CUSTOMARY AND MODERN ARBITRATION IN NIGERIA: A RECYCLE OF OLD FRONTIERS

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Abstract
This article reveals the existence of customary arbitration in Nigeria prior to the introduction of the adversarial system of resolving disputes by the British colonial masters. Customary arbitration which involves an arbitral proceeding conducted under the generally acceptable norms, customs and traditions of the people in a particular community has being widely contested through a plethora of cases of its existence in Nigerian jurisprudence. This article shows that certain conditions must be met before an arbitration conducted under customary law would be held as valid. Owing to the evolution of the world and certain shortcomings associated with customay arbitration, modern arbitration took the stage in bid of making arbitration an essential alternative in resolving disputes. Through the enactment of statute, rules, regulations and establishment of arbitration centres in Nigeria modern arbitration recycled customary arbitration for the benefit of mankind.

Keywords: Customary Arbitration, Modern Arbitration, Customs, Traditions, Nigeria.

Introduction
Before the advent of the Arbitration and Conciliation Act which serves as the principal statute regulating arbitration practice in Nigeria, arbitration was conducted in accordance with the customs and traditions of people. Arbitration had been with various indigenous communities in Nigeria prior to the introduction of litigation\(^1\). It is imperative to assert that the belief that arbitration is of recent development in Nigeria is misleading. There exists a voyage of decided cases validating the existence of arbitration prior to colonialism.

England in the course of colonizing Nigeria brought the adversarial system as a way of settling disputes. However, this system has been plagued with certain factors such as technical procedures, unwarranted delays in the dispensation of justice, cost inefficiency etc. thus discouraging disputants to settle their differences through litigation. This brought about concerns of reforming customary arbitration by enacting relevant statutes and rules that will serve as a

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‘legal backing’ for arbitration, hence making it possible for disputes to be settled in a flexible, time efficient and cost effective manner.

Arbitration is the process of resolving a dispute between at least two parties who through an agreement agree to submit their dispute to arbitration, appoints a third party who shall decide on their dispute and such decision shall be final and binding on the parties. This paper undertakes to ascertain the credibility of customary arbitration in Nigeria as well stating relevant laws that brought about modern arbitration in Nigeria.

**Arbitration**

Prof. (Dr.) J Olakunle Orojo CON and Prof. M. Ayodele Ajomo defines arbitration in the following manner:

> ‘Arbitration is a procedure for the settlement of disputes, under which the parties agree to be bound by the decision of an arbitrator whose decision is, in general, final and legally binding on both parties.’

Halsbury’s Laws of England see arbitration as:

> ‘the process by which a dispute or difference between two or more parties as to their mutual legal rights and liabilities is referred to and determined judicially and with binding effect by the application of law by one or more persons (the arbitral tribunal) instead of by a court of law.’

Furthermore Rene David defined arbitration as a device whereby the settlement of a question, which is of interest for two or more persons, is entrusted to one or more other persons – the arbitrator or arbitrators – who derive their powers from a private agreement, not from the authorities of a State, and who are to proceed and decide the case on the basis of such agreement. Arbitration can be simply be defined as a consensual procedure in which there is a form of intervention by a neutral third party in dispute between two others.

The advantages and characteristics of arbitration often times overlap but the most significant thing of note is party autonomy. Arbitration is a party-driven process, as they decide the number of arbitrator, the seat of arbitration, the language to be used throughout the procedure, the law applicable etc. This essentially makes the arbitral procedure flexible, less technical and expeditious.

**Customary Arbitration**

Customary arbitration can be seen a procedure for settling disputes conducted in accordance with the customs and traditions of the people. However, through decided cases, one will be able to grasp and fully understand the meaning and dynamics of customary arbitration. In the case of *Ohiaeri v Akabueze*, the Supreme Court adopting the definition of customary arbitration as proffered by the Supreme Court in the case of *Agu v Ikewibe* as:

> ‘An arbitration in dispute founded on the voluntary submission of the parties to the decision of the arbitrators’

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who are either the chiefs or elders of their community, and the agreement to be bound by such decision or freedom to resile where unfavourable.

In *Ufomba v Ahucahoagu*, customary arbitration described as:

‘A customary arbitration is essentially a native arrangement by selected elders of the community who is vast in the customary law of the people and takes decision, which are mainly designed or aimed at bringing some amicable settlement, stability and social equilibrium to the people and their immediate society or environment.’

According to T.O. Elias:

‘It is well accepted that one of the many African customary modes of settling disputes is to refer the dispute to the family head or an elder or elders of the community for a compromise solution based on the subsequent acceptance by both parties of the suggested award, which becomes binding only after such signification of its acceptance, and from which either party is free to resile at any stage of the proceedings.’

It is evident from the above that customary arbitration involves the voluntary submission of disputants absent any written agreement to arbitration in which the arbitral panel shall consist of chiefs and elders who have unrivaled knowledge in customary law and tradition, resolve the disputes between the parties. Decisions emanating from customary arbitration are enforced by the courts. In *Asampong v. Kweku Amuaka* Dean C.J. asserted that:

‘...When matters in dispute between parties are by mutual consent investigated by arbitrators at a meeting held in accordance with native law and custom and decision given, it is binding on the parties and the Supreme Court will enforce it’

In addition Karibi Whyte JSC in *Egesimba v Onuzurike* was of the view that:

‘Where a body of men be they chiefs or otherwise, acts as arbitrators over a dispute between two parties their decision shall have binding effect, if it is shown firstly, that both parties submitted to the arbitration, secondly that the parties accepted the terms of the decision, such decision has the same authority as the judgment of judicial body and will be binding on the parties and thus create an estoppels’

However, the case of *Okpuruwu v. Okpokam* is notably instructive as it rejects the existence of customary arbitration in Nigeria. Uwaifo JCA delivered that:

‘To talk of customary arbitration having a binding force as a judgment in this country is therefore somewhat a

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7 (2003) 4 SC part II 65 at 90
9 (2003) 4 SC part II 65 at 90
10 (2002) 9-10 SC 1 at 19
11 (1988) 4 NWLR (part 90) 554
misnomer and certainly a misconception. Of course, to say that a decision by such a body creates res judicata is erroneous...I do not know of any community in Nigeria which regards the settlement by arbitration between disputing parties as part of its native law and custom. It may be that in practical life, when there is a dispute in any community, the parties involved may sometimes decide to refer it to a disinterested third party for settlement. That seems more of a common device for peace and good neighbourliness rather than a feature of native law and custom, unless there is any unknown to me which carries with it 'judicial function' or authority as in Akan laws and customs. I do not also know how such a custom, if any, or more correctly, such a practice, to get a third party to intervene and decide a dispute can elevate such a decision to the status of a judgment with a binding force and yet fit it into our judicial system...I say by way of emphasis that we have no equivalent of Akan laws and customs in this country under which elders of the same description in Ghana’s circumstances perform recognized judicial functions consistent with our judicial system.'

His lordship took account of Inyang v Essein\textsuperscript{12} as well as Ozo Ezejieofor Oline & Ors v Jacob Obodo & Ors\textsuperscript{13} in reaching his conclusion that courts in Nigeria in a number of times denied the fact that customary arbitration indeed existed and can be pleaded as res judicata. However in Odonigi v Oyeleke\textsuperscript{14} the Supreme Court held that:

‘The decision of the Court of Appeal in Okpuruwu v Ekpokam that our legal system does not recognize the practice of elders or natives constituting themselves as customary arbitration to make binding decisions between parties in respect of land or other disputes cannot in cases be correct.’

It is imperative to assert that the denial of the existence of customary arbitration in Nigeria is disheartening. Taking account of the practice in the ancient Benin empire, where arbitration and mediation was the sole means of resolving disputes before the advent of the adversarial system. Odionwere who was the village head and heads of the different families who held titles as Okaegbe functioned as arbitrators or mediators in resolving disputes among people of the Benin Empire. In addition chiefs would be called upon by the Oba of Benin to mediate or reconcile differences between neighbouring villages’ sequel to the request of the villagers\textsuperscript{15}. Arbitration was not only practiced in the Benin Empire but across all ethnic groups in Nigeria. Even Holdsworth maintains that:

‘the practice of arbitration therefore, comes, so to speak, naturally to primitive bodies of law, and after courts have

\textsuperscript{12} (1957) 2 FSC 39
\textsuperscript{13} (1958) 3 FSC 84
been established by the state and a recourse to them has become the natural method of settling disputes, the practice continues because the parties to a dispute want to settle them with less formality and expense than is involved in a recourse to the courts\(^\text{16}\).

The Quran upholds arbitration which by analogy suggests that the ancient northern Nigerian practiced customary arbitration. It states that:

‘If two parties among the believers fall into quarrel make you peace between them...make peace with justice and be fair for God loves those who are fair and just\(^\text{17}\). If you fear a breach between them *twain appoint one from his family and one from hers*\(^\text{18}\) if they wish for peace God would cause their reconciliation for God had full knowledge and is well acquainted with all things\(^\text{19}\).’

**Essential Validity of Customary Arbitration**

Customary arbitration is said to valid upon fulfillment of certain conditions. Owing to the fact that during the ancient period not everyone or to say the least everyone do not understand a writing agreement. In bid of making the submission of the disputing parties to arbitration, certain ingredients must present. In the case of *Okereka v Nwanko*\(^\text{20}\) these conditions include:

1. If the parties voluntarily submit their dispute to non-judicial body
2. The indication of the willingness of the parties to be bound by the decision of the non-judicial body or a freedom to reject the decision where not satisfied
3. That neither of the parties has resiled from the decision so pronounced.

In *Egbesimba v Onuzuike*\(^\text{21}\), the justices of the Supreme Court started the ingredients which must be present to give customary arbitration validity. Ayoola JSC declared that:

‘The four ingredients usually accepted as constituting the essential characteristics of a binding arbitration are:

1. Voluntary submission of the dispute to the arbitration of the individual or body
2. Agreement by the parties either expressly or by implication that the decision of the arbitrators will be accepted and binding
3. That the arbitration was in accordance with the custom of the parties
4. That the arbitrators reached a decision and published their award.’

Ogundare JSC\(^\text{22}\) was of the view that:

‘For a customary arbitration to be valid, it must be shown:

1. That parties voluntarily submit their disputes to their elders or chiefs as the case may be for determination;
2. That there is an indication of the willingness of the parties to be bound by the decision of non-judicial body or freedom to reject the decision where not satisfied;
3. That neither of the parties has resiled from the decision so pronounced.’

\(^\text{17}\) Quran 4 v. 35
\(^\text{18}\) Emphasis mine; this suggest the appointment of arbitrators
\(^\text{19}\) Ibid, Quran 49 v. 9
\(^\text{20}\) (2003) 4 SC Pt. I 16 at 29
\(^\text{22}\) Ibid
Furthermore Tobi JSC\textsuperscript{23} set out the following ingredients:

1. \textit{That there has been a voluntary submission of the subject-matter in dispute to an arbitration of one or more persons;}
2. \textit{That it is agreed by the parties, either expressly or by implication, that the decision of the arbitrators will be accepted as final and binding;}
3. \textit{That the said arbitration was in accordance with the action of the parties or their trade or business;}
4. \textit{That the arbitrators reached a decision and published their award;}
5. \textit{That the decision or award was accepted at the time it was made}

Customary arbitration will be held to be valid after the fulfillment of the above-mentioned conditions. Failure to meet with these conditions will be tantamount to a nullity of the arbitral process.

\textbf{Modern Arbitration}

With the advent of the adversarial system of resolving disputes, certain shortcomings of customary arbitration, led to the emergence of reforming customary arbitration and developing arbitration in itself. In Nigeria the first statute to be enacted on arbitration law was the Arbitration Ordinance 1914 modeled based on the English Arbitration Act 1889. It was later re-enacted as the Arbitration Ordinance 1958\textsuperscript{24}. This ordinance was in force until in 1988 when Nigeria adopted the United Nations Commission on International Trade Law (UNCITRAL) Model law on International Commercial Arbitration\textsuperscript{25} and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, thereby enacting the Arbitration and Conciliation Decree 1988\textsuperscript{26}. This decree was largely significant as it provided for rules governing international and domestic arbitration and made provisions for conciliation, which was not present in the Arbitration Ordinance of 1958.

On the transition from a military regime to a democratic setting, the Arbitration and Conciliation Decree became an Act\textsuperscript{27} codified under the Laws of the Federal Republic of Nigeria. This Act has refined customary arbitration in Nigeria. Under section 1 of the Act it provides that:

\begin{quote}
\textit{Every arbitration agreement shall be in writing contained: (1) (a) in a document signed by the parties; or (b) in an exchange of letters, telex, telegrams or other means of communication which provide a record of the arbitration agreement; or (c) in an exchange of points of claim and of defence in which the existence of an arbitration agreement is alleged by one party and denied by another (2) Any reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if such contract is in writing and the reference is such as to make that clause part of the contract.}
\end{quote}

Major emphasis is placed on a written agreement evidencing the \textit{consensus ad idem} of the parties to submit their dispute to arbitration. Customary arbitration which is based on oral submission to arbitration brings with it the problem of certainty and enforcement. Where there is no initial

\textsuperscript{23} Ibid
\textsuperscript{24} CAP 13 Laws of the Federation of Nigeria and Lagos 1958
\textsuperscript{25} 1985
\textsuperscript{26} No 11 of 1988
\textsuperscript{27} Arbitration and Conciliation Act (ACA) 1988 CAP A18 Laws of the Federation of Nigeria 2004
written agreement, the decision of the arbitrator has no binding effect on the parties, as either of
disputing parties is at liberty to accept or reject the award at the time it was made. In Awosibe v
Sotunbo\textsuperscript{28} it was held that owing to the fact that the dissatisfied party filed a writ of summons, it
showed a positive demonstration that he never believed there was a binding arbitration and his
abandonment of the gentlemen’s agreement reached between them.

Modern arbitration takes a different dimension on the matter abovementioned. Once the
disputing parties through a written agreement submitted their dispute to arbitration, that
agreement is binding on those parties and any decision made by arbitrators appointed by parties
shall be final and binding. The award will create an estoppel and operate as ‘res judicata’ with
regard to matters with which the award dealt with, hence preventing either party from
abandoning the award or pursuing such matters dealt with in the award in litigation\textsuperscript{29}. It becomes
better as Section 31 (1) of the Arbitration and Conciliation Act (ACA)\textsuperscript{30} provides that:

\begin{quote}
‘An arbitral award shall be recognized as binding and
subject to this section 32 of this Act, shall, upon application
in writing to the court, be enforced by the court’
\end{quote}

Hence the award would be enforced in the same manner as a judgment or order of a court. This
significantly recycles the mode of procedure in customary arbitration. Also, judicial assistance is
rendered here as the court helps in enforcing an award. In Ras Pal Gazi Constuction Company
Ltd. v Federal Capital Development Authority\textsuperscript{31} it was held that:

\begin{quote}
‘An award made pursuant to Arbitration proceedings
constitutes a final judgment on all matters referred to the
arbitrator. It has a binding effect and it shall upon
application in writing to the court, be enforced by the
court…’
\end{quote}

Furthermore, New York Convention on the Recognition and Enforcement of Foreign Arbitral
Awards marks a significant recycle of customary arbitration. The Arbitration and Conciliation
Act (ACA)\textsuperscript{32} adopting Article 1 of the Convention enshrined it in its Article 54. Article 1 of the
New York Convention stipulates thus:

\begin{quote}
‘This Convention shall apply to the recognition and
enforcement of arbitral awards made in the territory of a
State other than the State where the recognition and
enforcement of such awards are sought, and arising out of
differences between persons, whether physical or legal. It
shall also apply to arbitral awards not considered as
domestic awards in the State where their recognition and
enforcement are sought’\textsuperscript{33}.
\end{quote}

Section 54 states that:

\begin{quote}
‘Without prejudice to section 51 and 52 of this Act, where
the recognition and enforcement of any award arising out
\end{quote}

\textsuperscript{28} (1992) 5 NWLR (pt. 243) 514
\textsuperscript{29} See Fidelitas Shipping Co. Ltd v V/O Exportchleb (1965) 1 Lloyd’s Rep. 223, C.A.
\textsuperscript{30} Ibid
\textsuperscript{31} (2001) 10 NWLR (pt. 722) p. 559 at 562 para. 3
\textsuperscript{32} Ibid CAP A18 Laws of the Federation of Nigeria (LFN) 2004
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of an international commercial arbitration are sought, the Convention on the Recognition and Enforcement of Foreign Awards (hereafter referred to as “the Convention”) set out in the Second Schedule to this Act shall apply to any award made in Nigeria or in any contracting state:

a. Provided that such contracting state has reciprocal legislation recognising the enforcement of arbitral awards made in Nigeria in accordance with the provisions of the Convention;

b. That the Convention shall apply only to differences arising out of legal relationship which is contractual."

Hence if the award is made in Britain and one of the disputant is a Nigerian who won against the other party who perhaps is a Briton, the Nigerian can enforce that award in Nigerian courts against the other party in light of the New York Convention. Customary arbitration does not involve international commercial arbitration or recognizing decisions that were under different norms, customs and traditions of a particular community to be enforced under another community’s custom and tradition.

In addition, with the emergence of arbitration centres in Nigeria, customary arbitration is recycled. There was nothing like an arbitration centre in ancient times that would be charged specifically with facilitating arbitration. These arbitration centres assist in the facilitation of arbitral proceedings coupled with resolving disputes through their own rules. Some of these Centres include:

1. Lagos Multi-Door Courthouse
2. Abuja Multi-Door Courthouse
3. Chartered Institute of Arbitrators UK (Nigerian Branch)
4. Lagos Regional Centre for International Commercial Arbitration
5. The International Chamber of Commerce (Nigerian National Committee)
6. Lagos Court of Arbitration

Conclusion

The act of referring a dispute to a third party who is chosen by the disputing parties themselves and agreeing to be bound by the decision rendered by that third party is known as arbitration. Justices of the Supreme Court, writers, scholars etc. have argued on the existence of arbitration at the customary law level prior to the emergence of litigation in Nigeria. Through a plethora of cases, customary arbitration has being held to be far in existence which was conducted in accordance with accepted norms, customs and traditions of people of a specific community. Chief, elders, family heads have being considered to make up the arbitral panel. It derives its essential validity on the fulfillment of certain conditions such as voluntary submission, arbitral proceedings conducted in accordance with the customs and traditions of the people, disputants have not resiled from the decision etc. which will make the courts to recognize it as a valid customary arbitration.

However, owing to certain shortcomings and the evolution of the world, there was the need for a modern arbitration. Through the enactment of statues, institutional rules and regulations, modern arbitration recycles customary arbitration in significant aspects despite retaining significant tenets of arbitration such as consent of parties and party autonomy. Arbitration in its modern
context aims at creating certainty and making people perceive arbitration as a viable tool in resolving disputes even in the most complex scenarios.

References