitution.[92] It would also follow that the federal government would not be lawfully capable of executing the proposed reform of the current federal legislation or enacting the intended new federal arbitration legislation. There would also be a risk that arbitration in the vast majority of Nigerian states would be governed, for the foreseeable future,[93] by only the old state arbitration laws which do not address international arbitration adequately if at all.[94] This would of course be inimical to the desired growth of arbitration in Nigeria both as a dispute resolution mechanism and as a business sector.

The analysis in section 4 of this article has demonstrated that the argument that arbitration is not within the legislative competence of the federal government cannot be correct. It has been demonstrated that arbitration is actually encompassed within the legislative competence of the federal government, at least to the extent that it concerns international and interstate trade and commerce. Accordingly, the Arbitration and Conciliation Act is an existing federal law and relates to matters in respect of which the federal legislature is empowered to make laws under the 1999 Constitution.[95] Similarly, it is within the legislative competence of the federal government to follow through the suggestions to replace the Arbitration and Conciliation Act with a more up to date arbitration legislation. The only outstanding issues in this respect are whether the Arbitration and Conciliation Act and any future replacement, as federal enactments, are to be confined to the spheres of international and interstate commerce arbitration while it is for states to legislate on intrastate commerce arbitration.

5.2 States do not have legislative competence over arbitration at all?

The conclusion that Nigerian states do not have legislative competence to enact arbitration legislation only rests on a dubious invocation of the doctrine of covering the field. Although, there is judicial support for this conclusion in

[87] It should be noted that this conclusion has not yet been seen in case law and is acknowledged by even a proponent to be a minority view; see Olawoyin, "Constructing the Road to Arbitral Prevalence: The Arbitration Law of Lagos State 2009 in Perspective" (2015) 2 *International Arbitration Law Review* 34, 36.

[88] Except that the federal legislature can enact legislation to give effect to Nigeria's treaty obligations on arbitration and that it can enact arbitration for only the Federal Capital Territory.

[89] See specifically s.315 of the 1999 Constitution; see also s.274 of the 1979 Constitution.

[90] See s.315(3) of the 1999 Constitution.

[91] Except in relation to the Federal Capital Territory; also, conceivably, some of the provisions of the Act could be saved to the extent that they implement Nigeria's international treaty obligations in relation to the New York Convention, since the implementation of Treaties is recognised to be within the legislative competence of the federal government. See also Olawoyin, "Constructing the Road to Arbitral Prevalence: The Arbitration Law of Lagos State 2009 in Perspective" (2015) 2 *International Arbitration Law Review* 34, 40.

[92] Technically, though perhaps inconceivably, this could at least potentially render nugatory all the arbitration proceedings that had been conducted under the auspices of the Act since the advent of the 1999 Constitution. One potential saving grace in that unlikely event would be to regard the Arbitration and Conciliation Act as existing state law (rather than federal law) on the supposition that arbitration is a matter for the residual list and is not embraced within "trade and commerce", especially international and interstate trade and commerce, of the Exclusive Legislative List.

[93] Most of the constituent states of Nigeria have not exactly shown a keenness to reform and replace their extant arbitration laws. On the other hand, there is at least an initiative at the federal level to replace the extant federal Act with more up to date legislation, even if that plan is presently suffering delay in the legislative process.

[94] The arbitration law of most Nigerian states remains that which is derived from the colonial era Arbitration Ordinance of 1914. Again, the one possible way to avoid the application of these old laws in the circumstances under discussion would be to deem the Arbitration and Conciliation Act to be existing state law.

[95] In respect of when a legislation is to be regarded as existing law, see further *Attorney General of Ogun State* (1982) 3 NCLR 166; *Aberuagba* (1985) 1 NWLR (part 3) 395.

the *Etuk* case, the approach does not command widespread support.[96] The Court of Appeal itself has, at least, demonstrated hesitation to follow *Etuk* subsequently.[97]

In *Etuk* the Court of Appeal did not really show that the federal government had intended to cover the whole field of arbitration or clearly establish that it had done so.[98] Neither did the court truly keep to the terms for the application of the doctrine of covering the field as set down by the Supreme Court.[99] It is also significant that the Arbitration and Conciliation Act did not repeal the state arbitration laws and seems to allow for their application in some circumstances. Another significant shortcoming of the conclusion based on the doctrine of covering the field is that its proponents have not really clearly articulated or analysed the constitutional bases of the legislative powers of either of the federal or state legislatures[100] in respect of arbitration.[101]

As reflected earlier, the Court of Appeal impliedly demonstrated hesitation to follow *Etuk* in the later *Stabilini* case with its implicit acceptance that federal and state legislations on arbitration can co-exist. It is submitted that the cause of the desire for the growth of arbitration both as a dispute resolution mechanism and as a business service sector is better served if there are efficient and up to date arbitration legislations at both the federal and state levels available as optional alternatives for parties to arbitration.[102]

5.3 States have legislative competence only in respect of intrastate commerce arbitration?

The conclusion that states have legislative competence but only in respect of arbitration disputes wholly connected with the particular state seems to command the greatest support in Nigerian literature.[103] To reiterate, the conclusion is based on the argument that arbitration is an incidental matter to trade and commerce and that while the federal legislature is the one with legislative competence on international and interstate commerce arbitration, because of items 62(a) and 68 of the Exclusive Legislative List of the 1999 Constitution, intrastate commerce arbitration, being connected to only one state and not included in that remit, is a residual matter within the exclusive legislative competence of the states.

There are some immediate concerns with this conclusion. First, as has been demonstrated, arbitration is not merely an incidental matter to trade and commerce but an aspect of trade and commerce. Accordingly, it is more accurate to preface the legislative competence of the federal legislature over arbitration on the trade and commerce provisions in item 62 of the Exclusive Legislative List alone without resort to the incidental powers provided for in item 68. Secondly, there is the more practical issue that if this position were to be correct any state arbitration law, such as the Lagos State Law, which purports to provide for international arbitration or interstate commerce arbitration would be unconstitutional[104] to that extent.[105]

If it is accepted that an arbitration legislation which makes provision for international arbitration and interstate commerce arbitration is a legislation concerning international and interstate trade and commerce it would appear that a state legislation on arbitration should be concerned only with arbitrations with connections exclusively to the particular state. In other words, the consequence would be that a state arbitration law, such as the Lagos State Arbitration Law, which purports to provide for international arbitration and interstate commerce arbitration is invalid to the extent that it concerns such matters.

It follows that if, as is argued in this article, the optimal approach for party autonomy and freedom of choice in respect of arbitration regime is for federal and state arbitration laws extending to international arbitration and interstate commerce arbitration to exist side by side,

[96] See, e.g. O.O. Olatawura, "Constitutional Foundations of Commercial Investment Arbitration in Nigerian Law and Practice" (2014) 40(4) *Commonwealth Law Bulletin* 657; Olawoyin, "Constructing the Road to Arbitral Prevalence: The Arbitration Law of Lagos State 2009 in Perspective" (2015) 2 *International Arbitration Law Review* 34; Ikeyi and Amucheazi, "Applicability of the Nigeria's Arbitration and Conciliation Act: Which Field Does the Act Cover?" (2013) 57(1) *Journal of African Law* 126.
[97] See fn.58 above and accompanying text.
[98] See fn.44 above and accompanying text.
[99] The principles set out by the Supreme court not only require a clear intention on the part of the federal legislature to cover the field but also allow for the coexistence of federal and state laws, especially if they are supplemental or cumulative. See *Attorney General of Ogun State* (1982) 3 NCLR 166; *Aberuagba* (1985) 1 NWLR (part 3) 395.
[100] See also Olawoyin, "Constructing the Road to Arbitral Prevalence: The Arbitration Law of Lagos State 2009 in Perspective" (2015) 2 *International Arbitration Law Review* 34. The doctrine of covering the field applies only if the competing enactments had both been made validly in the first place. In reality, the invocation of the doctrine of covering the field in these circumstances seems to be somewhat escapist and does not really provide any clarity or advance the cause of certainty on where legislative powers lie in respect of arbitration and to what extent.
[101] Interestingly, the invocation of the doctrine of covering the field as done in *Etuk* [2004] 1 NWLR (part 853) 20 also has a consequence that perhaps the court itself did not fully appreciate even though it was a consequence directly reflected in the case itself. The consequence is that under this approach, the legislative competence of the federal government in respect of arbitration would not be confined to international arbitration and interstate commerce arbitration but also to intrastate commerce arbitration. Once again *Etuk* provided no explanation of why and how federal legislative powers extended to what would ordinarily be regarded as a purely state matter. It fails to clarify whether the Arbitration and Conciliation Act, which was promulgated as a federal decree during a military era, continued in force in the era of constitutional federation as an existing law on a matter within the legislative competence of either the federal or state legislatures.
[102] Cf. also Olatawura, "Constitutional Foundations of Commercial Investment Arbitration in Nigerian Law and Practice" (2014) 40(4) *Commonwealth Law Bulletin* 657, especially 667–668.
[103] Olawoyin, "Constructing the Road to Arbitral Prevalence: The Arbitration Law of Lagos State 2009 in Perspective" (2015) 2 *International Arbitration Law Review* 34, 36; Ikeyi & Amucheazi, "Applicability of the Nigeria's Arbitration and Conciliation Act: Which Field Does the Act Cover?" (2013) 57(1) *Journal of African Law* 126, 133.
[104] In fairness, the problem of the restriction of parties' choice of arbitration regime is not immediately resolved even if the legislative competence of the federal legislature over arbitration is premised directly on its trade and commerce power under item 62 of the Exclusive Legislative List alone. This is reflected in *Aberuagba* (1985) 1 NWLR (part 3) 395 despite the Supreme Court holding that even though "trade and Commerce" is in the Exclusive Legislative List and not mentioned at all in the Concurrent List, it does not follow that state legislatures are completely lacking in power in respect of trade and commerce. It held that while international and interstate trade and commerce is exclusively for the federal legislature, trade and commerce within a state is left as a residuary matter for the states.
[105] As argued earlier, this would be inimical to the concept of party autonomy and would restrict the freedom of parties to arbitration in Nigeria to choose the legal regime to govern the arbitration.

sufficient support for such a position must be found directly within the Constitution or in other legal principles that are not inconsistent with it.

5.4 States have competence over international arbitration and interstate commerce arbitration?

The current position in Nigeria where there is a spate of arbitration legislation, with different levels of commendable attributes beneficial to the growth of arbitration as a dispute resolution mechanism and as a business sector, can be adduced as support for the conclusion that it is better for these different enactments to operate as alternatives and even in a competitive manner. This is the approach that would most optimally serve the freedom of the parties to an arbitration to choose the legal regime governing their arbitration.[106]

The benefit of this approach of competing alternatives can be demonstrated by the following considerations. At the moment, in the absence of conclusive judicial decision striking down either legislation, the Arbitration and Conciliation Act and the Lagos State Arbitration Law are the two potential regimes to govern arbitration proceedings being conducted within the territory of Lagos State. The more recent Lagos State Arbitration Law is perceived to be superior[107] in some significant respects to the older federal enactment and thus potentially more beneficial for attracting international arbitration. Indeed, one of the objectives behind enacting the Lagos Arbitration Law is to make Lagos State an attractive venue for the conduct of arbitration proceedings. If it were to be held, that it is not within the legislative competence of Lagos State to enact such legislation, the Arbitration and Conciliation Act with its perceived shortcomings, must be applied, at least in respect of arbitrations concerning international and interstate trade and commerce. This has the potential of harming the prospects for attracting international arbitration to Lagos State and necessarily to Nigeria. On the other hand, those states which still retain the old colonial era origin arbitration laws are also very unlikely to be able to attract international arbitration to their territories, not least because those laws do not even really address international arbitration.[108]

In light of the foregoing, the conclusion is preferred that, insofar as it is constitutionally justifiable, a federal legislation on arbitration should operate as a non-mandatory alternative to state arbitration laws even in respect of international arbitration and interstate commerce arbitration. This means that parties who wish to hold arbitration proceedings could opt for the perceived superior regime of the Lagos State Arbitration Law. At the same time, parties who wish, or are compelled, to conduct arbitration proceedings in one of the states without an up to date state enactment on arbitration could opt for the regime of a federal legislation which would be available as an alternative in all the component states of Nigeria. The real question then is whether there is an acceptable constitutional basis to conclude that both the federal and state legislatures have legislative competence to enact legislation concerning international arbitration and interstate commerce arbitration.

Somewhat indirectly, the Lagos State Government seems to accept the conclusion that both the federal and state legislatures have competence to enact arbitration legislation extending to international arbitration and interstate commerce arbitration. This stems from the part of its argument that is based on a concept called "the doctrine of pith and substance" which it borrows from Canadian jurisprudence and constitutional interpretation.[109] The essence of the argument as premised on the doctrine of pith and substance is that in a federal system, if legislation enacted by either the federal legislature or a state legislature is in pith and substance within its constitutional legislative competence, the legislation is not to be rendered invalid simply because it encroaches incidentally on a matter within the legislative competence of the other. It would follow that, in enacting its law on arbitration, an incidental encroachment on federal legislative power, should not render the Lagos law invalid.

While the position of Lagos State commends sympathy, there are questions about the extent to which its reliance on the doctrine of pith and substance is sufficient to support the constitutionality of the Lagos State Arbitration Law. In the first place, although the doctrine of pith and substance has also been invoked in India,[110] it appears to be a peculiar derivation of particular Canadian constitutional arrangements[111] and it is uncertain that it would necessarily be adopted by the Nigerian courts in respect of the Nigerian Constitution.[112] Secondly, the doctrine requires that it should be established that Lagos State has competence to enact legislation on arbitration

[106] In addition, this approach is more likely to serve as a stimulus for legislative authorities at both the federal and, especially, state levels to ensure that they have efficient and up to date arbitration legislation governing arbitration conducted within the respective territories for which they have legislative authority.
[107] See, e.g. Olawoyin, "Constructing the Road to Arbitral Prevalence: The Arbitration Law of Lagos State 2009 in Perspective" (2015) 2 *International Arbitration Law Review* 34, 43–45 ; U. Azikiwe & F. Onyia, "Nigeria: Trends and Developments — International Arbitration" Chambers & Partners Global Practice Guide 2016, *http://www.chambersandpartners.com/guide/practice-guides/location/265/7913/2153-199* [Accessed 13 January 2016]; for a general review of the Lagos State Law, see Onyema, "A Critique of the New 2009 Arbitration Law of Lagos State" (2010) 2(5) *Apogee Journal of Business, Property & Constitutional Law* 1.
[108] See, e.g. *Murmansk State Steamship Line* (1974) 2 SC 1; (1974) All Nigeria Law Report 893; [1974] 3 ALR (Comm) 1.
[109] See Lagos State Arbitration Reform Committee Report of February 2008, p.24.
[110] See, e.g. S.P.M. Bakshi, "A Background Paper on Concurrent Powers of Legislation Under List III of the Constitution" Paper prepared for the Law Commission of India, *http://lawmin.nic.in/ncrwc/finalreport/v2b3-3.htm*.
[111] See, e.g. R. Desgagnés & A. Hussain, "The Usefulness of Canadian Constitutional Concepts to Interpret Hong Kong's Basic Law" (2012) 6 *Journal of Parliamentary & Political Law* 509; see also G. Baier, *Courts and Federalism: Judicial Doctrine in the United States, Australia, and Canada* (University of British Columbia Press, 2006), p.16, asserting Canada's relative uniqueness among federations in listing powers of national and unit legislatures.
[112] See also Olawoyin, "Constructing the Road to Arbitral Prevalence: The Arbitration Law of Lagos State 2009 in Perspective" (2015) 2 *International Arbitration Law Review* 34, 37–38.

in the first place, whereas the state's argument on this point does not appear to clearly address the matter of the basis of the state's legislative competence on arbitration.[113]

Despite the shortcomings identified with the reliance by Lagos State on the pith and substance doctrine, it is thought that a better development of the argument has the potential to provide a satisfactory constitutional justification for the acceptance of the competence of Nigerian states to enact legislation extending to international arbitration and interstate commerce arbitration. A revised version of the argument, as presented below for example, will take into account other considerations arising from the Nigerian Constitution and, especially, elements of extant jurisprudence of the Nigerian Supreme Court both of which have been mostly overlooked[114] in the literature and case law on constitutional competence over arbitration.

As pointed out earlier, the Nigerian Supreme Court accepted in *Aberuagba* that even though "trade and commerce" is only in the Exclusive Legislative List, state and even local governments "have their respective shares to control trade and commerce." It is true that the primary basis for this conclusion by the Supreme Court is that federal power on trade and commerce is restricted to interstate and international trade and commerce thereby leaving intrastate trade and commerce as a residual matter within the legislative competence of states. On the other hand the court also analysed other provisions of the 1979 Constitution which appeared to confer legislative competence over aspects of trade and commerce on the states.

In its consideration of the respective legislative competences of the federal and state legislatures on trade and commerce in *Aberuagba*, the Supreme Court held that all the provisions of the 1979 Constitution which had a bearing on the trade and commerce power of the federation and of the states must be read together.[115] In reaching the conclusion that the federal legislature did not have exclusive power over trade and commerce in item 61, the Supreme Court considered provisions in the Concurrent Legislative List of the 1979 Constitution relating to "industrial, commercial or agricultural development".

First, the court reiterated that both the federal and state legislatures had powers to legislate on matters contained in the Concurrent List although to the extent specified for either of them. The court then noted that according to item H 17(a) of the Concurrent List, the federal legislature was empowered to make laws for the federation or any part of it in respect of the health, safety and welfare of persons employed to work, inter alia, "in inter-state transportation and commerce." Significantly, the Supreme Court stressed that it was also provided in para.18 of the same item H of the Concurrent List of the 1979 Constitution that, subject to the provisions of [illegible] Constitution, a state legislature may "make laws for [illegible] state with respect to industrial, commercial or agricultural development of the state."[116] Even more significantly, the court also noted that para.19 of the same item H provided that nothing in all the paragraphs of the item shall be construed as precluding a state legislature "from making laws with respect to any of the matters referred to" under the item. The court then held that it considered the scope of para.18 "as enabling a State to regulate trade and commerce within its borders."[117]

It is important to note that the provisions of item H of the Concurrent List of the 1979 Constitution are reproduced in almost identical terms as items 17–20 on the Concurrent Legislative List of the 1999 Constitution. Also, there is no immediate reason to suggest that the Supreme Court is likely to adopt a different interpretation to the same provisions in the 1999 Constitution as it had construed under the 1979 Constitution.

Relating the foregoing aspects of *Aberuagba* to whether a state legislature has competence to enact legislation extending to international arbitration and interstate commerce arbitration, the following observations arising from the case are pertinent. First, a state legislature has competence to enact laws concerning trade and commerce within its borders; secondly, a state legislature has competence to enact laws for the industrial and commercial development of the state. It follows that to the extent that a state law on arbitration concerns trade and commerce within its borders and has as one of its objectives the industrial and commercial development of the state such a law would ordinarily be within the constitutional legislative competence of the state. Even this conclusion does not, however, conclusively resolve the question whether a state law on arbitration, if it extends to international or interstate commerce arbitration, is not to be regarded as straying into the areas of legislative competence of the federal legislature. On the other hand it is at this juncture that the doctrine of pith and substance has the potential capability to provide constitutionally defensible justification for a state law extending to international arbitration and interstate commerce arbitration.

The doctrine of pith and substance requires first that a law enacted by one authority, in a federal system, is to be examined in terms of whether its subject falls within the area of legislative competence of the authority. According to the Canadian Supreme Court in *Ward v*

[113] See further Olawoyin, "Constructing the Road to Arbitral Prevalence: The Arbitration Law of Lagos State 2009 in Perspective" (2015) 2 *International Arbitration Law Review* 34, 38.
[114] Cf. however, Olatawura, "Constitutional Foundations of Commercial Investment Arbitration in Nigerian Law and Practice" (2014) 40(4) *Commonwealth Law Bulletin* 657, especially 663–666.
[115] *Aberuagba* (1985) 1 NWLR (part 3) 395 at 413.
[116] *Aberuagba* (1985) 1 NWLR (part 3) 395 at 418
[117] *Aberuagba* (1985) 1 NWLR (part 3) 395 at 416. While the court held that this provision did not entitle a state legislature to impose a sales tax discriminating against interstate or international trade and commerce, the court emphatically rejected the suggestion that the power to legislate on all fiscal subjects had been vested in the federal government as that would mean none of the states "would survive for one day." See *Aberuagba* at 418.

Canada (Attorney General),[118] the first task in a pith and substance analysis is to determine the pith and substance or essential character of the law in question. The court notes that this requires a consideration of two questions: "first, what is the essential character of the law? Second, does that character relate to an enumerated head of power granted to the legislature in question …?"

In relation to the first question, on the analysis that has been presented in this article, the essential character of a state law on arbitration is that it is a law concerning trade and commerce within that state and for its industrial and commercial development. Its essential character does not end simply at being a law to provide an alternative dispute resolution mechanism. In relation to the second question the character of a state law on arbitration in Nigeria clearly falls within the constitutional legislative competence of Nigerian states as the Supreme Court has confirmed that those states have power to make laws for trade and commerce within their territories as well as for their industrial and commercial development.

The Canadian Supreme Court highlighted some guidelines for analysing the relationship between the legislative powers of the different levels of government.[119] The guidelines are summarised by McLachlin CJ under two headings: (a) that the Constitution "must be interpreted flexibly over time to meet new social, political and historic realities"; (b) that the "principle of federalism must be respected." In elaborating further on the second heading McLachlin CJ noted that: each order of government is autonomous "in developing policies and laws within their own jurisdiction"; "Classes of subjects should be construed in relation to one another"; and "where federal and provincial classes of subjects contemplate overlapping concepts, meaning may be given to both through the process of 'mutual modification.'"[120]

What McLachlin CJ referred to as "mutual modification" together with another principle known as "concurrency" are used in Canadian jurisprudence in the process of determining whether separate enactments of Canadian federal and provincial governments on overlapping areas of legislative competence can both stand valid or whether one is to be regarded as going beyond the enacting authority's competence.[121] The mutual modification principle is to the effect that in the event of legislation by one authority extending to areas of overlapping competence with the other, the determinant factor is whether the features of the law relating to the enacting authority's competence are more or less important than the features relating to the other authority's area of competence. If they are more important, the legislative competence of the enacting authority prevails; otherwise, its legislative competence must be interpreted with modification to concede legislative competence to the other authority.[122] The concurrency principle on the other hand is to the effect that in some circumstances where enumerated constitutional powers of the federal and state authorities overlap, the features of a law passed by one of them relating to its area of competence may be as important as those which touch upon the other's areas of competence. In such case, it would not be possible to allocate legislative competence exclusively to either government.[123]

Applying some of the lessons derived from the foregoing discussion of Canadian jurisprudence to the Nigerian situation and in particular the question of whether a state law on arbitration, which has been argued to be within the state's legislative competence, unconstitutionally encroaches on federal legislative competence, the following considerations are noteworthy. First, the Constitution is to be interpreted in a flexible manner to take account of new social, political, historical and, it may be added, economic realities. The current reality is that Nigeria desires to position itself as favourably disposed towards international arbitration. It also desires to advance trade and commerce and to attract international business and inward investment. Consistent with the federal aspirations, individual states of Nigeria similarly seek to provide an atmosphere favourable to inward investment and, to this end, some of them consider the establishment of an arbitration regime of international standard to be an important strategy. A doctrinally sound approach towards the interpretation of the Constitution's provisions as they concern legislative competence over arbitration which advances the ability to achieve these complementary objectives without undermining the integrity of the federalist structure of the constitution would be very helpful.

The adoption of an interpretative approach based on or similar to the Canadian principle of concurrency could prove to be particularly helpful in arriving at a conclusion that both the federal and state legislatures in Nigeria have competence to enact arbitration laws concerning international arbitration and interstate commerce arbitration. The Nigerian Supreme Court accepted that both the federal and state legislatures have legislative competence in respect of trade and commerce. The court

[118] *Ward v Canada (Attorney General)* [2002] 1 SCR 569; 2002 SCC 17 (CanLII)
[119] That is, the federal and provincial governments in Canada, or, as would be the case in Nigeria, the federal and state governments.
[120] *Ward* [2002] 1 SCR 569; 2002 SCC 17 (CanLII) at [30].
[121] See, e.g. W.R. Lederman, "The Concurrent Operation of Federal and Provincial Laws in Canada" (1963) 9 *McGill Law Journal* 185; D. Beatty, *Constitutional Law in Theory and in Practice* (Toronto University Press, 1995).
[122] In the Canadian context itself, the principle was once summarised in the following terms: "If the federal features of the challenged law are deemed clearly to be more important than the provincial features of it, then the power to pass that law is exclusively federal. In other words, for this purpose the challenged law is classified by its leading feature, by its more important characteristic, by its pith and substance. And if, on the other hand, the provincial features are deemed clearly more important than the federal ones, then power to pass the law in question is exclusively provincial." See Lederman, "The Concurrent Operation of Federal and Provincial Laws in Canada" (1963) 9 *McGill Law Journal* 185, 187.
[123] Again, this has been aptly summarised in the context of Canadian jurisprudence by Lederman that: "If … it develops that the federal and provincial aspects of the challenged law are of equivalent importance — that they are on the same level of significance - then the allocation of exclusive power one way or the other is not possible." He thus notes further that "the idea of mutual exclusion if practical, but concurrency if necessary, explains much of Canadian constitutional law." Lederman, "The Concurrent Operation of Federal and Provincial Laws in Canada" (1963) 9 *McGill Law Journal* 185, 188.

also held that a state legislature has competence to enact laws for its industrial and commercial development. Thus if it is established that the essential character of a state's law on arbitration which includes provisions for international and interstate commerce arbitration relates to trade and commerce within that state and, especially, to the industrial and commercial development of the state, it would be entirely reasonable to hold that this feature is at least as important as any elements touching on federal legislative competence on interstate and international trade and commerce. It would follow that the power to enact arbitration legislation extending to cover international arbitration and interstate commerce arbitration is not exclusive to either the federal legislature or state legislatures.

6. Final considerations

The history of arbitration legislation in Nigeria instructs that state legislatures[124] have always had their own arbitration laws. These state laws were more concerned with the conduct of arbitration proceedings within the territory of the state concerned and not so much whether the dispute itself or the parties had connections to other territories. The current debate of whether the legislation concerned intrastate commerce, interstate commerce or international commerce did not arise.

When the Arbitration and Conciliation Act was promulgated as a decree by a military government, the fact that the military government had already suspended the erstwhile constitution and empowered itself to legislate for the entire country meant that there was no challenge to the applicability of that legislation nationally. The Arbitration and Conciliation Act did not, however, repeal the state arbitration laws. There are reasonable grounds to conclude that this was a deliberate action.[125]

The constitutional issue that has arisen since the advent of Nigeria's Constitution of 1999 is simply due to the fact that legislative competence over arbitration is not explicitly spelt out in that Constitution. Further, the allocation of legislative power in respect of trade and commerce under the Constitution, while following a discernible principle to reserve interstate and international trade and commerce to the federal legislature, exhibits some amount of complexity and requires a careful analysis, interpretation and application of provisions on the legislative powers of the different tiers of government.[126]

In determining the legislative competences of the different tiers of government over arbitration, it would be helpful to keep a number of overarching practical, economic and legal considerations in mind. First, the federal and state governments have complementary objectives to facilitate arbitration as a dispute mechanism and to develop arbitration as a potentially lucrative business sector in attracting international arbitration to Nigeria. Secondly, the Nigerian Constitution must be interpreted in a manner that promotes the legitimate and constitutional objectives and obligations of government in Nigeria without undermining its underlying principles of federalism.[127]

The Supreme Court has laid down principles for the interpretation of the Nigerian Constitution. With deliberate attention, the conclusions suggested in this article about how to approach the determination of legislative powers of the federal and state governments over arbitration are consistent with the principles of constitutional interpretation laid down by the court. In *Aberuagba*, the court reiterated the constitutional interpretation principles that it had laid down previously,[128] paraphrased as follows:

- the fundamental principle is that such interpretation as would serve the interest of the Constitution and would best carry out its objectives and purpose should be preferred
- relevant provisions must be read together, not disjointly;
- clear and unambiguous words must be given their ordinary meaning—except if this would result in absurdity or conflict with other provisions of the Constitution;
- effect must be given to those provisions without recourse to any other consideration;
- where the Constitution has used an expression in the wider or in the narrower sense the court should always lean to the broader interpretation where the justice of the case so demands—unless there is something in the constitution to indicate that the narrower interpretation will best carry out its object and purpose;

[124] Prior to the advent of federalism and the creation of states in Nigeria, regional legislatures had similarly adopted arbitration legislations again based on the old Arbitration Ordinance; see, e.g. Arbitration Law cap 7 Laws of Northern Nigeria and also *Kano State Urban Development Board* (1986) 5 NWLR (part 39) 74.
[125] The Arbitration and Conciliation Act only applies in respect of commercial arbitration and it is reasonable that it would not disturb pre-existing arbitration legislation covering matters outside its own scope. Furthermore, an impetus for enacting the Act was the need to implement Nigeria's obligations under the New York Convention which was not a matter addressed under the pre-existing arbitration legislation. More generally, another underlying factor leading to the enactment of the Act is the facilitation of international commercial arbitration. All these were achieved under the Act without the need to repeal pre-existing state legislation.
[126] That is, as spelt out in the Exclusive and Concurrent Legislative Lists and as may fall within the residual category.
[127] It is helpful to recall the dictum from the Canadian case of *Ward* [2002] 1 SCR 569; 2002 SCC 17 (CanLII), that, even while respecting the principle of federalism, a Constitution should be interpreted flexibly over time to meet new social, political and historic realities with the added suggestion that this should also include economic realities.
[128] See *Ifezie v Mbadugha* (1984) 5 SC 79; see also *Nafiu Rabiu v The State* [1982] 2 NCLR 293 at 326–329.

- in other words, where the provisions of the constitution are capable of two meanings, the court must choose the meaning that would give force and effect to the Constitution and promote its purpose.[129]

It is reiterated that the general expression "trade and commerce" in item 62 of the Exclusive Legislative List of the 1999 Constitution includes the specific subject of arbitration. This is consistent with the Supreme Court's interpretation of the expression in *Aberuagba* in which the court recognised the embracing nature of the words trade and commerce. It must be recognised, necessarily, that the federal legislature has the competence to enact legislation on arbitration at least in relation to interstate and international trade and commerce.[130]

The Supreme Court also recognised that individual states also have legislative competence in respect of trade and commerce within their territories and, crucially, also in respect of their industrial and commercial development. Once again, arbitration is encompassed within trade and commerce and is also certainly a subject relating to the industrial and commercial developments of states. In general terms, states have legislative competence to enact arbitration legislation especially where the purpose is to attract the conduct of arbitration proceedings to the territory concerned as well as for the facilitation of alternative dispute resolution.

Significantly, the enactment of an arbitration legislation aimed at attracting interstate and international arbitration to a particular state takes nothing away from the legislative competence of the federal government to legislate concurrently on the same matter. It is important that separate federal and state legislation both extending to interstate commerce arbitration and international arbitration can coexist without conflict—*even if they contain provisions differing in particular respects*. What is key is that the respective legislations should operate as alternatives open to choice by parties to arbitration. This would demonstrate a commitment to party autonomy and freedom of choice and contribute to enhancing Nigeria's image as an arbitration-friendly jurisdiction.

The possibility of coexistence of federal and state legislations on interstate commerce arbitration and international arbitration as alternative regimes is already reflected in Nigerian jurisprudence. In *Stabilini*, the Court of Appeal implicitly accepted that parties to arbitration could choose to conduct the proceedings under the Arbitration and Conciliation Act instead of the Lagos State Arbitration Law; both legislation of course purport to cover interstate commerce arbitration and international arbitration. Further, the Lagos State Arbitration Law itself contains a provision which recognises that arbitration proceedings conducted within the territory of the state could be subjected to a different regime as a result of the parties' choice. This was commended in *Stabilini* as "making sense".[131]

Interestingly, the trial judge in *Etuk* also recognised that federal and state arbitration legislation can coexist as alternatives[132] and his decision on the case is more consistent with the facts[133] and relevant principles of constitutional interpretation than the doctrine of covering the field employed by the Court of Appeal. The doctrine of covering the field is a particularly inapposite basis for the resolution of the constitutional debate in respective of legislative competence over arbitration in Nigeria.[134] On a technical basis, its invocation in *Etuk* did not sufficiently address the important question of how the federal legislature had really "intended to cover the field" with the Arbitration and Conciliation Act. The doctrine is also inappropriate for the different reason which was accepted in *Stabilini* that it is right for parties to arbitration to have the right to select among alternative regimes.

The Lagos State Arbitration Law clearly provides for the possibility of choice among alternative arbitration regimes. It is the contention of this paper that the existing federal Arbitration and Conciliation Act does so too and should be so interpreted. This explains why it did not repeal prior arbitration legislation in the various states and it also seems that where occasion has arisen the courts have been willing to continue applying the state arbitration laws even during the life of the federal legislation.[135]

The prospect for the clarification of the legislative competence over arbitration is in a better place following the enactment of the Lagos State Arbitration Law.[136] That law has set an example of what the various legislatures in Nigeria can do with future prospective arbitration legislation in terms of making similar provisions enabling the parties to arbitration to select among different possibly applicable regimes. This is especially pertinent in respect

[129] See *Aberuagba* (1985) 1 NWLR (part 3) 395 at 414. In addition to these principles related by the Bello JSC in *Aberuagba*, he also made another pertinent remark in the lead judgment when he stated (at 427): "Our Constitution should be interpreted in such a manner as to satisfy the susceptibilities of the Nigerian societies for whom it was made and to meet the needs of the Nigerian institutions."

[130] The issue of whether the federal legislature can also legislate in respect of arbitration relating to intrastate trade and commerce has not needed to be pursued in this article for a number of reasons including that it is not important or necessary that the federal government should enact arbitration legislation relating to intrastate commerce. This is because even if the legislative competence of the federal legislature is confined to interstate and international trade and commerce, this would still leave the states with the competence to retain their extant arbitration legislation or to enact new legislation to address arbitration dealing solely with intrastate commerce.

[131] See *Stabilini* [2014] 12 NWLR (part 1420) 134 at 180.

[132] He held that the Arbitration Law of Cross River State applied to the case before the court despite the existence of the federal Arbitration and Conciliation Act.

[133] The facts of the case suggest that the parties actually contracted by reference to the Arbitration Law of Cross River State. The manner in which they provided for the appointment of arbitrators and their agreements for default of appointment are directly consistent with that law in contradiction to relevant provisions of the federal Arbitration and Conciliation Act, It is also significant that one of the parties claimed to have acted in accordance with the Cross River State law.

[134] See also Olatawura, "Constitutional Foundations of Commercial Investment Arbitration in Nigerian Law and Practice" (2014) 40(4) *Commonwealth Law Bulletin* 657, 666–667; Olawoyin, "Constructing the Road to Arbitral Prevalence: The Arbitration Law of Lagos State 2009 in Perspective" (2015) 2 *International Arbitration Law Review* 34, 40–43.

[135] *Kano State Urban Development Board* (1986) 5 NWLR (part 39) 74.

[136] Even if only that Nigeria's highest courts will have to confront the constitutional issue directly at some point with the possibility that a case like *Stabilini* [2014] 12 NWLR (part 1420) 134 will go on appeal to the Supreme Court.

of the proposals for a new federal arbitration legislation. The recommended approach is that like the current Arbitration and Conciliation Act, a new federal arbitration legislation should be made applicable throughout the federation at least in respect of interstate commerce arbitration and international arbitration. Like the current Act, it should not repeal extant state arbitration laws[137] but unlike the current Act it should set out explicitly that parties to arbitration can choose to select an alternative applicable arbitration legislation.

[137] The federal legislature almost certainly does not have legislative competence to repeal state arbitration laws anyway; see *Aberuagba* (1985) 1 NWLR (part 3) 395.