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Introduction

Arbitration as a dispute resolution mechanism has a chequered history.¹ It has always been a more economical and friendly method of resolving disputes both in traditional and modern settings. Hence, in traditional settings, especially traditional African settings, it was after the advent of colonialism that statutory arbitration was evolved and certain provisions of the statute started

¹ Arbitration has been in existence from time immemorial though in an informal way even before the advent of colonialism. At, and after, colonialism, it developed and is now governed by statutory provisions without, however, losing its customary antecedents.

regulating arbitration.² But before then, dispute resolution, ranging from land dispute, marital dispute to other kinds of disputes, were being regulated, administered and settled by elders, chiefs and traditional rulers in a particular community.³ And *a fortiori*, the convenience, simplicity and informality that accompany arbitration in traditional way makes it to still have weight and recognition even at the national and international levels so much so that the case law recognises the traditional way of dispute resolution, which is being described and referred to as 'customary arbitration', as one of the alternative dispute resolution mechanisms.⁴

This book examines the finality and binding effect of customary arbitration. It appraises the essential ingredients of a valid customary arbitration without which any decision or award of the arbitration panel will be

² The first Nigerian statute on Arbitration is the Ordinance No. 16 of 1914. This Ordinance adopted the English Arbitration Act of 1889. The 1914 Ordinance was later re-enacted as Arbitration and Conciliation Decree of 1988 which became Arbitration and Conciliation Act, *Cap 19 Laws of the Federation of Nigeria 1990*. By the revised Edition Laws of the Federation of Nigeria 2004, the current Federal Legislation on Arbitration and Conciliation is now embodied in Arbitration and Conciliation Act, *Cap A18 Laws of the Federation of Nigeria 2004*. Each state of the Federation also has its own Arbitration Law.

³ See the following cases on customary Arbitration: *Agu v. Ikewibe* (1991) 3 NWLR (Pt. 180) 305; *Ohiaeri v. Akabeze* (1992) 2 NWLR (Pt. 221) 1; *Okereke v. Nwankwo* (2003) 4 SC (Pt. 1) 16; *Egesimba v. Onuzuruike* (2002) 9 SCNJ 46 to mention but a few.

⁴ Other Alternative Dispute Resolution mechanisms include: Negotiation, Conciliation and Mediation.

worthless.⁵ Although the decision of customary arbitration is not a decision of a court of law,⁶ the crucial issue is whether such a decision can operate as *estoppel per rem judicatam*, having in mind the fact that the essential ingredients of customary arbitration are not the same with those of a plea of *estoppel per rem judicatam*.⁷

The aim of this book is to examine the finality and binding effect of customary arbitration. The specific objectives are to: identify the relevance of customary arbitration as an alternative dispute resolution mechanism; examine the ingredients of a valid customary arbitration; juxtapose the decision or award of customary arbitration with that of a court of law and set out to see whether the decision of customary arbitration can have weight as the decision of court of law;⁸ examine the principle underlining

⁵ See *Agu v. Ikewibe* (Supra); *Ohiaeri v. Akabeze* (Supra) 1; *Okereke v. Nwankwo* (Supra) and *Egesimba v. Onuzuruike* (Supra) for the essential ingredients of a valid customary arbitration.

⁶ See *Tobi JSC in Sunday Ufomba & Anor V. Nwosu Ahuchaogu* (2003) 4 SC (Pt. 11) 65 @ 90 where it was held that customary arbitration is only a convenient forum for the settlement of native dispute and cannot be raised to the status of a court of law, hence the decisions of customary arbitration cannot be equated with the decisions of courts of law.

⁷ See the following cases for the essential elements or ingredients of a valid plea of *estoppel per rem judicatam*: *Oshodi v. Eyifunmi* (2001) 13 NWLR (Pt. 684) 298 @ 326; *Ezeokonkwo & Ors v. Okeke & Ors* (2002) 11 NWLR (Pt. 777) 1.

⁸ Although the decision of customary arbitration cannot be equated with those of courts of law, the consequence of a valid customary arbitration is the same as that of a valid plea of *estoppel per rem judicatam*. See also the case of *Dr David Chukwuemeka Obiefuna Okoye & Anor v. Christopher N. Obiaso & 2 Ors* (2010) 3 SC (Pt. II) 69 @98, Per Adekeye JSC.

res judicata and harmonise the effect of a successful plea of *estoppel per rem judicatam* with that of decision of customary arbitration.

Basically, this work tends to provide answers to various questions or issues that may arise on the essential ingredients that make a valid customary arbitration. It proffers solutions to the issue whether and under what circumstances can customary arbitration operate as *estoppel per rem judicam*, among others.

Also of importance is the need to enlighten the public, particularly those who have dealings with the practice of law; be it litigation practice, academics, corporate practice or soliciting practice, of the necessity to improve on alternative dispute resolution like customary arbitration.⁹

The consequential effect of the inability to have the true grasp of the essential elements of a valid customary arbitration fortifies and justifies the attempt to embark on this work which is centered on the essentials necessary to constitute a valid customary arbitration. It further compares the essentials of a valid customary arbitration with those of *estoppel per rem judicatam* and dichotomises between the duo. The work is restricted to this area for the convenience of research and to have an intense and proper study in the particular areas of law, that is, customary arbitration and *estoppel per rem judicatam* so as to produce a qualitative work.

⁹ Other Alternative Dispute Resolution mechanisms include: Negotiation, Conciliation and Mediation.

This work is sourced from series of work by legal writers and academics. Judicial pronouncements take dominant role and few statutory provisions are also examined as a back up to judicial pronouncements. Specifically, on arbitration, literatures like International Law by Malcolm N. Shaw;¹⁰ Annotation of the Nigerian Evidence Act by Sottari F. Oruwari;¹¹ Customary Law Arbitration and Customary Arbitration in Nigeria, an essay by E. S. Nwanehe;¹² the Nigerian Legal System by Obilade¹³ are examined. Judicial pronouncements of our superior court of record and foreign courts also contribute immensely to the writing of this work.

The methodology adopted in appraising this work is doctrinal in nature. Materials are sourced from both primary and secondary sources of law. A comparative analysis is employed to explain the relationship between the effect of customary arbitration and *estoppel per rem judicatam*.

¹⁰ (Forth Edition, Cambridge Low Price Edition, Cambridge University Press, 1998).

¹¹ (First Edition, Akuro R. George & Associates, 2004).

¹² A Publication of Nigerian Law and Practice Journal Vol. 3 No. 1, 1999 (Published by the Council of Legal Education, Nigerian Law School, Abuja).

¹³ (Sweet and Maxwell, 1979).

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Nature and Scope of Arbitration: Historical Background of Arbitration

Arbitration has been in existence from the time immemorial. It has been an informal way of settling disputes between the parties¹⁴ It later developed to become a formal way of settling disputes without necessarily or impliedly abrogating or jettisoning the traditional and informal way of settling disputes.¹⁵ Originally, arbitral proceedings or

¹⁴ J.K. Gadzama, “Development and Practice of ADR and Arbitration in Nigeria (being an Essay presented at the Nigerian Bar Association Annual General/Delegates’ Conference in Abuja in Abuja in Aug. 2004.

¹⁵ Ibid.

arbitration were/was governed by the rules of common law as it had a very ancient way of origin in the practice of merchants and trades.¹⁶

Initially, only disputes relating to personal chattels or personal wrongs could be referred to arbitration but now disputes as to real or landed property and a host of other categories of disputes are being referred to arbitration.¹⁷

It is axiomatic to conclude that conflicts and controversies are normal occurrences in the daily life of the society and this is primarily a result of the different interests of persons in communal matters, personal claims, family affairs, labour relations, property interests, neighborhood relationship and government activities.¹⁸

In order to manage these various conflicts and controversies which ultimately result in disputes, the law recognises the rights of individuals, groups and the government to approach a court of law. However, the court system is adversarial in nature and failure of the court system has led to the growing search for alternatives to litigation. This, therefore, is a major factor for the growth and development of arbitration as one of the alternative dispute resolution mechanisms globally.¹⁹

¹⁶ See Gaius Ezejiofor; *The Law of Arbitration in Nigeria* (First Edition, Longman Nigeria Plc. p.20.

¹⁷ Op. cit p.3.

¹⁸ Ibid.

¹⁹ Other alternative dispute resolution apart from Arbitration include mediation, conciliation, negotiation, evaluation etc.

Arbitration, and in particular customary arbitration, has been in existence long before the advent of colonialism and is still in existence. The primary sources of the Nigerian Law of Arbitration are the English Common Law, the Nigerian Customary Law, the Nigerian statutes and case law.²⁰

The local enactments on Arbitration in Nigeria incorporated the English Common Law, the Doctrine of Equity together with the English Statutes of General Application brought into the country during the period of colonial administration.²¹ Consequently, English Common Law rules on Arbitration are part of the Nigerian law. However, because of the inadequacies of the common law arbitral process, it is hardly resorted to in modern times. Therefore, practically, most arbitrations under the Nigerian law, with the exception of customary arbitration, are conducted under the statutes.

At Common Law, an agreement to refer a dispute to arbitration could be oral or in writing and such an agreement was often called a “submission” because there must be an existing dispute as well as actual reference thereof to a particular arbitration(s) for the agreement to be valid and complete.²²

Today, written agreements to arbitrate are exclusively governed by statute while oral agreements are entirely

²⁰ See Ezejiofor Op.cit p.15.

²¹ Ibid. p.20.

²² Ibid.

regulated by the common law and customary arbitration and continue to be known as submissions.²³

An oral agreement to arbitrate remains so and must be treated as such even if the award is in writing or indeed under seal.

The first Nigerian Legislation on Arbitration is the Arbitration Ordinance, Ordinance 16 of 1914 which was an adaptation of the 1889 English Arbitration Act. This was later re-enacted as Arbitration Act of 1958.²⁴

In 1960 when Nigeria got political independence, the Arbitration Act was applicable to Lagos, the then Federal Capital Territory while each region had its own Arbitration Law. States that were eventually created out of these regions adopted the laws applicable to their mother regions. This was the position until 1988 when Nigeria adopted the United Nations Commissions on International Trade Law (UNCITRAL) model law on International Commercial Arbitration vide the promulgation of the Arbitration and Conciliation Decree of 1988.²⁵

In 1990, it became Arbitration and Conciliation Act and by the effect of the Revised Edition, Laws of the Federation of Nigeria 2004 which codified all Federal enactments in force as at December 31st 2002. The Act become the Arbitration and Conciliation Act, 2004.

²³ Ibid.

²⁴ J.K. Gadzama (Supra).

²⁵ *ibid*

Nature of Arbitration

Arbitration is the reference of a dispute between two or more parties to a person or body of persons other than a court of law for determination.²⁶

The person or body of persons to whom the reference to arbitration is made is called an arbitrator or arbitrators as the case may be. His or their decision is called an award.²⁷

From the foregoing, it could be noted that one or more arbitrators may constitute an arbitral tribunal and the decision of such a tribunal is also called an award. If it is provided in the agreement to refer to arbitration that in the event of a disagreement between the arbitrators, the dispute is to be referred to third party, such a third party is called an umpire and his decision is also called an award.

The procedure of arbitration in the International Legal system grew to some extent out of the process of diplomatic settlement and represented an advance towards a developed international legal system. In its modern form, it emerged with the Jay Treaty of 1794 between Britain and America, which provided for the establishment of mixed commissions to solve legal disputes between the parties.²⁸

²⁶ Note that the arbitral tribunal or panel may be constituted by one or more person depending on the agreement of the parties or the provisions of statute.

²⁷ While the determination of a dispute in a court of law is usually referred to as decision, that of arbitral tribunal is referred to as award.

²⁸ Malcolm M. Shaw, *International Law*, (Fourth Edition) p.737.

Resort to arbitration is necessary as a result of:

- a) the frustrating delays which have bedeviled the judicial processes, particularly in recent times when the growth of litigations seems to have overwhelmed the judiciary and reduced it almost to a position of helplessness;
- b) the comparatively heavier financial outlay which judicial processes entail;
- c) the disclosure of business secrets to competitors which sometimes occur in litigation;
- d) the adverse publicity which litigation attracts; and
- e) the rigid formality which characterises court trials.²⁹

It should be noted that the fact that there is an arbitration clause in an agreement does not oust the jurisdiction of the court but parties should first employ settlement by arbitration and this is what is referred to as "*Scott v. Avery Clause*",³⁰ which Halsbury's Laws of England put as follows:

A provision in an arbitration agreement, known as a Scott v. Avery Clause; whereby the making of an arbitral award is expressed to be a condition precedent to any right in respect of any of the matters agreed to be referred does not oust the jurisdiction of the court. Such a clause constitutes a defence to any proceedings brought before the making of the award.³¹

²⁹ Ezejiofor loc. Cit p. vi.

³⁰ See *Scott v. Avery*(1856) 5H.L Ca 811.

³¹ See *Halsbury's Law of England* (4th Edition, Vol. 2 para 646. See also the Supreme Court case of *African Insurance Development Corporation v. Nigeria LGN Limited* (2000) 2 SC 57 @ 64 per Ayoola JSC.

The above stated position tallies with Section 5 of the Arbitration and Conciliation Act.³² Thus, where an action is commenced by a party to arbitration agreement in court in respect to any matter which is the subject of an arbitration agreement, the other party to the agreement may apply to the court to stay the proceedings.

Definition of Arbitration

Professor Gaius Ezejiofor, defines Arbitration as:

.....the reference of a dispute or difference between not less than two parties for determination, after hearing both side in a judicial manner, by a person or persons other than a court of competent jurisdiction.³³

In Oxford Advanced Learner's Dictionary, it is defined as the official process of settling an argument or a disagreement by some body who is not involved.³⁴ Similarly, J.K. Gadzama, SAN defines arbitration as a process of Alternative Dispute Resolution (ADR) in which a neutral third party (Arbitration) renders a decision after a hearing at which both parties have an opportunity to be heard.³⁵

From the above definitions of the word "Arbitration", arbitration can be conveniently defined as a method or process of settling disputes and differences between two or

³² *Cap A18 Laws of the Federation of Nigeria 2004.*

³³ Ezejiofor loc, Cit P.3

³⁴ 6th Edition.

³⁵ See Gadazama 1oc. Cit.

more persons or parties whereby such disputes and differences are refereed to one more person for settlement either before recourse to court of law or by a court order if a legal action has already been taken.

Where arbitration is voluntary, the disputing parties select the arbitrators who have the power to render binding decisions. Generally, the parties decide how the arbitrators will be appointed and if they fail, there is usually a default provisions in the law. Thus, a default provision is contained in Section 7(2) of the Arbitration and Conciliation Act³⁶ wherein it is provided that if a party fails to appoint the arbitrator within 30 days of receipt of request to do so by the other party, the appointment shall be made by the court on the application of any party to the arbitration agreement.³⁷

Commercial Arbitration

Commercial arbitration are usually governed by statutes, laws or rules, and now developed to settling International Commercial disputes toward a developed international legal system.³⁸ Thus, there are, among others, the American Arbitration Association, London Court of International Arbitration, the Cooperation of London Chambers of Commerce and Industry, the London Maritime Arbitration

³⁶ *Cap. A18 Laws of the Federation of Nigeria 2004.*

³⁷ Note that by the effect of Section 57 of the Act the court to which an application may be made is either the State High Court or Federal High Court and by force of Section 7(4) of the Act the decision of the court on such an appointment shall not be subjected to appeal.

³⁸ See Malcolm N. Shaw, *Op. cit* p.737.

etc. Other foreign international commercial arbitration includes International Chambers of Commerce (ICC), THE United Nations Commission on International Trade Law (UNCITRAL) whose 1976 Arbitration Rules have become increasingly popular.³⁹

There are in existence, among others, the following commercial Arbitration bodies in Nigeria:

1. The Nigerian Branch of the Chartered Institute of Arbitrators (UK)
2. The Chartered Institute of Arbitrators (Nigeria)
3. The Chartered Institution of Dispute Resolution, Ekpan in Delta State.
4. The Institute of Dispute Resolution, Ekpan in Delta State.
5. Negotiation and Conflict Management Group.⁴⁰

Each arbitration body has its own rules and regulations governing its procedure. The Arbitration and Conciliation Act⁴¹ is essentially made to provide a legal framework for the fair and efficient settlement of commercial disputes by arbitration.⁴² Commercial Arbitration, therefore, is that which concerns the relationship of a commercial nature and includes any trade transaction for the supply or exchange of goods or services, distribution agreement, commercial representation or agency, factory leasing,

³⁹ Read more in chapter 11 of Ezejiofor Op. cit.

⁴⁰ See Gadzama Op. cit.

⁴¹ *Cap A18 LFN 2004.*

⁴² See the Long Title to the Act.

construction of works, consulting, investment, financing, banking, insurance, joint venture and other forms of industrial or business co-operation.⁴³

Statutory Arbitration

Aside the classification of arbitration as commercial arbitration, any arbitration that is governed one way or the other by statute is classified as statutory arbitration.

When arbitration is based upon the agreement of the parties to arbitrate, it is consensual in nature. However, where a statute provides that disputes of a particular class are to be settled by arbitration, such arbitration is statutory arbitration. Such a statute may stipulate that reference of such disputes to arbitration is optional or compulsory.⁴⁴

Example of statutory provisions for statutory arbitration could be found in the Trade Disputes Act which enjoins the employers to resolve their trade disputes by agreed arrangements if any, other than those stipulated in the Act.⁴⁵

If there is no such agreement, or if settlement fails, the parties are admonished to meet and attempt an amicable settlement of the dispute with the assistance of a mediator. If this again fails, the Ministers of Labor may refer it to a conciliator or a board of inquiry. If this also fails the matter may be referred to the Industrial Arbitration Panel (IAP) by the Minister.⁴⁶

⁴³ See section 57 of the Arbitration and Conciliation Act.

⁴⁴ Ezejiofor Op. cit p.123.

⁴⁵ Loc. cit P. 124.

⁴⁶ Ibid.

Another example of statutory arbitration could be found in Co-operative Societies Law which provides that if any dispute touching on the business of a registered co-operative society arises among its members or between a member and the society or between the society or its committee and any officers or agent of the society or between the society and any other registered society.

Such a dispute shall be referred to the Registrar of Co-operative societies for decision.⁴⁷ On receipt of such a reference, the registrar shall decide the dispute, or refer it to an arbitrator for disposal.⁴⁸

Customary Arbitration

It becomes otiose to dissipate much ink on customary arbitration at this stage since the bulk of this work is on customary arbitration which will be discussed extensively in Chapter Three (*infra*). It suffices at this stage to say that Customary Arbitration is arbitration in dispute founded on the voluntary submission of the parties to the decision of the arbitrators who are either the chiefs or elders of their communities in accordance with Customary Law.⁴⁹

Arbitration as an Alternative Dispute Resolution

Alternative Dispute Resolution (ADR) simply refers to any means of dispute resolution other than litigation. It is a form of facilitated settlement, which is confidential.

⁴⁷ Loc. cit p.126-127.

⁴⁸ Ibid.

⁴⁹ See full discussion on customary arbitration in the below chapter.

Consequently, the details of the process need not usually be disclosed. If agreement is reached, a binding settlement agreement can be entered into.⁵⁰

Black's Law Dictionary defines ADR as procedure for settling disputes by means others than litigation; e.g. by arbitration, mediation, mini-trials.⁵¹

Of all the Alternative Dispute Resolution Processes, Arbitration is the most prominent and has enjoyed statutory backing both nationally and internationally. Other Alternative Dispute Resolution mechanisms include: Mediation, Conciliation, Negotiation, Evaluation, Facilitation, mini-trials etc.

Arbitration is the leading form of Alternative Dispute Resolution.⁵² The crucial question now is: as an Alternative Dispute Resolution, why do parties prefer Arbitration? The simple answer is that Arbitration has been accepted globally and has a number of advantages over litigation and these include the following:

- (a) disputes can be more speedily brought to trial and end in arbitration than by litigation in a court of law.
- (b) arbitration is usually less costly than an action in court.
- (c) having regard to date, time and place of hearing in arbitral proceedings, arbitration is more convenient.

⁵⁰ See Gadzama Op. Cit.

⁵¹ Sixth Edition p.78.

⁵² Gadzama Op. cit.

- (d) in arbitration, proceedings are less formal and more flexible than litigation as parties have greater control over the proceedings whereas in court of law, the court or presiding Judge controls the proceedings.

Arbitration is conciliatory in nature, unlike litigation which has the connotation of a battle between the litigants.⁵³

⁵³ Ibid.

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Customary Arbitration: Nature and Scope of Customary Arbitration

Decisions arrived at outside the formal court systems are recognised by the formal courts. Arbitration, generally speaking, has become an alternative dispute resolution⁵⁴ other than court of law and has been so recognised both nationally and internationally so much so that its efficacy and effectiveness cannot be over-emphasised.

As earlier pointed out in the previous chapter,⁵⁵ customary arbitration is different in scope, nature and

⁵⁴ See Ezeji for Op. cit pp. 7-9.

⁵⁵ See Chapter chapter above.

content from statutory arbitration. However, before delving into the nature of customary arbitration, it is pertinent to note that whether one refers to it as customary arbitration or customary law arbitration, one is saying one and the same thing for this purpose as any distinction sought to be made is merely academic⁵⁶ having regard to the various judicial pronouncements.⁵⁷ The crucial question now is: What then is a customary arbitration? This question is better answered by reference to judicial pronouncements.

Karibi Whyte JSC, once asked the same crucial question in *Agu v. Ikewibe*⁵⁸ and answered as follows:

It is well accepted that one of the many African customary models 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 upon 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 up to that point...

⁵⁶ See E.S. Nwauche, "Customary Law Arbitration and Customary Arbitration in Nigeria" (being an Essay in a Publication of Nigerian Law and Practice Journal, Vol. 3 No I March 1999 (Published by Council of Legal Education, Nigerian Law School p.03 wherein the author tries to make a distinction between Customary Law Arbitration and Customary Arbitration.

⁵⁷ See the following cases: *Agu v. Ikewibe* (1991) 3 NWLR (P. 180) 385; *Ohiaeri v. Akabeze* (1992) 2 NWLR (Pt. 221) 1; *Eke v. Okwaranyia* (2001) 4 SC (PL. 11) 71; *Ufomba v. Ahuchaogu* (2003) 4 SC (Pt. II) 65; *Okereke v. Nwankwo* (2003) 4SC (Pt. 1) 16; *Egesimba v. Ohuzuruike* (2002) 9 SCNJ 46.

⁵⁸ (1991) 3 NWLR (Pt. 180) 385 @ 407.

The learned erudite Jurist goes further:

What then is a customary arbitration? I venture to regard customary law arbitration as an arbitration in dispute founded on the voluntary submission of the parties to the decision of the Arbitrator who are either the chiefs or elders of their community, and the agreement to be bound by such decision or freedom to resile where unfavourable⁵⁹

The learned erudite Jurist maintained virtually the above quoted view in the case of *Ohiaeri v. Akabeze*.⁶⁰ This position has equally been confirmed by the Supreme Court in *Eke v. Okwaranyia*,⁶¹ per Uwaifo, JSC delivering the leading Judgment.

The above vividly represents the nature and scope of customary arbitration. Customary Arbitration, therefore, is essentially a native arrangement by selected elders of the community who are vast in the customary law of the people and take decisions, which are mainly designed or aimed at bringing some amicable settlement, stability and social equilibrium to the people and their immediate society or environment.

It has equally been held that customary arbitration is only a convenience forum for settlement of native disputes and cannot be raised to the status of a court of law.⁶²

⁵⁹ *Agu v. Ikewibe* (1991) Supra @ 407.

⁶⁰ (1992) 2 NWLR (Pt. 221) 1 @28.

⁶¹ (2001) 4 SC (Pt. 11).

⁶² See the dictum of Tobi, JSC in *Ufomba v. Ahuchaogu* (2003) 4 SC (Pt. 11) 65 @ 90.

Essential Ingredients of Customary Arbitration

A decision by a court of competent jurisdiction is binding on the parties to it so also is a decision of a customary arbitration as long as the ingredients constituting preconditions for its bindingness are met or complied with. For there to be a valid customary arbitration, the following ingredients must be proved:

- (a) That there had been a voluntary submission of the matter in dispute to an arbitration of one or more persons;
- (b) That it was agreed by the parties either expressly or by implication that the decision of the arbitrator(s) would be accepted as final and binding;
- (c) That the said arbitration was in accordance with the custom of the parties or their trade or business;
- (d) That the arbitrator(s) reached a decision and published their award; and
- (e) That the decision or award was accepted at the time it was made.⁶³

It should be noted that unless the above-mentioned conditions are fulfilled, the arbitration award is unenforceable. Thus, the Supreme Court, per Uwaifo JSC

⁶³ See the following Supreme Court cases: *Eke v. Okwaranyia* (2001) supra @ 87 – 88; *Okereke v. Nwankwo* (2003) supra @ 21-22; *Odonigi v. Oyeleke* (2001) 2SC 194 @ 203 – 204; *Okoye & Anor v. Obiaso & 2 Ors* (2010) 3 SC (Pt. II) 69 @ 103, per Adekeye JSC; *Okala v. Udah* (2019) All FWLR (Pt. 1021) 203 @ 216.

delivering the leading Judgment in *Eke v. Okwaranyia*⁶⁴ held as follows:

I think anything short of these conditions will make any customary arbitration award risky to enforce. In fact, it is better to say that unless the conditions are fulfilled, the arbitration award is unenforceable.

Put succinctly, Akpata, JSC in *Ohiaeri v. Akabeze*⁶⁵ in his leading judgment proffered a rationalisation for the need to be circumspect about customary arbitration when he said:

It is common feature of customary arbitration in a closely knit community that some of the arbitrators if not all not only have prior knowledge of the fact of the dispute, but also have their prejudices and varying interests in the matter, and one therefore sometimes judges in their own cause and are likely to pre-judge the issues. Prior knowledge and pre-judging issues are more pronounced in land dispute having bearing with the finding of the village and how families migrated to the village and come to occupy parcels of land. The arbitrators are well informed on these matters. The position however is that traditional history is sometimes transmitted, received or construed with a slant by the person using it for a purpose. Hence it is essential before applying the decision of a customary arbitration as an estoppel for the court to ensure that parties had voluntarily submitted

⁶⁴ (2001) Supra @ 88.

⁶⁵ Supra @ 24.

to the arbitration, consciously indicated their willingness to be bound by the decision and had immediately after the pronouncement of the decision unequivocally accepted the award.

At this juncture, it is pertinent to state as a general principle that the onus is on the party who alleges that the transaction leading to a dispute is a case of customary arbitration and must prove all the ingredients of customary arbitration, hence the aphorism “he who asserts must prove “. Thus, Section 131 (1) of the Evidence Act⁶⁶ provide as follows:

Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

The crucial issue now is whether the above ingredients of customary arbitration must not only be proved by the party relying on it but also must be pleaded? In *Eke v. Okwaranyia*,⁶⁷ the Supreme Court held, per Uwaifo JSC, that the ingredients for a valid customary arbitration “must be pleaded and proved”

⁶⁶ *Cap E14 Laws of the Federation of Nigeria 2004* (as amended).

⁶⁷ (2001) *supra*@ 87.

The same Supreme Court in *Ohiaeri v. Akabeze*,⁶⁸ per Akpata, JSC had earlier held that:

Where it is clearly averred by a party that there was a previous customary arbitration which was in his favour and that he (will rely on it, it) will not be necessary for him to plead the ingredients establishing the estoppel. The party will have to adduce credible evidence of the relevant ingredients or incidents necessary to sustain the material plea of estopped by customary arbitration.

It is observed that the Supreme Court in *Eke v. Okwaranyia*⁶⁹ cited and relied on Supreme Court cases of *Agu v. Ikewibe*⁷⁰ and *Ohiaeri v. Akabeze*⁷¹ to arrive at its conclusion that for there to be a valid customary arbitration, the five ingredients must be pleaded and proved. However, it is submitted that the decision relied upon in *Agu v. Ikewibe* is a dissenting judgment delivered by Nnaemeka Agu JSC, where the learned Justice held that before a party in a case in the High Court can defeat the right of his adversary to have his case adjudged upon by the court on the ground that there has been a previous binding arbitration which raises an estoppel between them, the ingredients of a binding customary arbitration must be pleaded and established. The opinion of the majority as expressed in the

⁶⁸(1992) supra @153-154.

⁶⁹ (2001) supra.

⁷⁰ (1991) supra.

⁷¹ (1992) supra.

leading Judgment delivered by Karibi Whyte JSC that prevailed was not that the ingredients must be pleaded but that such ingredients should be established by evidence. It was the view expressed in the majority judgment in *Agu v. Ikwibe*⁷² that was expressly put by Akpata JSC in *Ohiaeri v. Akabeze*.⁷³

The same Supreme Court had another occasion to Consider and review the cases of *Agu v. Ikwibe*⁷⁴ and *Ohiaeri v. Akabeze*⁷⁵ in *Egesimba v. Onuzuruike*⁷⁶ and it tilts in favour of the position that the ingredients of customary arbitration need not be pleaded but that such ingredients should be established by evidence.

In the first instance, as it appears, there are two conflicting decisions of the Supreme Court on whether the ingredients of customary arbitration must be pleaded or not. The position of the law on conflicting decisions of the Supreme Court is far clear. Where there appears to be a conflict in two previous decisions of the Supreme Court on the same point or issue, the Court of Appeal is bound by the later decision and must follow and apply it.⁷⁷ Regarding the issue before hand, the decision in *Egesimba v. Onuzuruike*⁷⁸ which affirms the decision in *Ohiaeri v.*

⁷² (1991) supra.

⁷³ (1992) supra @ 153-154.

⁷⁴ (1991) supra.

⁷⁵ (1992) supra.

⁷⁶ (2002) 9 SCNJ 46 @63, per Ayoola JSC delivering the leading judgment.

⁷⁷ (2002) supra.

⁷⁸ (1992) supra.

*Akabeze*⁷⁹ will prevail over the decision in *Eke v. Okwaranyia*.⁸⁰ It is, therefore, humbly submitted that if all the ingredients of a valid customary arbitration are to be pleaded, it means that the settled proposition of the law that what is required to be pleaded are facts and not evidence is being jettisoned. Hence, it would work hardship on the party who relies on previous customary arbitration to still plead the ingredients. It suffices if it is pleaded that there was a previous customary arbitration and its ingredients will then be proved by evidence at trial, thus complying with the provisions of the rules of courts relating to pleadings.

⁷⁹ (2001) *supra*. At any rate, the opinion relied upon in *Agu v. Ikewibe* (*supra*) by Uwaifo, JSC in *Eke v. Okwaranyia* (*supra*) JSC apparently has no binding force.

⁸⁰ See the case of *Okpozo v. Bendel Newspaper Corp.* (1990) 5 NWLR (Pt. 153).

Thus, Order 27 Rule 2(1) of the High Court of Justice of Kwara State of Nigeria (Civil Procedure) Rules 2022 provides as follows:

Every pleading shall contain a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved, and shall be divided into paragraphs, numbered consecutively, and dates, sums and numbers shall be expressed in figures.⁸¹ (Underlining is mine for emphasis).

To further buttress the point being made here, it has been held that it is not the law that evidence is pleaded in the pleadings. The law on pleadings is that parties only plead facts in support of pleadings and then lead evidence to support the pleaded facts. This is the view of the Supreme Court in *P.N. Uddoh Trading Co Ltd v. Abere*, per Karibi-Whyte JSC.⁸²

⁸¹ See also Order 25 Rule 4(1) of the High Court of the Federal Capital Territory Abuja (Civil Procedure) Rules Decree No 56 of 1989; Order 25 Rule 4(1) of the Kwara High Court (Civil Procedure) Rules 1989; Order 17 Rule 2 of the High Court of Lagos State (Civil Procedure) Rules 2019 and Order 26 Rule 4(1) of the Federal High Court (Civil Procedure) Rules 2000.

⁸² 2001) 5 SC (Pt. 11) 64 @78-79. See also the case of *Trade Bank Plc v. Yisi (Nig) Ltd* (2006) 1 NWLR (Pt. 960) 101 140.

It should also be noted that the proceedings of customary arbitration is not a public document as long as the it is constituted by elders of the community, and therefore the requirements of certification of the proceedings as a true copy of the original is not applicable to tendering of the proceedings.⁸³

At this stage, it is pertinent to consider the ingredients of a valid customary arbitration.

(a) That there aad been a Voluntary Submission of the Matter in Dispute to an Arbitration of One or more Persons

The most important thing is that the submission of parties to arbitration must be voluntary. The issue of voluntariness is very important not only in customary arbitration but also in other types of arbitration like commercial or statutory arbitration. Parties should not be induced, coerced, intimidated or unduly influenced in submitting to customary arbitration. In *Aguocha v. Ubiji*,⁸⁴ the court relied on native law and custom on the effect of the three arbitrations between the parties and the only condition impliedly required by the court was the fact that the parties voluntarily submitted to the arbitrations. Two of the arbitrations were the bodies

⁸³ This is the position of the Supreme Court in *Okoye & Anor v. Obiaso & 2 Ors* (2010) 3 SC (Pt. II) 69 @ 97 per Onnoghen JSC.

⁸⁴ (1975) 5 ESCR 221.

recognised under the native law and custom of the parties as possessing the power to settle disputes. The third arbitration was also a recognised traditional institution and required one of the parties to swear to an oath to assert his ownership. The party that refused to swear to this oath was held to have lost his claim to the land by the arbitration and the court confirmed the decision of the arbitration when it opined that:

It was commonly accepted by the Plaintiff and the Defendant in evidence that where a party had agreed to swear a *Juju* oath produced by his opponent, and the latter on its production, refused to swear to the oath upon the terms prescribed and agreed he would *ipso facto* under native law and custom lose the *res litigosa* to his opponent.⁸⁵

The arbitrator(s) could be village head or traditional ruler or body.⁸⁶ It could be council of chiefs. It could be some elders in the community⁸⁷ and the arbitration could be conducted by priest

⁸⁵ *Aguocha V. Ubiji* (supra) @ 225.

⁸⁶ As in *Ohiaeri v. Akabeze* (supra) where the customary arbitration was made by the traditional ruler and his cabinet. So also is in *Anosile v. Sotunbo* (1992) 5 NWLR (PL. 514).

⁸⁷ *Agu v. Ikewibe* (supra) where the customary arbitrators were the chiefs and elders of the town. See also *Okere v. Nwoke* (1991) 8 NWLR (Pt. 209) 317 where the customary arbitration was reached by a body composed of elders.

wherein oath taking will be administered.⁸⁸ What is material in all circumstances is that the parties must voluntarily submit to customary arbitration. Therefore, once the evidence has shown that both parties to the customary arbitration participated in the proceedings, and other ingredients are satisfied, the proceedings would be binding and a party cannot deny the existence of the arbitration.⁸⁹

(b) That it was Agreed by the Parties either Expressly or by Implication that the Decision of the Arbitrators would be Accepted as Final and Binding

It is immaterial under this ingredient whether the parties expressly agreed that the decision of the arbitrators would be binding or not. The agreement could be by conduct of the parties. It could happen that particular transactions such as land matters are usually referred to customary arbitration by the parties. It would, therefore, not be a defence for either party to contend that there was no agreement that

⁸⁸ As in *Onyege v. Samuel* (2005) 7 NWLR (Pt. 924) 365. See also *John Onyege & Others v. Chief Loveday Ebere & Others* (2004) 6-7 SC 52 where one Okonkwo Chukwueta, a juju priest, administered his juju, Ogwugwu Akpu of Obaha Ezike in Okija, on the parties in respect of a disputed Land. See also Toriola Oyewo, *African Customary Law in Comparative Milieu and Related Topics* (First Edition, Jator Publishing Company, 2003) p. 57.

⁸⁹ See *Chief Onuoha Ordu & Anor v. Chief Amadi Elewa & Ors* (2018) 6-7 SC (Pt. IV) 1 @50, Per Okoro JSC.

the decision of the arbitrators would be final and binding on them merely because the agreement was not express, whether orally or writing.

In *John Onyenge & Ors v. Chief Loveday Ebere*,⁹⁰ the parties agreed to customary arbitration of oath-taking and it was even the Defendants/ Appellants who were instrumental to the exercise of oath taking and they were trying to resile from it despite their willingness and intention that the decision of the customary arbitration would be final and binding on them. In fact, the mere fact that the Appellants were instrumental to the customary arbitration or oath taking is sufficient to conclude that parties (and particularly the Appellants) accepted that the decision of customary arbitration would be final and binding on them. In this case, Niki Tobi, JSC delivering the leading judgment held:

One fairly curious aspect in this case is that the appellants, who were instrumental to the exercise of oath taking, are trying to resile from it. I do not think that such a position is available to them in law.⁹¹

⁹⁰ (2004) (supra).

⁹¹ Sec Tobi, JSC in *Onyenge & Ors v. Ebere & ors* (2004) supra @ 63.

Similarly, the Supreme Court in *Oparaji v. Ohanu*,⁹² per Iguh, JSC put the point thus:

I think I ought to start by restating the well settled principle of law that where two parties to a dispute voluntarily submit the issue in controversy between them to an arbitration according to customary law and agree expressly or by implication that the decision of such arbitration would be accepted as final and binding, then once the arbitrators reach a decision, it would no longer be open to either party to subsequently back out or resile from the decision so pronounced.

(c) That the Arbitration was in Accordance with Custom of the Parties or Their Trade or Business

Custom differs from place to place and from community to community. What is custom today may be outdated in the nearest future. Hence, the custom of the parties must be considered and proved to the satisfaction of the court. That is the customary arbitration is made according to the custom of the parties and where, for instance, the parties do not belong to the same customary tie, recourse may be made to their trade or business.

In order to establish this criterion, therefore, the custom or customary law of the parties with regard to the particular customary arbitration must be proved.

⁹² (1999) 6 SC (Pt. 1) 41; (1999) 9 NWLR (Pl. 618) 290 @ 304.

Custom has been defined as “Unwritten law which lays down how things are usually done and have been done since time immemorial”⁹³

It has equally been defined as a rule which, in a particular district has, from long usage, obtained the force of law.⁹⁴

Customary law, therefore, is the organic or living law of a particular indigenous people regulating their lives and transactions. It is organic in the sense that it is not static and regulatory in that it controls the lives and transactions of the community subject to it, hence custom is said to be a mirror of the culture of the people.⁹⁵

⁹³PH Collin, *English Law Dictionary*, (1st Edn. Peter Collin Publishing Ltd. 1987) p. 72.

⁹⁴See Section 2 of the Evidence Act, *Cap 112 Laws of the Federation of Nigeria 1990* (now Section 258 of the Evidence Act 2011 (as amended)). See also Obilade, *The Nigerian Legal System* (Sweet and Maxwell, 1979) p.83 where the learned author posited that “customary law consists of customs accepted by members of a community as binding among them.” Alam Watson has also been quoted by Funso Adaramola, *Basic Jurisprudence* (1st Edn, 1995 p. 69 to define Custom in the following terms “...the nature of custom is quite unlike that of any other source of law. Other kinds of law making are at least in form, imposed on the populace from above, custom represents... what people do (and accept) as having the effect of law.”

⁹⁵See the dictum of Obaseki JSC in *Oyewunmi v. Ogunesan* (1990) 3 NWLR (PL. 137) 182 @207. See also *Ogolo & 15 Ors v. Ogolo & 5 Ors* (2003) 12 SC (Pt. 1) 56 @65 per Edozie, JSC; *Tawo v. Dosunmu* (1966) NWLR 67; *Otogbohi V. Okeluwa* (1981) 6-7 SC 99; *Dang Pam v. Sale Dang Gwom* (2000) 1 SC S6 @ 65 per Ogwuegbu JSC.

Having defined what is meant by custom or customary law, it is pertinent to observe that being a fact to be established, customary law must either be proved by evidence in court or be taken judicial notice of. Thus, in *Okpowagha v. Ewhedomma*,⁹⁶ the Supreme Court held that custom or customary law is a question of fact to be established by evidence.

Sections 16 and 17 of the Evidence Act⁹⁷ are also relevant here. They provide:

16 (1) A custom may be adopted as part of the law governing a particular set of circumstances if it can be judicially noticed or can be proved to exist by evidence.

(2) The burden of proving a custom shall lie upon the person alleging its existence.

17. A custom may be judicially noticed when it has been adjudicated upon once by a superior court of record.⁹⁸

⁹⁶(1970) ANLR 208 @213; (1970) 6 NSCC 165 @169. See also *Ogolo & Ors v. Ogolo & Ors* (supra) @65, per Edozie, JSC; *Nzekwu v. Nzekwu* (1989) 2 NWLR (Pt. 104) 373 @ 427-428; Sotari F. Oruwari, *Annotation of the Nigerian Evidence Act, 1990* (Akuro R. George & Associates) 2004 P. 34.

⁹⁷ 2011 (as amended).

⁹⁸ See also Section 122 of the same Evidence Act, the communal effect of which is that the court must take judicial notice of all general customs, rules and principles which have been held to have the force of law in or by any of our superior courts and in such a situation such fact need not be proved.

The sum effects of the above provisions of the law and judicial pronouncement is that, as earlier stated, custom may either be proved by evidence or the court takes judicial notice of same.

Another vital issue is the validity of the custom which any party is relying upon to prove customary arbitration. This is because, unlike other laws in Nigeria, certain proceedings exist for the validity and proof of customary law and this is what is called “validity tests of customary law.” When a party seeks to rely on a customary rule, the court finds out if it passes three tests.⁹⁹ The first is the repugnancy test, the second is compatibility test while the third test requires that the customary law is not contrary to public policy.

Section 34 (1) of the High Court Law of Kwara State¹⁰⁰ provides:

The High Court shall observe and enforce the observance of customary law which is not repugnant to natural justice, equity and good conscience, nor incompatible either directly or by implication with any law for the time being in force (underlining mine for emphasis).

⁹⁹ See E. S. Nwauche, Op. Cit p. 64. See Obilade, op. cit p. 100. But see Funsho Adaramola. Op. Cit. p. 74 where a fourth criterion to be decipherable from the law is stated to be the criterion of applicability. See also Akintola Aguda, *Jurisprudence* (Spectrum Books Publishing, Reprint Ed. 2004) p. 244.

¹⁰⁰ *Cap 67, Laws of Kwara State 1994*. See also Section 34(1) High Court Law of Lagos State *Cap 52 of 1973*.

Section 16 (3) of the Evidence Act¹⁰¹ also provides:

Where a custom cannot be established as one judicially noticed it may be established and adopted as part of the law governing particular circumstances by calling evidence to show that persons or the class of persons concerned in the particular area regard the alleged custom as binding upon them:

provided that in case of any custom relied upon in any judicial proceeding it shall not be enforced as law if it is contrary to public policy and is not in accordance with natural justice, equity and good conscience.

The above provisions of the laws provide succinctly the need for customary law to pass the validity tests without which such customary law will not be enforceable.

And in the context of customary law, once the validity to a customary law has been established, the questions of proof which had already been discussed becomes the next issue to settle. However, it is observed that rarely in any case of customary arbitration are validity tests to customary law conducted. It is believed that the tests are assumed and neither parties nor their counsel usually raise the issue of validity to customary laws in cases of

customary arbitration. The assumption seems to proceed from a probable confusion over the sequence for the application of customary law arbitration.

In every case that a customary arbitration is pleaded and intended to be relied upon, the tests of validity and proof must follow. And it is the customary law that will determine whether or not the body of elders, chiefs or priests constituting customary arbitration is recognised. Each case must be treated separately to satisfy the requirement of the law.¹⁰²

(d) That the Arbitrator(s) Reached a Decision and Published their Award

It must be established by a party asserting the existence of customary arbitration that a decision was reached and award from such decision was published.

Without prejudice to the definition of decision in relation to court of law,¹⁰³ but having regard to the fact that the proceedings of a Customary Arbitration, when binding, operates as *estoppel per*

¹⁰² Op. cit. See also *Nsirim v. Nsirim* (2002) 2 SCNJ 46 @ 59. See E.S. Nwauche Op. Cit. p.65.

¹⁰³ Section 318 of the Constitution of the Federal Republic of Nigeria, 1999 (as altered) defines decision in relation to a court as “any determination of that court and includes judgment, decree, order, conviction, sentence or recommendation.” AS Hornby, Oxford Advanced Learner’s Dictionary of Current English (Sixth Edition, Oxford University Press) p. 301 defines decision as “a choice or judgment that you make after thinking and talking about what is best thing to do.”

rem judicatam,¹⁰⁴ a decision of arbitrators in Customary Arbitration is any determination of the arbitration in relation to the matter referred to it, how-be-it, the matter must be civil in nature.

Another vital issue here is in a situation where there are more than one arbitrators and they are not unanimous in their decision, whether unanimity can be used in determining the bindingness or otherwise of the decision of the arbitrators.

In *Nwosu v. Nwosu*,¹⁰⁵ the learned trial Judge referred a matter before him to a group of arbitrators who arrived at a majority and minority decisions. The Court of Appeal held that the learned trial Judge was wrong in accepting the majority decision and the arbitration was not acceptable because the arbitrators were not unanimous.

The question one may ask here is whether the relevant native law and custom require unanimity in the arbitral decisions. It is submitted, therefore, that the duty of the court in such circumstances would be to refer to the relevant native law and custom to find out whether unanimity is the hallmark of arbitral decisions in the community in question.

On the issue of publication of arbitral award, it is submitted that this requirement must be viewed

¹⁰⁴ The issue whether the decision in customary arbitration could operate as *estoppel per rem judicatam* below.

¹⁰⁵ (1996)2 NWLR 64.

with extreme caution. The word “Publish” has been defined to mean:

To have a document (such as catalogue or book or magazine or newspaper or piece of music) written and printed and then sell or give it to the public.¹⁰⁶

Going by the definition of the word “publish” as could be seen in the dictionary, one may conclude that publishing arbitral award in Customary Arbitration presupposes that the award will be documented and made known to the public. But having regard to the fact that Customary Arbitration is inseparable from, and indispensable to, customary law, this requirement of publication of award could be said to be alien to customary law. This is because the use of document or writing of decision and/or publishing same is uncommon, and even alien, to customary law. Hence, once the arbitration is Customary Arbitration, the need for publication of arbitral award should not ordinarily be a condition or sub-condition precedent to the validity of customary law. In *Gaji v. Paye*,¹⁰⁷ the Supreme Court held that Section 4 of the

¹⁰⁶ P.H. Collin, Op. Cit p. 224. AS Hornby, Op. cit p. 943 also defines “publish” as “to produce a book, magazine, C-D Rom etc and sell to public”, “to print a letter, an article etc in a newspaper or magazine”, “to make something available to the public on the internet,” “to have your work printed and sold to the public.”

¹⁰⁷ (2003) 5 SC, 53 @ 64.

English Statute of Fraud 1677 which requires writing as a prerequisite for a valid disposition of land is inapplicable to transaction the subject matter in dispute which was made under customary law. It suffices to say that once there are witnesses to the Customary Arbitration proceedings who can testify to the existence of the award of the decision of the arbitration, the requirement of publication of the award becomes otiose.

(e) That the Decision or Award was Accepted at the Time it was Made

This aspect still touches on the voluntariness of the parties to consent to arbitral proceedings. The validity or otherwise of arbitral proceedings under Customary Arbitration with respect to whether the parties accepted the decision or award of the arbitrators must be determined. In *Okereke v. Nwankwo*,¹⁰⁸ the 2nd Defendant relied on the decision and award of Customary Arbitration as binding. He gave evidence at trial as follows:

At last our Umunna Okolobi Imoko approached Eze Dike, (sic) took the matter and settled the matter for us (the plaintiff and the defendants) and in their decision the Umunna said that the land is ours (defendants) and that the plaintiff should stay (sic) clear. This is the settlement document.

¹⁰⁸ (2003) 4 SC (Pt.1) 16 @ 22.

The trial court admitted the said settlement document as exhibit B. The 2nd Defendant proceeded by saying: “Again the Plaintiffs refused the verdict of Umunna and sued us into court”.

By the above excerpt, the Defendants (Appellants at the Supreme Court) are saying that the Plaintiffs (Respondents at the Supreme Court) did not accept the arbitral award as per Exhibit B. The Supreme Court held, per Edozie JSC¹⁰⁹ that the legal implication being that Exhibit ‘B’ is not binding on the parties.¹¹⁰

Above shows that one either of the parties to Customary Arbitration resiles from the arbitration or does not accept the decision or award of the arbitration at the time it was made, such decision or award is not binding on the parties and therefore affects the validity of the arbitration.

Bindingness of Decisions of Customary Arbitration

Like any other type of Arbitration, once all the conditions precedent to be fulfilled for the validity of Customary Arbitration¹¹¹ have been fulfilled, the parties to it are bound

¹⁰⁹ @22.

¹¹⁰ See also *Awosile v. Sotunbo* (Supra) @ 253.

¹¹¹ See the discussion on the ingredients of a valid customary arbitration earlier discussed.

by the decision or award of the arbitration and they cannot resile from it. Thus, in *Agudoro Ekpe & Ors v. Ben Oke & Ors*,¹¹² the contention of the Plaintiffs was that the land in dispute between them and the defendants was submitted to Customary Arbitration by both parties and that the arbitrators reached a decision and awarded the land in dispute to them (i.e the Plaintiffs). The Defendants, however, denied the fact that they submitted to the Customary Arbitration. However, the record of proceedings of the arbitration panel with the Defendants statement showing that they (the Defendants) submitted to arbitration and participated in the arbitration proceedings (including their statement which they made to the arbitrators) was tendered in evidence through the Plaintiffs' witness. The court noted that both parties submitted to arbitration, made statement and called witnesses. In fact, the members of the arbitration visited the land in dispute. All the parties were given equal opportunities to present their case and call their witnesses. The Supreme Court agreed with the position of the trial court and the Court of Appeal that the arbitral proceedings

¹¹² (2001) 5 SC (Pt.1) 180.

were without bias and malice. It was held, per Kutigi JSC, delivering the leading judgment as follows:

It is therefore not correct to say that the Court of Appeal did not consider Exhibit D in its resolution of whether or not the defendants submitted to arbitration. The trial High Court certainly did and the Court of Appeal agreed with the findings of the High Court that the Defendants did submit to arbitration and that they are therefore bound by the result of arbitration.¹¹³

It should be noted, as earlier stated, that once any of the conditions precedent to the validity of Customary Arbitration is missing, the decision or award is not binding. In *Duruaku Eke & Ors v. Udeozor Okwaranyia*¹¹⁴ the parties relied on traditional history in proof of their title to the land in dispute. The Customary Arbitration which was conducted by the elders of their community or traditional rulers did not comply with all the conditions necessary for its enforcement. The purported customary arbitration was rejected by the court as being invalid. In his leading judgment, Uwaifo JSC held as follow:

In the present case both the pleadings and evidence on the alleged arbitration are completely defective. The ingredients were not pleaded and not proved. The so-called arbitration is worthless.

¹¹³ See page 188 of the report.

¹¹⁴ (2001) 4 SC (Pt. 11) 71.

It is submitted that such an arbitration which is worthless and therefore rejected by the court for non-compliance with the condition precedent to its validity is not enforceable and not binding on the parties.¹¹⁵ Similarly, where the decision of customary arbitration is not agreeable to both parties or where the arbitration was inconclusive, then it cannot be binding on the parties and cannot create *estoppel*.¹¹⁶

On the binding effect of decisions of customary arbitration, the Supreme Court succinctly posited in *Elder Isaac Udum Okala v. Chief Franklyn Udah* (2019) All FWLR (Pt. 1021) 203 @ 222, per Bage JSC delivering the leading judgment as follows:

The binding effect of decisions of customary arbitrators derives from the fact that parties who have right to have their disputes voluntarily decide, have, without prompting opted for a decision by non-judicial body, the decision of which they have held themselves to be bound by, neither of them can be allowed both in law and equity, to resile from the position they have willingly created. Clearly, to allow parties to approbate and reprobate in the customary arbitration will make nonsense of that indigenous institutional avenue of dispute resolution particularly where the subject matter of dispute is a rule of custom or tradition.

¹¹⁵ See page 89 of the report.

¹¹⁶ This is the position of the Supreme Court in *Ezike v. Egbuaba* (2019) All FWLR (Pt. 1017) 546 @561-562, per Okoro JSC

4

Decisions of Customary Arbitration Operating as *Estoppel Per Rem Judicatam*

It is not in dispute that Customary Arbitration or arbitration is not a court of law, hence its decision cannot by any stretch of imagination be said to be a decision of a court of law. Therefore, Customary Arbitration does not qualify as court of law within the Constitution. It is not even an inferior court outside the Constitution, like Magistrate Court, District Court, Area Court or Customary Court.

Aside the fact that the members of the body constituting customary arbitration may not be learned in the law, it is a notorious fact that the procedure adopted in adjudication is simple, and clearly outside the technical procedure of

courts of law. Apart from this, the decisions of customary arbitration do not qualify as judgments in the real technical sense of the expression in jurisprudence and, therefore, cannot pass the tests of judicial precedent nor come within the purview of *stare decisis*.

Niki Tobi, JSC put the position clearly in his concurring judgment in *Sunday Ufomba & Anor v. Nwosu Ahuchaogu & Ors*¹¹⁷ when he opined that:

A Customary Arbitration is essentially a native arrangement by selected elders of the community who are vast in the customary law of the people and take decisions, which are mainly designed or aimed at bringing some amicable settlement, stability and social equilibrium to the people and their immediate society or environment. Native or customary arbitration is only a convenient forum for the settlement of native disputes and cannot be raised to the status of a court of law.... In view of the fact that a native or customary arbitration is not a court of law, the learned trial Judge, with the greatest respect, was in error when he equated decisions of native arbitration with those of courts of law. While I concede to the learned trial judge that a customary arbitration could be binding on the parties when certain ingredients are fulfilled, decisions of such body do not qualify as "concurrent findings" with those of the High Courts.

¹¹⁷ (2003) 4 SC (Pt. II) 65@90.

It should, however, be noted that because of the nature and binding effect of customary arbitration when the preconditions for its bindingness have been fulfilled, parties will be estopped from resiling from it; hence, even though a decision by a court of competent jurisdiction creates an *estoppel per rem judicatam*, and despite the fact that the decision of a customary arbitration is not a decision of a court of law, an award by a customary arbitration will have the same consequence if the preconditions for its validity and bindingness are satisfied. This is the view expressed by the Supreme Court in *Okereke v. Nwankwo*.¹¹⁸

The argument on whether the award or decision of customary arbitration could operate as *estoppel per rem judicatam* would be incomplete without making reference to the Court of Appeal decision in *Okpuruwa v. Ekpokam*¹¹⁹ where it was held that our legal system does not recognise the practice of elders or natives constituting themselves as customary arbitration to make binding decision between parties in respect of land or other disputes. It is humbly submitted that, having regard to the various Supreme Court decisions on the subject matter,¹²⁰ the decision of the

¹¹⁸ (2003) supra @ 21, per Edozie JSC. See also *Balogun v. Afolayan* (2002) FWLR 331 @ 356 where it was held that the proceedings of customary arbitration is relevant and sufficient enough for the purpose of establishing or proving the plea of estoppel.

¹¹⁹ (1988) 4 NWLR (Pt. 90) 554.

¹²⁰ *Yakeen Alabi Odonigi v. Aileru Oyeleke* (2001) 2 SC 194; *Balogun v Afolayan* (2002) supra.

Court of Appeal cited above cannot be correct. Customary arbitration is recognised and could be constituted by elders or natives of a particular community.

The Supreme Court in *Yakeen Alabi Odonigi v. Aileru Oyeleke*,¹²¹ per Kalgo JSC delivering the leading Judgment held:

It is no doubt true that customary arbitrations is not an exercise of judicial power under the constitution (not a function) exercised by the courts. On the other hand, it is now well settled that one of the many ways of settling disputes among African Societies is refer the dispute to either the family head, or elders or chiefs of the community concerned for settlement, and upon subsequent acceptance of the arbitration grant or award, it becomes binding on them.

Above shows, without doubt, that the decision of customary arbitration can conveniently operate as *estoppel per rem judicatam* as long as all the preconditions for the validity of customary arbitration are satisfied.

Apart from the fact that the decision of customary arbitration can operate as *estoppel per rem judicatam*, it can also operate as *estoppel* by conduct by virtue of Section 169 of the Evidence Act.¹²²

¹²¹ (supra) @ 203.

¹²² 2011 (as amended). See also *Benjamin & Ors v. Kalio & Anor* (2018) All FWLR (Pt. 920) 1 @22-23, per Eko JSC.

But the burning and crucial issue is the fact that the ingredients or preconditions for a valid customary arbitration are not the same as those of *estoppel per rem judicatam*.

At this juncture, the question is what are the essential elements or ingredients for a valid plea of *estoppel per rem judicatam*? These shall be discussed *anon*.

Essential Elements of *Estoppel Per Rem Judicatam*

The principle of *estoppel per rem judicatam* has been enunciated in our laws, both statutory and case laws. By Section 173 of the Evidence Act ¹²³every judgment is conclusive proof, as against parties and privies, of fact directly in issue in the case, actually decided by the court, and appearing from the Judgment itself to be the ground on which it was based; unless evidence was admitted in the action which Judgment was delivered which excluded in the action in that Judgment is intended to be proved.

Estoppel generally is a rule which bars a party to a suit from asserting or denying a particular fact, but regarding *estoppel per rem judicatam*, ¹²⁴ Lord Denning put the position thus in *Fidelis Shipping Co. Ltd v. V/O Expotchle*:¹²⁵

¹²³ Supra.

¹²⁴ Also known as estoppel by record. It is divided into two kinds: cause of action estoppel and issue estoppel.

¹²⁵ (1966) 1 QB 630 @ 640; (1965) 2 ALLER 4 @ 8. See also *Uwemedimo & Anor v. Mobil Producing Nigeria Unlimited* (2021) MWLR (Pt. 26)1167 @ 1200, per Oseji, JSC.

If one party brings an action against another for a particular cause and judgment is given on it there is a strict rule of law that he cannot bring another action against the same party for the same cause. The Learned Jurist stated further:

Within one cause of action, there may be several issues raised which are necessary for the determination of the whole case. The rule then is that, once an issue has been raised and distinctly determined between the parties then, as a general rule, neither party can be allowed to fight that issue all over again.¹²⁶

The rationale behind the principle of *estoppel per rem judicatam* is as put by Ikogbhe JCA in *Ikpo v. Azubuike*¹²⁷ that it is to ensure that the matter is completely and finally settled or resolved. There ought to be an end to litigation and it is for the general good that solemn adjudication of the courts be not rescinded at will or lightly disturbed.¹²⁸

¹²⁶ Ibid.

¹²⁷ (2000) 14 NWLR (Pt.686) 166 @ 186.

¹³⁸ See also *Gaba v. Tsoida* (2021) All FWLR (Pt. 1084) 536 @563-564; *Umaru Sunday v. Federal Republic of Nigeria* (2019) All FWLR (Pt. 971) 56 @100.

The law is now firmly established that for a plea of *estoppel per rem judicatam* to succeed the party relying on it must prove the following, being the element or ingredients:

- The parties or their privies are the same in both previous and present proceedings;
- The claim or the issue in both proceedings is the same;
- The res or subject matter of the litigation in the two cases is the same;
- The decision relied upon to support the plea of *estoppel per rem judicatam* must be valid, subsisting and final; and
- The court that gave the previous decision relied upon to sustain the plea must be a court of competent jurisdiction.

Unless the above preconditions are established, the plea of *estoppel per rem judicatam* cannot be sustained.¹²⁹

¹²⁹ See the following cases: *Okpala Ezeokonkwo & Ors v. Nwafor Okeke & Ors* (2002) 11 NWLR (Pt. 777) 1 @ 26-27 paras H-D; *Oshodi v. Eyifunmi* (2001) 13 NWLR (Pt. 684) 298 @ 326 paras A-D; *Chief Sam Warri Esi v. The Chief Secretary to the Federation of Nigeria* (1973) 11 & 12 SC (Reprint) 115 @ 133-135 paras 15-25; *Adone v. Ikebudu* (2001) 14 NWLR (Pt. 733) 385; *Okunrinjeje v. Ajikobi* (2021) All FWLR (Pt. 1095) 2488 @ 2541; *Gaba v. Tsoida* (2021) All FWLR (Pt. 1084) 536 @ 563-564.

1. The Parties or their Privies are the same in both Previous and Present Proceedings

The term “privies” under this heading was considered by the Supreme Court in the case of *Coker v. Sanyaolu*¹³⁰ wherein Idigbe JSC of blessed memory observed as follows:

Privies are of two classes and they are:

1. Privies in blood (as ancestor and/heir)
2. Privies in law (as testator and executor, intestate and administrator)
3. Privies in estateAs vendor and purchaser, lessor and lessee”¹³¹

Similarly, where an action brought by a person in a representative capacity against another person personally and prosecuted to judgment and later a further action is brought against him in representative capacity by the Plaintiff in the original action, the judgment is not the same, since in the earlier action, the Defendant is sued in his personal capacity and in the later action as a representative

¹³⁰ (1976) 9-10 SC, 203.

¹³¹ P. 223. See also *Okafor Adone & 2 Ors v. Ozo Gabriel Ikebodu* (2001) 14 NWLR (pt. 733)385 @ 413; *Ishie V. Mowanso* (2000) 13 NWLR (Pt.684)279 @ 292.

of class of persons.¹³² Simply put, the law is settled that a decision against a person in one capacity cannot be *res judicata* against him suing in another distinct capacity.¹³³ Hence, in order to rely on a plea of *estoppel per rem judicatam*, it must be established that the parties in the previous and present proceedings are the same.

2. The Claim or the Issue in Dispute in both Proceedings is the Same

The claim or issue in dispute denotes the cause of action in a suit. Thus, where the claim in the two proceedings is not the same a plea of *estoppel per rem judicatam* cannot lie.

In *Abiola & Sons Bottling Company Limited & Anor v. First City Merchant Bank Limited & 2 Ors*,¹³⁴ the Plaintiffs' action was for declarations, orders, damages and injunction in respect of a debenture deed and appointment of receiver while in *Abiola &*

¹³² See the Supreme Court cases of *Olowo Okukuje v. Odejeima Akwido* (2001) 3 NWLR (Pt. 700) 261 @ 293-294, per Katsina Alu JSC; *Shitta Bay & Ors V. Lagos Executive Development Board & Ors* (1962) ALL NLR 373.

¹³³ This is the decision of our courts in *Cardoso v. Daniel* (1986) 2 NWLR (Pt. 20) 1; *Iboro & Anor v. Ume-Ohana* (1993) 2 NWLR (Pt. 277) 510; *Ezeanaya & Ors v. Okeke & Ors* (1995) 4 NWLR (Pt. 388) 142 @ 161; *Alabi v. Ladeji* (1986) 5 NWLR (Pt. 42) 523, *Iyaji v. Eyigede* (1983) 3 NWLR (Pt. 61) 523.

¹³⁴ Unreported Suit No; KWS/122/91.

*Sons Bottling Company Limited v. Seven-up Bottling Company Limited & 2 Ors*¹³⁵ the action was essentially for damages for an alleged wrongful sale of the Plaintiff's assets. The Supreme Court in *Seven-up Bottling Company Limited v. Abiola & Sons Bottling Company Limited*¹³⁶ unanimously held as follows:

The later action was for various declarations, orders, damages and injunction in respect of the debenture deed and appointment of the 2nd Defendant as receiver/manager. The present action was for damages for alleged wrongful sales of plaintiff's assets. The Learned Trial Judge was right when he held that the cause of action were dissimilar.¹³⁷

3. The Res or Subject Matter of the Litigation in the Two Cases is the Same

This relates to the issue of claim or issue in dispute. The duo are interwoven in view of the Court of Appeal decision in *The Military Administrator, Benue*

¹³⁵ Unreported Suit No. KWS/270/89.

¹³⁶ (2001) 6 SC 73, (2001) 13 NWLR (Pt.730) 469; (2001) 6 SCNJ 18.

¹³⁷ (2001) 13 NWLR (Pt. 730) @ 508.

*State & 2 Ors v. Abayilo*¹³⁸ where it was held as follows:

The subject matter in a suit, invariably denotes the claim, the prayer which the Plaintiff takes before the court and ask that by virtue of the facts warranting such a prayer, he is entitled to the relief he asked of the court.

In view of the above decision, it serves no useful purpose dissipating much ink on this heading.

4. The Decision Relied upon to Support the Plea of *Estoppel Per Rem Judicatam* Must be Valid, Subsisting and Final

In a plea of *estoppel per rem judicatam*, the issue whether an issue has been finally decided does not necessary always need to be tied to the question whether or not there has been an adjudication of the substantive suit on the merit. The test most adequate for all occasions is whether the court which gave the decision can vary, re-open or set aside the decision. If it cannot, the decision in that context is final. This is the view of the Supreme Court in *Onyeacuchi v. INEC & Ors.*¹³⁹

¹³⁸ (2001) 5 NWLR (Pt. 705) 19 @ 36.

¹³⁹ (2002)4 SCNJ 265 @ 276.

Where a judgment is already appealed against, it is no longer final as it is liable to be set aside or nullified on appeal thereby rendering it inoperative as a basis for the defence of *estoppel per rem judicatam*,¹⁴⁰

5. The Court that gave the Previous Decision Relied upon to Sustain the Plea must be a Court of Competent Jurisdiction

The issue of competence of a suit and the jurisdiction of the court to entertain and determine same are of paramount importance to our adjudicatory process as any decision, order, judgment or finding arrived at by any court without jurisdiction is a nullity, no matter how well conducted. A court has jurisdiction and therefore competent when:

- (a) It is properly constituted with respect to the number and qualification of its members;
- (b) The subject matter of the action is within its jurisdiction;
- (c) The action is initiated by due process of law; and
- (d) Any condition precedent to the exercise of its jurisdiction has been fulfilled.¹⁴¹

¹⁴⁰ See *Owonikoko v. Arowosaiye* (1997) NWLR (Pt. 523) 61 @ 75; *Odutola v. Oderinde* (2004) 5 SC (Pt. 11) 90 @ 98.

¹⁴¹ See the following Supreme Court cases: *Madukolu v. Nkendihiem* (1962) 2 ALLNLR 581 @ 589-590; *Odu'a Investment Co. Ltd v. Talabi* (1997) 10 NWLR (Pt. 523) 1 @ 58-59; *Ishola v. Ajiboye* (1994) 6 NWLR (pt. 352). Note that any defect in competence of the court is fatal, for the proceedings are a nullity, however well conducted and decided it may be.

Thus, a judgment which has been given by a court without jurisdiction or which is otherwise a nullity for any reason cannot operate as *estoppel per rem judicatam*.¹⁴²

Setting Aside of Decision of Customary Arbitration

Customary arbitration, unlike commercial or statutory arbitration, is mostly and usually not codified. So, there is no section of the law that can apply for setting aside of arbitral award or decision in customary arbitration.

However, it could be rightly said, having regard to the essential ingredients for a valid customary arbitration, that the ground upon which a party may seek or apply to have the customary arbitration award or decision set aside is when any of the ingredients is not made out. Thus, a party, who is dissatisfied with an arbitral award under customary arbitration may, if he can prove that any of its preconditions is lacking, request the court to set aside the award. Similarly, it cannot be gainsaid that a party may be empowered to apply to set aside customary arbitral award if he can prove that the award contains decisions on matters which are beyond the scope of the submission.

¹⁴² Aguda, *The Law of Evidence* (Third Edition, Spectrum Books Limited Ibadan 1989) p. 246. See also *LSDPC V. Adeyemi-Bero* (2005) ALLFWLR (Pt. 252) 486 @ 511; *FRN v. Ifegwu* (2003) 5 SC 252@ 275.

5

Conclusion

The need to recognise customary arbitration, as an important institution among non-urban dwellers stems from the fact that the resolution of disputes and differences, like in other forms of Alternative Dispute Resolution (ADR), is cheaper, less formal and rancorous than litigation.

The legal position seems to be that where a decision has been handed down under customary arbitration, and accepted by the parties, it will not open to any of the parties to turn around at a later stage and reject it, the operative factor being the initial acceptance of the decision at the time it was given. Where the arbitrators are traditional institutions or chiefs recognised by customary law as

possessing the power to act as arbitrator customary arbitration, it is clear that this recognition is one of the ingredients which will be used to determine the validity of the arbitration. However, the nature and application of customary law seems to run contrary to this view. Unlike other laws, certain procedures exist for the validity and proof of customary law. The court must find out if the customary law passes the validity tests of repugnancy, incompatibility, public policy and applicability.

Once the validity tests have been passed, the question of proof becomes the next issue to settle. It is observed that in none of the cases or instances of customary arbitration pronounced upon by our courts is the validity tests conducted. They seem to be assumed.

The assumption of validity tests of customary law in customary arbitration seems to proceed partly from a confusion over the sequence for the application of customary law and partly because neither the parties nor the court before whom the issue of customary arbitration raises the issue of validity tests to customary law. It is submitted and recommended that in every case where a customary arbitration is pleaded or raised, the tests of validity and prove of customary law must follow.

Although customary arbitration itself has its own ingredients for its validity, this does not mean that the usual and established validity tests of customary law should not be passed. It must be determined whether the customary arbitration sought to be relied upon passes the validity tests and if it does the next stage would be to establish, by proof, the ingredients of a valid customary arbitration. Similarly,

the requirement that the award of customary arbitration must be published, it is opined, runs contrary to the age long characteristics of customary law that customary law is largely unwritten. The implication of the requirement of publication of the award of customary arbitration is that without the award of the arbitration being published, such customary arbitration is invalid. This position, however, derogates from, and is liable to bastardise the whole essence of customary law. It is recommended, therefore, that when the occasion arises, the court should soften the requirement of publication and such requirement should be made merely directory and discretionary, and not mandatory.

This issue of finality and binding effect of customary arbitration has been critically appraised in this book. Although judicial pronouncements have not attempted to distinguish between customary arbitration and customary law arbitration, it is humbly submitted that the two mean one and the same thing and any attempt to distinguish between the duo is merely academic.

This work is laced with both statutory and judicial authorities and is limited in scope to customary arbitration. Also being a form of Alternative Dispute Resolution, the essence and importance of arbitration is articulated in this book. Similarly, the essential ingredients of a valid customary arbitration and a plea of *estoppel per rem judicatam* are examined.

Customary arbitration exists in our society both at the rural and urban areas and therefore should be recognized, thereby promoting a dispute settlement mechanism which is simple, less formal, less costly and non-litigious.

Bibliography

- Adaramola, Funso (1995). *Basic Jurisprudence* 1st Edition.
- Aguda, Akinola (2004). *Jurisprudence*, Reprint Edition
Spectrum Books Publishing.
- Collin, P.H. (1987). *English Law Dictionary*, 1st Edition, Peter
Collin Publishing Ltd.
- Ezejiiofor, Gaius. *The Law of Arbitration in Nigeria*, 1st Edition,
Long Man Nigeria Plc.
- Hornby, A.S. (2000). *Oxford Advance Learner's Dictionary of
Current English*, 6th Edition, Oxford University Press.
- Malcom, N. Shaw (1998). *International Law*, 4th Edition
Cambridge University Press.
- Obilade (1979). *The Nigeria Legal System*; Sweet And
Maxwell.
- Oyewo, Toriola (2003). *African Customary Law In
Comparative Milieu And Related Topics*; 1st Edition,
Jator Publishing Company.
- Sotaki, Foruwari (2004). *Annotation of the Nigeria Evidence
Act 1990*, 1st Edition Akuro R George & Associates.

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