

National Industrial Court Nigeria Pre-2010 Constitutional Amendment and the Investment and Securities Tribunal – Common Bed Fellows?

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Abstract

The debate as to the powers of the Investments and Securities Tribunal (IST) as provided for by its enabling legislation, the Investment and Securities Act (ISA) has stirred up loads of controversy within academic and practice discusses. These controversies majorly pertain to the jurisdiction, status and powers of the Tribunal in the face of Constitutional provisions. In the not very distant past, the National Industrial Court of Nigeria (NICN) found itself in a similar quagmire that stalled the advancement of its own quota in the administration of justice process. The said court after a very intense struggle, was able to overcome its setback. The paper considers whether the approaches employed in tackling the challenges previously faced by the NICN can equally be adopted in the resolution of issues that presently confront the IST. In determining this, the paper reflects upon the journey undertaken by the NICN and how it was able to surmount its setbacks, which led it to its current standing, giving it its pride of place amongst other superior courts in Nigeria. The paper therefore recommends the possibility of the Tribunal taking a cue from the NICN by drawing a lesson or two from the NICN experience for the benefit of the IST, causing the latter to re-evaluate its current legal framework towards a more formidable corporate dispute resolution process.

Keywords: National Industrial Court of Nigeria, Investments and Securities Tribunal, Constitutional Amendment, Constitutionality, Jurisdiction.

1.0 Introduction

Once again, the issue of jurisdiction, status and powers of yet another judicial institution intended for dispute resolution in the administration of justice system in Nigeria is under the spotlight. This is coming a few years after a Constitutional amendment was carried out in response to constitutional issues that plagued the NICN in rather similar circumstances to those currently experienced by the IST.² In the case of the NICN, its problems began as far back as 1999 when the Constitution of that year was passed, leaving out the Court in its listing of superior courts of record, whether inadvertently or otherwise. The question as to the status of the Court which was once regarded as superior, became a subject of confusion and ridicule in the face of its existence. The outcome of this caused the NICN to be placed on the same pedestal as courts of inferior record and; sometimes, at best, be referred to as having concurrent jurisdiction with the High Courts. More perturbing were occasions during which decisions passed by the NICN were made subject to review by the High Courts.

The IST was set up as an administrative tribunal established by the ISA³. In its own case, it is conferred with appellate status to assume jurisdiction over matters initially adjudicated upon by the Securities and Exchange Commission (SEC) in the first instance. Besides this, the question of its exclusive jurisdiction over matters pertaining to capital market disputes and disputes arising from the operation of the ISA appear not to be in tandem with Constitutional provisions guiding the jurisdiction of the Federal High Court.⁴ In addition, the ISA confers the Court of Appeal with powers to determine appeals which lie from the IST.⁵ In summary, the status and the jurisdiction conferred on the IST defy constitutional norms, and where such is the case, the inconsistency rule may apply.⁶ This paper considers the validity of the powers conferred on the IST and what may be done to address the inadequacies of the said powers bestowed on it.

2.0 The Jurisdiction, Status and Powers of the Investment and Securities Tribunal by Virtue of the ISA vis a vis that of the Federal High Court under the CFRN 1999.

2.1 A Brief Background of the ISA and the Challenges Posed Therefrom

The ISA 2007 is the legislation responsible for the establishment of the IST.⁷ The ISA 2007 which is a repeal of

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² Constitution of the Federal Republic of Nigeria (Third Alteration) Act 2010.

³ See ISA 1999, s. 224; ISA 2007, s 274.

⁴ Constitution of the Federal Republic of Nigeria CFRN (1999) s. 251.

⁵ See ISA 2007, s. 284.

⁶ *ibid.* s 1.

⁷ Investment and Securities Act (ISA) s. 274.

the ISA 1999 was, amongst other things, established to guarantee the securities of investors and to sustain a fair, efficient and transparent market while simultaneously reducing systemic risks.¹ At the outset of its establishment, the IST was permitted to exercise exclusive jurisdiction in dealing with matters arising out of the then ISA.² In addition, its decisions were to be addressed directly to the Court of Appeal which assumed appellate jurisdiction by virtue of the rules and regulations contained under the Act.³ By 2007, when the Act was repealed, the exclusive jurisdiction and the powers for its decisions to lie to the Court of Appeal remained. However, a significant insertion was made to it. The Tribunal was given appellate powers over disputes emanating from the Securities and Exchange Commission (SEC) which heard matters in the first instance.⁴ The combined effect of the foregoing creates the following image for the IST: that it is empowered to preside over decisions emanating from the SEC;⁵ it has exclusive jurisdiction to preside over matters within its jurisdictional ambit⁶ in addition to matters specified in the Act and:⁷ appeals from the Tribunal lie to the Court of Appeal.⁸ What then is the implication of the role of the IST?

2.2 On the IST as an Appellate Body to the SEC

This area regrettably does not form the core of the discussion of this paper, but is nonetheless, worthy of briefly addressing. On the IST functioning as an appellate body as regards decisions from the SEC, there have been arguments as to whether SEC is a body established dependently of the IST or otherwise.⁹ Proponents to the arguments have given reasons why the SEC cannot be treated as part of the IST as it lies in breach the cardinal principles of fair hearing. It cannot be a judge in its own cause.¹⁰ Others have however argued that both exist independently of each other particularly so that the SEC was established under the ISA in the same manner that the latter also makes provisions for the establishment of the IST and for that reason, that the IST cannot assume appellate jurisdiction over matters from SEC.¹¹ This paper humbly allies with the latter position.

2.3 The Issue of Exclusive Jurisdiction

It is constitutionally provided that the Federal High Court (FHC) has and can exercise exclusive jurisdiction in civil cases, to the exclusion of any other court in matters arising from the operation of the Companies and Allied Matters Act (CAMA) or any enactment replacing the CAMA or regulating the operation of companies incorporated under the CAMA.¹² The Court's powers also extend to possessing exclusive jurisdiction in relation to actions or proceedings for a declaration or injunction touching on the validity of an executive or administrative action or decision by the Federal Government or any of its agencies such as CBN, SEC and the CAC¹³ and in addition, exclusive civil jurisdiction in matters pertaining to banks and other financial institution and actions arising in banks inter se or banker/customer relationship;¹⁴ In the same token, the IST has been accorded powers by the ISA to exercise jurisdiction to the exclusion of any other court, to hear and adjudicate over questions of law or disputes involving (1) a decision or determination of the SEC as well as disputes mainly: (a) between capital market operators (b) between capital market operators and their clients (c) between an investor and Securities Exchange or capital trade point or clearing and settlement agency; (d) between capital market operators and self-regulatory organisation (2) SEC and self-regulatory organisation (3) capital market operator and SEC; (4) an investor and SEC; (5) an issuer of securities and SEC; and (6) disputes arising from the administration, management and operations of collective investment schemes.¹⁵ The Tribunal also has the powers to exercise its jurisdiction in respect of other matters as may be prescribed by an Act of the National Assembly and it can also interpret laws, rules or regulations as may be applicable. From the foregoing, a cursory look at the jurisdictional boundaries would reveal that there is a clash of powers as regards the exclusive

¹ *ibid.* See Long title.

² ISA 1999.

³ J O Ikwanusi and A Oguekwe-Udeze, "The Investment and Securities Tribunal: A Case for the Division of the Federal High Court into Specialized Divisions" (January 7, 2016). Available at SSRN: <https://ssrn.com/abstract=2712448> or <http://dx.doi.org/10.2139/ssrn.2712448> accessed on 10 September, 2016.

⁴ *ibid.* s 289.

⁵ S 284 (1).

⁶ S 284 (2) and (3).

⁷ S 294.

⁸ S 295.

⁹ J O Ikwanusi and A Oguekwe-Udeze, "The Investment and Securities Tribunal: A Case for the Division of the Federal High Court into Specialized Divisions" (n 10).

¹⁰ *ibid.*

¹¹ *ibid.*

¹² CFRN, s 251(1) (e).

¹³ *Ibid.* s 251 (1) (r).

¹⁴ S 251 (1) (d).

¹⁵ ISA 2007, s 284 (1)

jurisdiction conferred on the FHC on the one hand and that bestowed on the IST on the other. The jurisdiction of the IST is therefore in clear breach of the provisions of the Constitution as it relates to the jurisdiction of the FHC and to such extent, calls the exclusive jurisdiction of the IST as found in sections 284 and 285 to question. It would be difficult if not impossible to sever the relationship between the operations of companies incorporated under the CAMA and the business of the IST under section 284 of the ISA. For instance, it is not unusual to be confronted with issues of mixed corporate law and securities regulation. It is also not out of place to find capital market dispute been resolved within the contemplation of CAMA's operations. In addition, the FHC has exclusive jurisdiction in civil causes and matters in relation to actions or proceedings for a declaration or injunction touching on the validity of an executive or administrative action or decision by the Federal Government or any of its agencies. SEC is an agency of the Federal Government and an application for a declaration of injunction of the Administrative Proceedings Committee's decision under section 284 (1) falls within the scope of Section 251(1) (r).

First and foremost, the IST was established to be a tribunal and must be treated as such.¹ It was established under the ISA in 1999 to exclusively preside over securities disputes. The present ISA is a part-product of the CAMA. It repealed and replaced within it, the aspect of CAMA which formerly dealt with 'Dealings in Companies Securities' but which is now wholly captured by ISA.² The ISA created the IST as a specialist tribunal for the settlement of conflicts arising from securities. At the time of the creation of the IST, Constitutional provisions in relation to the exclusive jurisdiction enjoyed by the FHC were already in place. This leaves one to deduce the intent of the Legislature as likely being a case of reducing the burdensome jurisdictional scope of the FHC and donate a part of its powers to the IST and not to take over the other powers with which the FHC was originally bestowed. The FHC remains a court of superior status to the IST and this position is supported by provisions of the ISA to the effect that the latter's award or judgment should operate as a judgment of the FHC.³ Therefore, the jurisdiction of the IST in relation to that of the FHC can at best be described as complimentary rather than being outright exclusive.⁴

2.4 On the issue of the Status of the IST

Moving away from the issues of jurisdiction and unto the need to determine the status of the IST particularly surrounding the right conferred by the ISA on the IST regarding appeals, the question which arises is whether appeals from a tribunal can lie directly to the Court of Appeal. According to the Constitutional provisions, it provides for courts that are commonly referred to as superior courts of record.⁵ The judicial framework in Nigeria operates in a manner that the Supreme Court of Nigeria is the apex court in the Country. This is followed by the Court of Appeal and then by the High Courts or courts of equivalent powers, amongst others.⁶ Ordinarily, appeals lie from the High Courts (or similar ranking courts) to the Court of Appeal and thereafter to the Supreme Court. In addition to the foregoing courts, the National Assembly or House of Assembly has the powers to establish courts with subordinate jurisdiction to that of a High Court. In other words, any court created by the National Assembly or House of Assembly must not be superior or of equal ranking with the High Court or its equivalent.⁷

The IST was created by an Act of the National Assembly. As prescribed by the Constitution, the National Assembly is precluded from establishing courts that are superior or equal in status with the High Courts. In other words, the nature of courts the National Assembly is bound to establish must be of subordinate jurisdiction to the High Court.⁸ The National Assembly from time to time enacts laws which establish tribunals. It means the said tribunals rank amongst inferior courts of record and must therefore have jurisdiction subordinate to that of the High Courts. By implication, their powers must not extend beyond the powers of other inferior courts of record. By law, appeals generally lie from inferior courts of record to the high courts or such court of coordinate/equivalent jurisdiction. It is therefore uncharacteristic for an Act of the National Assembly, which is excluded by the Constitution from establishing courts of superior jurisdiction, to equally give powers beyond that which courts of inferior record are accorded. Consequently, the action by the National Assembly conferring the IST with powers to refer its decisions for appeal to the Court of Appeal is a jurisdictional blunder. The position of the law is that appeals from inferior courts of record must lie from them to the high courts or such

¹ CFRN, s. 6(5)

² Companies and Allied Matters Act (CAMA) Part XVII

³ ISA, s 293 (3)

⁴ See Olumide Famuyiwa, "Forum Issues in the Enforcement of Regulatory Obligations of Nigerian Public Companies" (2015) Afe Babalola University: Journal of Sustainable Development Law and Policy 5 (1).

⁵ CFRN 1999, s 6 (5).

⁶ See 6(5) (c-J).

⁷ CFRN 1999, s 6(4) (a).

⁸ *ibid.*

courts of coordinate jurisdiction.¹ There are however exceptions to the foregoing position. In the case of the Code of Conduct Tribunal² and Election Petition Tribunals,³ it is constitutionally provided for the said tribunals to have their appeals lie directly to the Court of Appeal. The IST does not fall under the said exceptions and as such, the powers it has under section 295 to refer its decisions to the Court of Appeal are therefore unconstitutional.

3.0 The Journey of the National Industrial Court of Nigeria

It would be recalled that quite recently, the National Industrial Court of Nigeria (NICN) suffered a similar fate. The exclusive jurisdiction of the court was severally challenged on the grounds that the enabling laws namely; the Trade Disputes Act and later, the National Industrial Court Act (NICA) which gave the Court exclusive jurisdiction within the Court's subject area lacked the requisite authority to so confer such powers on the said Court. The Court was therefore treated as an inferior court of record and as such, had its cases appealed to and reviewed by the High Courts rather than its decisions being entertained on appeal by the Court of Appeal. This was regardless of the fact that the NICN was once recognised as a superior court of record. The following is an account of the experience of the NICN and how it was able to surmount the challenges it was once plagued with.

3.1 *The NICN under the 1963 Constitution*

The National Industrial Court was established in 1976 by the Trade Disputes Decree No 7 of 1976⁴ but did not fully commence operation until 1978. At the time that the Trade Disputes Decree No 7 of 1976 was being promulgated, the intention that the framers of the Decree had for the NICN was that it be recognized as one of the Courts of the land.⁵ The jurisdiction of the Supreme Court as well as that of the High Court were left unaltered while the Decree, by use of consequential amendments made to the 1963 Constitution, introduced the NICN as one of the Courts in Nigeria⁶. Certain provisions of the Supreme Court Act No 12 of 1960 were also made applicable to the NICN.⁷ It was clear from the steps taken above that the intention of the legislature was to rank the NICN as one of similar status with the Supreme Court and the High Court.⁸

3.2 *The National Industrial Court under the 1979 Constitution*

It might have been expected that the opportunity would have been taken to incorporate the changes effected by Decree in 1976 in the 1979 Constitution. Unfortunately, this did not happen, thereby costing the NICN the opportunity to be constitutionally recognized as a court with the same standing as the Supreme Court or the High Court (as was the case with the predecessor Constitution). To correct this anomaly, the Trade Disputes Decree was amended⁹ purposely to make the commencement of trade disputes in courts other than the NICN an offence.¹⁰ In addition, the Decree expressly armed the NICN with jurisdiction to hear such matters to the exclusion of others and categorically stated therein that the Court shall operate as a superior court of record.¹¹ It is important to note here that at the time these changes were made, a Military Government was in place. It was the practice of Military Governments to oust the supremacy of the Constitution, making Decrees superior over the Constitution and indeed any other law.¹² In essence, in spite of the absence of the NICN being listed under the Constitution, it still assumed such status by virtue of a Military Decree.

3.3 *The National Industrial Court under the 1999 Constitution*

Seven years after the promulgation of the Trade Disputes (Amendment) Decree 47 of 1992, a new Constitution was enacted in 1999 (by which time, the Military government had been replaced by democratic rule) and it was again detected that the NICN was not included in the provisions listing courts of constitutional record, which by implication again left its status in question. With this discovery, the dilemma as to the constitutionality and status of the NICN caused the jurisdiction of the Court to be challenged which issue in turn stirred up several

¹ BPE v NUEE.

² See Code of Conduct Bureau and Tribunal Act Cap C15 LFN 2004.

³ Electoral Act 2010.

⁴ The Court was established by the Trade Disputes Decree No 7 of 1976, now referred to as the Trade Disputes Act Cap T8 Laws of the Federation of Nigeria, 2004.

⁵ Benedict Bakwaph Kanyip, "The National Industrial Court: Jurisdiction, Powers and Challenges" in Labour Law Manual (Enobong Etteh ed.) 2007, 52.

⁶ See Decree No 7, ss15 and 22.

⁷ s 21.

⁸ *ibid.* (n 35) 58.

⁹ Decree No 47 of 1992.

¹⁰ *ibid.* s 1A (2).

¹¹ s 5.

¹² *Labiyyi v Anretiola* (1992) 8 NWLR (Pt. 258) 139.

controversial debates.¹ Even litigants via their lawyers were seen to undermine the provisions conferring superior status on the Court. They treated the Court as an inferior court of record when applications were brought by them before the Federal High Courts to exercise judicial review on judgements pronounced by the NICN.² The net effect of the Court's omission from the 1999 Constitution caused identity crises for the NICN.

As was earlier stated, the omission of the Court from both the 1979 and the 1999 Constitutions caused a setback to the Court's normal operations, particularly those which it carried out while it was recognized as a superior court of record. Its exclusion from the 1999 Constitution in particular, affected it so badly that its status was likened to that of a mere administrative body or commission of inquiry whose decisions are by law subject to judicial review by the High Court. This meant that a Court that had once enjoyed the privileges attached to the institution of the High Court by virtue of its being of equal ranking with that Court, now had to have its decisions reviewed by it.³ This was a slight to the existence of the NICN.

The continued inability to effectively determine the scope of the jurisdiction of the Court meant that the NICN continued to share concurrent jurisdiction in the resolution of trade disputes with such other courts as the Federal High Court, the State High Courts (which number 36 across the Country) and the High Court of the Federal Capital Territory (FCT). This paved the way for multiple decisions on the same issue.⁴ It also caused litigants to go forum shopping in search of judgments that were most favourable to them. For instance, at the High Court, while collective agreements had binding effects only if they were included in the conditions of service of the employees, it was a different matter at the NICN. No such qualification was required by the NICN before such agreements were accepted as binding. This sort of practice availed litigants the opportunity to pick and choose from what was beneficial to them.⁵ Additionally, such practice gave rise to conflicting decisions from different courts. In the case of *Federal Government Nigeria v. Oshiomole*⁶ for instance, a matter which no doubt was well suited for the NICN was commenced before the High Court of the FCT. The matter proceeded on appeal where the Court of Appeal held that the court of first instance lacked jurisdiction and it referred the matter to the Federal High Court (FHC) which had an extensive territorial jurisdiction spanning across the whole country. The reasons adduced for referring the matter to the FHC were preposterous: the main reason given was that the Court was mainly seized with jurisdiction on matters pertaining to the Federal Government and its establishment. This rationale was offered notwithstanding the fact that the dispute in question was in relation to labour (an area within the exclusive jurisdiction of the NICN) and that the NICN possessed similar national territorial jurisdiction as that of the FHC.

The Court of Appeal's pronouncements on other similar matters also did not assist the NICN in escaping from the controversy surrounding it. More than anything, it was made more impossible for the NICN to acclaim a superior standing. In the case of *Kalango v Dokubo*⁷ for instance, the Court of Appeal in referring to the status of the Court under the Constitution stated that although it recognized that the NICN was 'not one of those specified in section 6(5)(a)-(i) of the 1999 Constitution as one of the only superior courts of record...', it however maintained that '... [it] is, nevertheless, not an inferior court'.⁸ The rationale of the Court's finding was based on the amendment done to section 19 of Decree 47 of 1992, an authority which unfortunately, was no longer relevant in the scheme of democratic governance. At the time this decision was made, Military rule had become an event of the past. Regrettably, however, this case set a precedent which subsequent cases erroneously relied upon.⁹

However, in the case of *Bureau of Public Enterprises (BPE) v National Union of Electricity Employees (NUEE)*¹⁰, the Court of Appeal took a divergent view and held that though section 2 of the Decree no 47 of 1992 may confer exclusive jurisdiction on the NICN, such a provision could not override section 1(3) (the supremacy provision) of the 1999 Constitution and, therefore, that the section under that Decree becomes null and void and of no effect on the authority of the said Constitutional provision. The position as stated by the same Court in the *BPE v. NUEE* case was the correct position. With the exit of Military rule from the country, section 19 of Decree

¹ Benedict Bakwaph Kanyip, "The National Industrial Court: Jurisdiction, Powers and Challenges" in *Labour Law Manual* (Enobong Etteh ed.) 2007 *ibid* (n 16) 52, 57 for a list of contribution by legal authors at the NIC's 25th anniversary celebrations, discussing the need for the NIC to be repositioned.

² For example, see *SGS Inspection Services Limited (Nigeria) Limited v Petroleum and Natural Gas Senior Staff Association of Nigeria (PENGASSAN)* Suit No NIC/3/2000 (Unreported). Summarized at pp 428-430 of the Digest of Judgments of the NIC (1978-2006) Oluwole Kehinde ed.

³ *ibid*.

⁴ *ibid* (n. 35).

⁵ *ibid*.

⁶ (2004) 3 NWLR (Pt. 860) 305.

⁷ (2003) 12 WRN 32.

⁸ p 77.

⁹ *Attorney-General Oyo State v Nigerian Labour Congress* (2003) 8 NWLR 1; *Ekong v Osude* (2004) All FWR 562.

¹⁰ (2003) 13 NWLR (Pt. 837) 382.

47 of 1992 was no longer applicable and could no longer take precedence over Constitutional provisions in a democratic era. Although section 315(1) of the Constitution permits the continued application of existing laws at the time of enactment of a new Constitution, section 315(3) states in clear terms that a court is empowered to declare any provision of such existing law as invalid once it is found to run inconsistent with the provision the Constitution.¹ The provisions of the Trade Disputes Act (as amended), conferring the NICN with exclusive jurisdiction runs inconsistent with several constitutional provisions. For instance, section 251 confers the Federal High Court with exclusive civil jurisdiction in matters particularly pertaining to the Federal Government and its agencies. By virtue of section 272, the State High Courts have jurisdiction to preside over civil actions that are to the exclusion of those within the jurisdiction of the Federal High Court as listed in section 251. Therefore, it was impossible for the NICN to claim *exclusive* jurisdiction to civil actions that derive out of labour disputes and assume *exclusive* jurisdiction over same.² The best that could have been achieved was for it to share jurisdiction with the State High Courts. As things stood however, the NICN remained an inferior court of record and unable to assume exclusive jurisdiction over civil matters pertaining to labour disputes. This meant that the decisions arrived at by the Court in matters that came before it were still capable of undergoing judicial review by the State High Courts under the supervisory powers conferred on the latter by the Constitution.³

3.4 National Industrial Court Act (NICA) 2006 is passed

It became clear that the NICN was lacking the power to succeed in the roles for which it was established and, as such, there was the need to confer on it the status of a superior court of record and to arm it with exclusive jurisdiction in matters pertaining to labour and trade dispute resolution. To achieve this, therefore, the 1999 Constitution required amendments to accommodate the listing of the NICN and also, to revise the provisions of the TDA in order to place the powers of the Court in the right perspective. In November 2003, a conference was organized by the Court to devise the means of rectifying the anomalies which it was plagued with.⁴ The holding of this conference was instrumental to the then President of the Country, Chief Olusegun Obasanjo, sponsoring the National Industrial Court Bill 2006. This Bill was passed into law in the same year, making groundbreaking changes to the regime of the NICN. Most of the complications earlier discussed were addressed. The most significant achievement of the Act was that it re-established the NICN as a superior court of record.⁵ In addition, the establishment of the Act made it possible to oust the TDA from its control over the NICN by providing the Court with its own enabling law.

Given the improvements achieved by the introduction of the NICA 2006, it is regrettable that the efforts made to set the Court in line with other superior courts of record and to accord it with its rightful jurisdiction once again ended up in a catastrophe. The approach adopted by the National Assembly in the bid to remedy the standing of the Court to a superior court of record as well as to bestow it with exclusive civil jurisdiction in labour matters was claimed to be unlawful. To adjust the status of the Court, the National Assembly simply enacted provisions stating that 'the Court shall (a) be a superior court of record; and (b) except as may be otherwise provided by any enactment or law, have all the powers of a High Court.'⁶ In addition, section 7 of the Act went on to state the areas in which the Court shall have and exercise exclusive civil jurisdiction in relation to labour matters.⁷ This development was greeted with enormous criticisms from legal practice and academia that such action was incapable of achieving any meaningful changes for the administration of the Court. The opinion of the majority was that the provisions of sections 1(3) and 7 were unworkable for similar reasons as those surrounding the Trade Disputes Act (as Amended). In relation to the Court ranking with the High Court, the Constitution clearly provided that the Courts listed under section 6(5)(a-i) shall be the *only* superior courts of record, namely: (a) the Supreme Court of Nigeria; (b) the Court of Appeal; (c) The Federal High Court; (d) the High Court of the Federal Capital Territory, Abuja; (e) a High Court of a State; (f) the Sharia Court of Appeal of the Federal Capital Territory, Abuja; (g) a Sharia Court of Appeal of a State; (h) the Customary Court of Appeal of the Federal Capital Territory, Abuja; and (i) a Customary Court of Appeal of a state.⁸ The only circumstances under which the National Assembly could establish a court was if such court were of subordinate jurisdiction to that of a High Court and not of coordinate jurisdiction.⁹ On the question of exclusive jurisdiction, the enactment of the NICA by the National Assembly ran contrary to the provisions of section 251 of the Constitution which

¹ s 315(3)(d).

² Emphasis added.

³ s 272(2).

⁴ The conference was titled 'Nigerian Industrial Dispute Settlement System: Challenges and Prospects of the National Industrial Court' Chaired by the then Chief Justice of the Federation.

⁵ See the Commencement provision of the Act as well as its s 1(3)(a).

⁶ s 1(3)(a) and (b).

⁷ s 7(1-6).

⁸ CFRN (Pre-amendment), s 6(3). Emphasis added.

⁹ s 6(4)(a).

conferred the Federal High Court with exclusive jurisdiction in certain matters (which may or may not include labour disputes) as well as section 272 which conferred jurisdiction on the State High Courts in civil actions generally. As such, both provisions ran contrary to constitutional provisions and were necessarily declared null and void and of no legal consequence.¹

3.5 *The Turning Point for the NICN - Bureau of Public Enterprises v. National Union of Electricity Employees* (2010) 7 NWLR (Pt. 1194) 538 (BPE v. NUEE)

In spite of the unrelenting efforts made to justify the standing of the Court as a court of superior record with exclusive civil jurisdiction in civil labour actions, the matter was far from concluded. The case of *BPE v NUEE* (which earlier decided that conferring exclusive jurisdiction on the NICN based on section 2 of Decree No 47 of 1992 was null and void and of no effect in the light of Constitutional provisions) went on appeal to the Supreme Court of Nigeria. The background to that case was that BPE approached the State High Court via an application for interlocutory injunction preventing NUEE from commencing strike action until the hearing of the interlocutory injunction filed by BPE. NUEE raised a preliminary objection challenging the jurisdiction of the State High Court to entertain the action and declared rather that it was the NICN that had the exclusive jurisdiction to preside over such matters. The High Court agreed with this argument and decided that the NICN indeed had exclusive jurisdiction over such matters by virtue of the provision of section 2 of Decree 47 of 1992. Dissatisfied, BPE filed an appeal to the Court of Appeal where it was held that it was the trial Court that had jurisdiction over the matter and not the NICN. On the issue of jurisdiction, the Court of Appeal held that section 2 of Decree 47 of 1992 was inconsistent with section 272 of the 1999 Constitution. Displeased with the decision of the Court of Appeal, the NUEE appealed to the Supreme Court. The issues of the scope of the exclusive jurisdiction and of the status of the court were raised for consideration. On the issue of the Court's exclusive jurisdiction, the Learned Justice of the Supreme Court had the following to say:

‘Again, it is trite law that the jurisdiction of the State High Court as conferred by the Constitution can only be curtailed or abridged or even eroded by the Constitution itself and not by an Act or law respectively of the National Assembly or State House of Assembly, meaning that where there is conflict in that regard between the provisions of the Constitution and the provisions of any other Act or law of National Assembly or House of Assembly respectively the constitution shall prevail if I may emphasize expecting as I have observed above by direct and clear provision in the Constitution itself to that effect...’

On the issue of whether the NICN was a court of superior record or otherwise, the Supreme Court rejected the argument canvassed by NUEE to the effect that the interpretation of the combination of section 2 of Decree 47, and section 315 and section 316 of the Constitution meant that the NICN was a superior court of record. According to the Court:

‘by Decree No 47 of 1992 arrogating to the National Industrial Court a superior Court of record as has been contended by the appellants does not by that token make the said National Industrial Court a superior court of record without an amendment of the provisions of section 6(3) and (5) of the 1999 Constitution which has listed the only superior courts of record recognized and known to the 1999 Constitution and the list does not include the National Industrial Court; until the Constitution is amended it remains a subordinate court to the High Court.’

In conclusion, the Justice had this to say:

‘In summary, the implication of conferring exclusive jurisdiction in trade dispute on the National Industrial Court is to exclude the wide powers of the State High Court thus causing the conflict between Decree No 47 and section 272 of the Constitution and as I have outlined above any inconsistency with section 272 of the 1999 Constitution in that regard is void to the extent of the inconsistency.’

The judgment of the Supreme Court is striking for two reasons. First, the pronouncement by this Court stating its position on the issue of the status of the NICN and also, the extent of the latter's jurisdiction, were pronouncements made obiter. This meant the questions of the jurisdiction of the NICN and its constitutional status were not the subject of the judicial decision, and as such, the judicial pronouncement thereon has no binding effect. In spite of that fact, however, the Court was finally able to confirm its position on the issue of the status and jurisdiction of the NICN, as it was the first time the question had gone beyond the Court of Appeal for determination after being raised several times in the latter Court. The much-awaited outcome of this matter temporarily doused the tension raised by arguments of contending stakeholders as to where the stance of the Court was, but the pleasure of those stakeholders who welcomed the view of the Supreme Court was short-lived. The clarification occasioned by this decision paved way for the advancement in the administration of justice in labour and industrial law affairs in the country. Secondly, the cause of action in this case first arose at the High Court several years before the passage of the NICA. Despite this, however, the pronouncement of the Supreme Court was of such a sweeping nature as to address the ‘unconstitutionality’ of the Decree, which was the law in

¹ CFRN, s 1(3).

use by the NICN at the time, and even in relation to the NICA, which was later passed. What this meant in effect was that the NICA, which was passed after the enactment of the 1999 Constitution, was just as unconstitutional as the Decree of 1987 and the TDA of 1992 (as amended). Therefore, the enactment of the NICA by the National Assembly in replacement of the TDA Decree or Act could be described as a futile legislative exercise.

3.6 *The National Assembly in Response to the Supreme Court Judgment of BPE v NUUE*

The decision of the *BPE* case neither deterred the NICN nor the National Assembly who were the ones largely affected by the outcome of the judgment of the Supreme Court. The stakeholders took immediate steps to work towards resolving this recurrent setback sporadically experienced by the Court. In an effort to overcome the obstacle, a member Bill was sponsored by the National Assembly seeking the alteration of the provisions of the 1999 Constitution.¹ The purpose of the Bill was to establish an Act for the establishment of the National Industrial Court under the Constitution. As expected, the Bill garnered overwhelming support in the National Assembly which led to its speedy passage into law.² As such, the Constitution was at last amended to include the 'National Industrial Court' in the section listing the courts of superior record and, in addition, conferring the NICN with jurisdiction to the exclusion of any other court to preside over civil causes and matters pertaining to labour and industrial disputes.³ In addition to these, the Court was conferred with even wider powers than it possessed under the section 7 of the NICA making its jurisdiction far more extensive. The contention of status and the exclusive jurisdiction of the Court were finally put to rest.

4.0 In Defence of Constitutional Amendment for the Upgrade of the IST to a Superior Court of Record.

There is no doubt that there are common challenges shared between the justice dispensation of the then NICN and the current IST. The basic areas of similarities as regards the challenges which was experienced and is being experienced (as the case may be) have been identified as the statuses of both court and tribunal and the exclusive civil jurisdiction conferred on them both. As indicated in the judgment of the *BPE* case, the Supreme Court pronounced and rightly too that the jurisdiction of a superior court as recognized under the Constitution cannot be limited by an Act or Law of the National Assembly or the State House of Assembly respectively. The Court also held to the effect that Constitutional provisions shall prevail in circumstances of disputes between the former and any Act of the National Assembly or Law of the State House of Assembly. In addition, and in relation to the status of the Court, the Supreme Court posited that for a court to be regarded as a superior court of record, a constitutional amendment shall be required to amend the provisions of section 6(3) and (5) as the inability to achieve this would mean that the court shall remain of an inferior status.

In relation to the IST and as far back as the early eighties in the case of *Skenconsult (Nig.) Ltd v Ukey*,⁴ the Supreme Court had made a pronouncement regarding the nature of the jurisdiction of the FHC to the effect the latter had exclusive jurisdiction on matters pertaining to the then Companies Act of 1968. Granted that this case was decided pre-1990 CAMA, the principle however remains unaffected in the light of more recent court decisions in cases such as *S.E.C v Kasunmu*,⁵ *Nospetco Oil and Gas Ltd v Olorunnimbe & 15 Ors.*⁶ and *Okeke v SEC.*⁷ The pronouncements in the cases point in one direction, that the powers of a tribunal is precluded from ousting the exclusive jurisdiction of the FHC which is constitutionally guaranteed. In the words of Saulawa JCA in *Okeke's Case*,⁸ 'the exclusive jurisdiction conferred upon the Federal High Court cannot be whittled down or taken away by an ordinary Act of the National Assembly in the absence of any amendment to the provision in question.' In the manner that the Trade Dispute Act and the NICA were incapable of conferring exclusive jurisdiction on the NICN in spite of being expressly stated in the respective Acts, is the same manner that the ISA is incapable of conferring exclusive jurisdiction on the IST in relations to matters pertaining to the ISA's subject area. The reason as has been earlier pointed out; the provisions of an Act of the National Assembly can only be subject to constitutionally guaranteed provisions. For the IST to achieve the exclusive jurisdiction on matters as desired by the ISA, there must be a constitutional amendment bringing the IST at par with the other courts as listed under section 6 (5) of the CFRN.

This paper however recognizes that there could be instances where the subject area in contention fall within the exclusive reserve of the provisions of the ISA. These would include areas like securities regulation, specifically issues like the contents of a prospectus and related offer documents. Such situations are not in contention in that the IST shall unreservedly exercise its exclusive powers as granted by the ISA in such

1. ¹ Third Alteration Bill (2010).

2. ² Constitution of the Federal Republic of Nigeria (Third Alteration) Act, 2010.

3. ³ CFRN s 6(cc); 254C-1.

4 [1988] 1 SC 6.

5 (2009) 10 NWLR pt. 1150 p 534.

6 (2012) 10 NWLR pt. 1307 p 115.

7 (2013) LPELR – 20355 (CA).

8 *ibid.*

instances. However, the major problem lies where the subject raises combined issues such as those relating to banking law, securities regulation and general financial reporting obligations which also touch on the exclusive jurisdiction of the FHC.¹ What is to be done in such cases? As suggested by Famuyiwa, ‘the jurisdiction of the IST and FHC ought in principle to be coordinate and complementary, in so far as neither of the two fora, purports to decide a case which from clear indications can be said to belong to the province of the other’.² This foregoing position, in the view of this paper, may only reduce and not wholly resolve the pending controversies. In other words, the suggested position may be adopted as a safety net pending an alteration of the Constitution.

5.0 Conclusion

Due to the important role that matters of investments and securities play in the economy of any country, this paper is of the view that a call for another constitutional amendment beckons for the Nigerian Government. It is apparent that the functions for which the ISA was established is not achieving its full potential caused by problems of constitutional impediments.

This paper is of the view that these impediments can easily be overcome if the Legislature would look back at recent history and recall how the NICN was able to wriggle out of similar constitutional challenges by employing legislative assistance. This paper asserts that the position of the IST is not very different and should follow the same line as done by the NICN so that the economy can begin to benefit from the dividends associated with capital market investment and all that it portends for the economic advancement of this country. Yesterday was the best time to act and the next best time is now.

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¹ See Olumide Famuyiwa, “Forum Issues in the Enforcement of Regulatory Obligations of Nigerian Public Companies” (n 26).

² *ibid* 85.