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CUSTOMARY ARBITRATION IN NIGERIA: REFLECTIONS ON SOME CONCEPTUAL CHALLENGES TO ITS EFFECTIVE DEVELOPMENT AS A VIABLE ADR MECHANISM IN NIGERIA

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ABSTRACT

Customary arbitration dispute resolution machinery in Nigeria is a simple and less sophisticated means in which conflicts, particularly in traditional Nigerian society, are resolved. Resolution of disputes via customary arbitration has numerous advantages part of which is speed, less cost and absence of unnecessary technicalities associated with litigation. Despite these imminent advantages, there are certain practical challenges associated with its practice which has hindered its growth as a viable dispute resolution mechanism in Nigeria. These challenges largely stem from the courts trying to infuse the features of statutory arbitration into customary arbitration – with the two having obvious incompatible features. This paper reflects on some of these challenges with a view to suggesting a way forward so as to enhance the progressive growth and development of customary arbitration as a dispute resolution process in Nigeria.

1.0 INTRODUCTION

Customary arbitration is one of the methods of settling civil disputes in Nigeria. It is a traditional system of dispute resolution in which traditional rulers, elders, age groups and deities play a prominent role in dispute resolution to ensure social justice and harmony within and among the people of various Nigeria communities.¹ The practice of customary arbitration involves a process of referring disagreements to the family heads, elders or chiefs for a compromise solution based upon subsequent acceptance by the parties of the arbitral award which becomes binding and enforceable after the signification of its acceptance and from which either party is free to resile at any stage of the process.² Such decisions (arbitral awards) are based on the prevailing custom and practice of that community³ otherwise known as customary law. Customary law under Nigerian Legal system includes native law and customs which is predominant in the southern

- 1 Daibu A. A. „Application of the Rules of Natural Justice in Arbitral Proceedings in Nigeria Ife Juris Review vol. 1, (2013) p. 60; Oba A. A. „Juju Oath in Customary Arbitration and their Legal Validity in Nigerian Courts Journal of African Law vol. 52 No.1 (2008) p. 140 p. 142; Igboke V.C. „Law and Practice of Customary Arbitration in Nigeria: Agu v. Ikewibe and Applicable Law issues Revisited Journal of African law vol. 41. No. 2 (1997) p. 201
- 2 Akanbi M. M. Domestic Commercial Arbitration in Nigeria: Problems and Challenges (Lambert Academic Publishing Germany, 2012), 58; Elias T.O. The Nature of African law (Manchester University Press 1956) 212; Kolajo A.A. Customary Law in Nigeria through Cases (Spectrum Books Ltd Ibadan 2000), 219; Ayinla L.A. „ADR and the relevance of Native or Customary Arbitration in Nigeria University of Ilorin Law Journal vol. 5 No. 1 (2009), 258;
- 3 Oba A. A. „Juju Oath in Customary Arbitration and Their Legal Validity in Nigerian Courts Journal of African Law vol. 52 No.1 (2008), 142-143; Daibu A. A. „Application of the Rules of Natural Justice in Arbitral Proceedings in Nigeria, Ife Juris Review, vol. 1, (2013), 70; Ayinla L.A. „ADR and the relevance of Native or Customary Arbitration in Nigeria, University of Ilorin Law Journal vol. 5 No. 1 (2009) 258

part of the country and Islamic law (Shariah) prevalent in the northern Nigeria.⁴

The legality of the practice of customary arbitration in Nigeria has been a subject of intense debate.⁵ Though, issues like its nature and scope, features, conditions for its validity and legal effect of an arbitral award have been pronounced upon and appear settled by plethora of cases,⁶ customary arbitration still faces a number of conceptual challenges which stand in the way of its growth as a viable ADR mechanism in Nigeria.

⁴ See the cases of *Njoku v. Ekeocha*, ECSI R (1972) 199; *Ekwueme v. Zakari* (1973) ECSI R 631. This does not mean that there is the total absence of native law and custom in Northern Nigeria. Some sections of people in Northern Nigeria do not subscribe to the Islamic faith and have their own prevailing native law and custom.

⁵ See generally Oba A. A. „Juju Oath in Customary Arbitration and Their Legal Validity in Nigerian Courts Journal of African Law, Vol. 52 No.1. (2008), 139; Akanbi M.M. Domestic Commercial Arbitration in Nigeria: Problems and Challenges (Lambert Academic Publishing: Germany, 2012), 113- 178; Ayinla L. A. „ADR and The Relevant of Native or Customary Arbitration in Nigeria, University of Ilorin Law Journal vol. 5 No. 1(2009), 254; Imam I. „The Legal Regime Of Customary Arbitration In Nigeria Revisited 3(2) Confluence Journal of Jurisprudence and International law, Kogi State University, Ayingba. (2010), available on line at <<http://www.unilorin.edu.ng/publications/imami/UNIKOGI%20CUSTOMARY%20ARBITRATION%202.pdf>> (accessed 17th September 2015); Ariyoosu D.A. "Customary Arbitration As A Dispute Mechanism And Its Operational Frame Work As Estoppel Per Rem Judicatum" University of Ilorin law Journal vol. 5 No.1 (2009) p. 102 ; Igboikwe V.C. „Law and Practice of Customary Arbitration in Nigeria: Agu v. Ikewibe and Applicable Law issues Revisited Journal of African law vol. 41, No.2 (1997), 201; Umeche C.I. „Customary arbitration and the Plea of Estoppel Under Nigerian Law Commonwealth law Bulletin, vol.35 No. 2 (2009) p. 291; Akanbi M.M. „A Critical Assessment of The History and Law of Domestic Arbitration in Nigeria Trends in Nigeria Law: Essays in Honour of Oba DVF Olatun-Olagbegi III, Olowo of Owo Kingdom Oluduro et al (eds.) (Constellation Nig. Publishers) p. 462; Oluduro O. „Customary Arbitration in Nigeria: History and Developments in Kipolati T (ed.) Current Issues in Nigerian Jurisprudence Essays in Honour of Chief Adegboyega Solomon Awomolo SAN (Renaissance Law Publishers, Lagos, 2007) p.1; Ladipo O.A. „Where does Islamic Arbitration fit into the Judicially Recognised Ingredients of Customary Arbitration in the Nigerian Jurisprudence? African Journal on Conflict Resolution vol. 8, No. 2 (2008) p.108 also available online at <www.ajol.info/index.php/ajcr/article/viewFile/39427/59591> (accessed on 29 May 2014); Omekoro F. J. „Customary Law Arbitration and Oath Taking: The Crises of Validity Ikeja Bar Journal, vol. 1, Pt. 2 (2005) 54

⁶ *Ido William Utong & Ors v. Edet Archibong Utong & Ors* (2013) 1 PELR- 20201(CA) at 34; *Ikeja v. Tyo* (2007) 11 NWLR (Pt.1045) 385 at 399; *Alibo & Ors v. Okusun & Ors* (2010) 3-5 SC (Pt.1) 11 at

This paper examines the major challenges of customary arbitration in Nigeria. In so doing, certain pertinent issues related to customary arbitration will be addressed such as its nature, emergence and development and characteristics. The paper notes that some of the major challenges of the practice of customary arbitration include imposition of other incompatible legal regimes on customary arbitration practices, uncertainties, restricted scope of jurisdiction of customary arbitration tribunals and the general attitudes towards litigation. In concluding, far reaching recommendations are made to enhance the status of customary arbitration as a dispute settlement method in Nigeria.

2.0 NATURE OF CUSTOMARY ARBITRATION IN NIGERIA

There are some controversies on an acceptable definition of customary arbitration. However, a very apt definition is that given by Elias in his book titled *Nature of African Customary Law*. He defines customary arbitration as:

A mode of referring a dispute to the family head or an elder of the community for a compromise solution based upon subsequent acceptance by both parties of the suggested award, which becomes binding only

81; *Achor v. Adejoh* (2010) 6 NWLR (Pt.1191) 537; *Okereke v. Nwanko* (2003) 9 NWLR (Pt. 826) 592; *Egesimbe v. Onwuzurike* (2002) 15 NWLR (Pt. 791); *Ohiaeri v. Akabueze* (1992) 2 NWLR (Pt.221) 1; *Agu v. Ikewibe* (1991) 3 NWLR (Pt.180) 385; *Onyege v. Ebere* (2004) 6 SCNJ 126; *Eke v. Okwaranya* (2001) 4 SC pt II, 71; *Ufomba v. Ahuchaogu* (2003) 4 SC pt. II, 65; *Odonigbi v. Oyeleke* (2001) 2 SC 184

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.⁷

The arbitral award is valid and enforceable by the courts of law; creates a *res judicata* effect. The definition has been adopted by various judicial authorities signifying its acceptability nevertheless; this definition raises two questions which have to do with the general conceptual understanding of customary arbitration and its practice in Nigeria. First, is it just any person who settles disagreements under customary law that has the powers of a customary tribunal and thus make awards that are binding. The second question is regarding the award. Is it any customary arbitral award that is enforceable by the courts? With regards to the first issue, it seems that such persons who settle disputes based on native law and customs must be recognized by the relevant native law and customs and the people as having the requisite qualifications and mandate to make a decision that is binding.⁸ Certain persons, be them elders, traditional rulers and so on must be given express or

⁷ Elias T. Nature of African Customary Law 212. Karibi-Whyte in a like manner define customary arbitration as „an 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 community and the agreement to be bound by such decision or freedom to resile where unfavourable. Akanbi has heavily criticized this decision. He contends that „the definition is not a true reflection of the customary arbitral practices of the diverse communities in Nigeria, each with different culture and norms Akanbi M.M. Domestic Commercial Arbitration in Nigeria: Problems and Challenges 161

⁸ See the decision of the court in *Inyang v. Essien* (supra) where the purported native tribunal, the Imam council, was held not to have the mandate to make a binding award but to make peace between the parties. Thus it is not every decision by a group of persons under native law and custom that will be considered as binding.

implied authority to settle disputes.⁹ It is only awards made by such persons that can be enforceable by the courts. Regarding the second issue, it is not just any award that is enforceable by the courts of law. For a customary arbitral award to be valid and enforceable, certain conditions must be present. This will be discussed in the subsequent part of this article. What shall be considered now is the historical development of the practice of customary arbitration in Nigeria.

3.0 EMERGENCE AND DEVELOPMENT OF THE PRACTICE OF CUSTOMARY ARBITRATION IN NIGERIA

Customary arbitration is not a new dispute resolution mechanism.¹⁰ It has existed in Nigeria for a very long time and has even been stated to predate the courts.¹¹ Historically, the practice of customary arbitration can be divided into three main periods with particular feature. These periods are the pre-colonial era, the colonial era and the period of a brief set back.

⁹ *Inyang v. Essien* (supra) at 464.

¹⁰ See Bello A.T. „Customary and modern arbitration in Nigeria: A recycle of old frontiers” 2(1) *Journal of Research and Development* (2014). Pp 50-58. Indeed, as pointed out by a commentator, arbitration generally has been with mankind in one form or another from time immemorial. Oluduro O. „customary arbitration in Nigeria: Development and prospects 19 *Afr. J. Int'l & Comp. L.* (2011) 308

¹¹ Igbokwe V.C. „Law and Practice of Customary Arbitration in Nigeria: *Agu v. Ikewibe* and Applicable Law issues Revisited, 201

a. Pre-colonial Nigeria

Before the Europeans came into contact with most communities in Nigeria, organized structures of government existed in various forms and degrees of perfection, irrespective of the levels of development of the individual communities.¹² Conflicts which arose were resolved through an organized dispute resolution processes based on the customs and traditions of the people. Hence disputes such as personal disagreements, religious crises, political rivalry, marital disputes, chieftaincy matters, land disputes, commercial disputes and boundary disputes are usually resolved by particular respected members of the society who are vast in the native laws and traditions of the people.¹³ In fact, it is safe for one to argue that even crimes were subjected to the jurisdiction of native tribunals as there was no formal structure of courts to deal with such issues at that time.¹⁴

Though the practice of customary arbitration was deeply entrenched in the communities before colonization, the methods adopted was sharply divided based on the existing indigenous superstructure in the Nigerian communities. Based on the

structure, the communities can be classified into two. The first category was the cephalous society that has a central authority like the kings and Emperor. This is prevalent style in the northern, southern and western part of Nigeria and the acephalous society which has a decentralized system of government but controlled through collective leadership and predominantly found in the eastern part of Nigeria.¹⁵ In the cephalous societies, feuding members in the communities bring their disputes voluntarily to family or kindred heads, elders, and prominent leaders in the communities, chiefs or kings who are independent persons for settlement.¹⁶ These persons are often selected ad hoc with the primary aim of restoring harmony through elimination of grievances.¹⁷ The parties usually accept the decisions of these respected elders and chiefs who sit as native tribunals because they derive their authority from the custom and tradition of the community

15 Akanbi M.M. *Domestic Commercial Arbitration in Nigeria: Problems and Challenges* (Lambert Academic Publishing: Germany, 2012) p. 70. For more on the system customary arbitration system of resolution of disputes in Western Nigeria, see Isaac Olawale Albert et al *Traditional Channels of Conflict Resolution in Ibadan* <<http://webcache.googleusercontent.com/search?q=cache:RAkmU9mIn2EJ-books.openedition.org/ifa/718%3Flang%3Den+&cd=1&hl=en&ct=clnk&gl=ng>> (accessed 12 December 2014)

16 Andrew I. Okekeferem *The Recent Odyssey of Customary Law Arbitration and Conciliation in Nigerias Apex Courts* (2005) 5 (No.1) *Modern Practice Journal of Finance & Investment Law*, p.130

17 The term 'arbitration'... in the mouth of the African, refers to all customary settlements of disputes other than by the regular courts. The aim of such a transaction is not the rigid decision of the dispute and the imposition of penalties, so much as reconciliation of the two parties and removal of the disturbance of the public peace'. -Allott, A.N. *Essays in African Laws*. (London: Butterworth, 1960, 126; Edu O.K, *Effect of Customary Arbitral Awards on Substantive Litigation: Setting Matters Straight*. <<http://www.nigerianlawguru.com/articles/customary%20law%20and%20procedure/EFFECT%20CUSTOMARY%20ARBITRAL%20AWARDS%20ON%20SUBSTANTIVE%20LITIGATION,%20SETTING%20MATTERS%20STRAIGHT.pdp>> (accessed on 6th December, 2013)

12 See A Emiola, *The principles of African Customary Law*, (Emiola Publishers 2005) 1, O Oluduro 'Customary arbitration in Nigeria: Development and prospects' 309.

13 Daibu A. A. 'An Examination Of The Rules of Natural Justice and Equal Treatment of Parties in Arbitration (LL.M Thesis, Faculty of Law, University of Ilorin, 2012) pp.101-102

14 See generally Oba A. A. 'Juju Oath in Customary Arbitration and Their Legal Validity in Nigerian Courts; Oluduro O. 'customary arbitration in Nigeria: Development and prospects. Both scholars discussed elaborately on the criminal jurisdiction on customary arbitral tribunal and focused specifically on the rules of evidence taking by oath taking.

which are accepted by members of the communities as binding upon them.¹⁸

It is important to note however that in the predominantly Muslim North societies, a special system of customary arbitration held sway. It was referred to as Tahkim (Arabic for Islamic customary arbitration) which was based on the Islamic law (Shariah)¹⁹ 'Tahkim' is an agreement by parties to a contract that in the event of any dispute, such disputes should be brought before a 'Hakam' (Arabic word for an arbitrator) for settlement. There is however little or no pronouncement by the courts on Tahkim unlike other customary arbitration.²⁰

The second category of society was the acephalous societies which are essentially decentralized in structure. This kind of society does not have formal organized institutions like the

¹⁸ Akanbi M.M. "A Critical Assessment of the History and law of Domestic Arbitration in Nigeria" p. 33

¹⁹ The Supreme Court of Nigeria classified the Islamic Shariah as part of the Nigerian customary law, on account of it not being a statutory body of law, but nonetheless enforceable and binding within Nigeria as between the parties subject to its sway. Zaidan v. Mhassen (1973) 11 SC p. 1, Adesubikan v. Yunusa (1971) NNLR p. 77; Ahmadu Usman v. Umaru (1992) 7 NWLR (Pt. 254) p. 377; Mariyama v. SadikuEjo (1961) NRNL p. 81. Some jurists and scholars have queried the classification of Islamic Law as part of customary law, and the only ground for their query has been that the Shariah, being a divine law, ought not to be classified with other customary laws which are manmade. With utmost respect to these jurists and scholars, we align myself in part to this line of argument however, it is our opinion that some sources of the Shariah evolved from the non-Islamic Arabian customs which are not incompatible with Shariah and Judicial precedents, thus making its classification as customary law valid. See Oba A. A. "Islamic Law as Customary Law: the changing perspective in Nigeria, International and Comparative Law Quarterly 51 (4), (2002), pp. 817-850, Ladipo O.A. "Where does Islamic Arbitration fit into the Judicially Recognised Ingredients of Customary Arbitration in the Nigerian Jurisprudence?" p.108

²⁰ Imam I., "The Legal Regime of Customary Arbitration in Nigeria (Revisited)" <<http://www.unilorin.edu.ng/publications/imami/UNIKOGI%20CUSTOMARY%20ARBITRATION%202.pdf>> (accessed on 24th August, 2015); Akanbi M.M. Domestic Commercial Arbitration in Nigeria: Problems and Challenges p. 68.

cephalous or centralized system. Power was shared among various groups of people in community such as age grades. Dispute resolution through customary arbitration is therefore carried out by elders and chiefs whose authority is wielded either by reason of headship of a very important and powerful family or clan or by seniority in the community.²¹

This is unlike the cephalous society where the king or ruler resolves disputes or appoints particular individuals serve as arbitrators.

b. Colonial Nigeria

This practice of informal resolution of disputes by native tribunals did not cease on colonization. It continued after the arrival of the Whiteman in Nigeria was even given legal backing by the statutory courts. Thus as far back as 1932, it was held in the case of *Assampong v. Amuaku & Ors* that:

*Where matters in dispute between parties are by mutual consent, investigated by arbitrators at a meeting held in accordance with the native law and custom and a decision given, it is binding on the parties and the Supreme Court will enforce such decision.*²²

²¹ Emiola A. The principle of African Customary Law (Emiola Pub Nig. 1997) p.1; Igbokwe V.C. Dispute settlement among Ibo and community justice in North America p. 451; Akanbi M.M. A Critical Appraisal of the History and Law of Domestic Arbitration in Nigeria p. 41

²² (1932) 1 WACA p. 192 See also Foll v. Akese 91930 1 WACA p. 1; Kwasi v. Larbi (1952) 13 WACA p. 76

The case even though of Ghanaian origin was cited in several Nigerian Cases.²³ Thus in *Kwasi v. Larbi*²⁴ the court held that „in native customary law, the elders have a recognized judicial function and are in fact a tribunal before which natives can bring their disputes for judicial decision. Hence members of the communities who submit to the jurisdictions of these tribunals will be bound by their decision.²⁵

A distinctive feature of the colonial period in the practice of customary arbitration is that disputing parties could approach the statutory (English styled) courts for the recognition and enforcement of customary arbitral award. This by implication means native and customary tribunals were constitutionally recognized as having the authority to make binding decisions. Without doubt, this gave further impetus to the practice of customary arbitration in colonial Nigeria.

c. The period of a brief setback

The practice of customary arbitration continued even after colonization. Its judicial recognition further strengthens its acceptability in traditional Nigeria societies. However, in the late 1980s there was a brief period of setback in the practice of customary arbitration as a mechanism for dispute resolution. In that period, the Nigerian Court of Appeal surprisingly

²³ Inyang v. Essien, *Nkoku v. GelixEkeocha*, *Mbagbu v. Agochukwu&Idika v. Erisi*

²⁴ (1952) 13 WACA 76

²⁵ Akanbi M.M. Domestic Commercial Arbitration in Nigeria: Problems and Challengesp. 141

denied the existence of customary arbitration as a dispute resolution mechanism under Nigeria jurisprudence. This was in the case of *Okpuwuru v. Okpokam*,²⁶ where *Uwaifo JCA* (as he then was) who delivered the lead judgment held that: '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.'²⁷ The implication of this decision is that it denied the legality of resolving disputes informally by native tribunal. This dealt a heavy blow to the law and practice of customary arbitration.

Fortunately, the effect of the above dictum of the learned justice was ephemeral as the Supreme Court restored the status of customary arbitration in the colonial era.²⁸ This was done in several subsequent decisions by the court.²⁹ Thus in the case of *Agu v. Ikweibe*³⁰ the Supreme Court held that:

It is well accepted that one of the many African customary modes of settling dispute is to refer the dispute to the family head or an elder or elders of the

²⁶ (1988) 4 NWLE (Pt. 90) p.554

²⁷ p.572 supra

²⁸ Igokwe opined that "the opinion of the court of Appeal in this (*Opuwuru*) case was astonishing and thus heightened the already existing confusion of thought bedevilling customary arbitration. Further, the passage quoted above was given per incuriam". Igokwe V.C. "Law and Practice of Customary Arbitration in Nigeria: *Agu v. Ikweibe* and Applicable Law issues Revisited" p.204

²⁹ *Agu v. Ikweibe* (1991) 3 NWLR (Pt. 180) p. 385, *Ojibah v. Ojibah* (1991) 5 NWLR (Pt. 191) p. 296, *Okere v. Nwoke* (1991) 8 NWLR (Pt. 209) p. 317, *Ohiaeri v. Akabeze* (1992) 2 NWLR (Pt. 221) p.1, *Awosile v. Sotumbo* (1992) 5 NWLR (Pt. 243) p. 514, *Igwego v. Eseugo* (1992) 6 NWLR (Pt. 249) p. 561 and *Osuigwe v. Nwihim* (1995) 3 NWLR (Pt. 386) p.752.

³⁰ (1991) 3 NWLR (Pt. 180)p. 385

community for a compromise solution based upon the subsequent acceptance by both parties of the suggested award, which either party is free to resile at any stage of the proceedings up to that point. This is a common method of settling disputes in all indigenous Nigerian societies.

Similarly, in *Odonigi v. Oyeleke*³¹, the Supreme Court held that:

the decision of the Court of Appeal in *Okpavuru v. Okpokam* (1998) 4 NWLR pt.90 at p.554 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 respects of land or other disputes cannot in all cases be correct.³²

The above decisions of the court show that customary arbitration is recognized under the Nigerian legal system and their customary tribunal's awards are legally binding. They have constitutional and statutory backing under Nigerian jurisprudence.³³ Despite the formalized legal system and the

31 (2001) 6 NWLR (Pt. 708) p.12

32 (Supra) pp.27-28 para G-A

33 The Arbitration and Conciliation Act recognizes customary arbitration when it provide in section 35 as follows

"This Act shall not affect any other law by virtue of which certain disputes-

(a) May not be submitted to arbitration; or

(b) May be submitted to arbitration only in accordance with the provisions of that or another law. Customary arbitral tribunal rely on customary laws which is an "existing law by virtue of sec

attendant efforts at modernization and reform of the legal system, it is worthy to note that customary arbitration still persists and thrives in certain communities in Nigeria.³⁴ The question now is what are the conditions or requirements for a customary arbitral award to be recognized as valid and binding under Nigerian jurisprudence?

4.0 THE REQUIREMENTS FOR THE VALIDITY OF CUSTOMARY ARBITRATION AWARDS

It must be stated that despite the recognition of customary arbitration by the courts, their decision or award, though binding on the parties and privies, is not a decision of the court.³⁵ It cannot be enforced like the judgments of regular courts until pronounced upon by a court of competent jurisdiction. For a customary arbitral award to be recognized as binding and enforceable and create estoppel per rem judicata, certain conditions must be present. This is because issues of customary law are not judicially noticed as such it must be specially pleaded and evidence must be adduced in that regard.³⁶ That notwithstanding, these requirements are heavily contested and it brings about uncertainties in the practice of customary arbitration. The courts have continued

31(5)(3) & 4(b) of the Constitution of Federal Republic of Nigeria as it was a body of rules of law in force immediately before the coming into force of the Constitution. Hence, customary arbitration is a form of arbitration in accordance with "another law i.e. customary law.

34 See Ezediaro, "Guarantee and incentive for foreign investment in Nigeria, 5 International Law 770 (1971) at 775

35 Oluduro O "customary arbitration in Nigeria: Development and prospects" p.311, see Niki Tobì JSCs judgment in *Ufomba v Ahuchaogu* (2003) F.W.L.R. (Pt 157), 1013 at 1038

36 See also Section 122(2) (j) and section 70 of the Evidence Act (Cap E: 14) 2011

to provide different requirements.³⁷ A close examination of majority of decisions shows five major requirements to wit³⁸:

- (a) There must voluntary submission of the parties to the jurisdiction of the native tribunal;
- (b) The parties must have agreed, either expressly or by implication, that the decision of the arbitration will be accepted as final and binding;
- (c) That the arbitration was in accordance with the custom of the parties or of their trade or business;
- (d) The arbitrators reached a decision and published their award and;
- (e) The decision or award was accepted at the time it was made.

The courts have reiterated the position that unless the above mentioned conditions are fulfilled, customary arbitral award would not be enforceable.³⁹ This requirement forms one of the major problems or challenges of the practice of customary arbitration in Nigeria.

³⁷ Ladipo O.A. 'Where does Islamic Arbitration fit into the Judicially Recognised Ingredients of Customary Arbitration in the Nigerian Jurisprudence?' p. 113

³⁸ Ohiaeri v. Akabeze; Agu v. Ikewibe; Eke v. Okwaranya.

³⁹ Ohiaeri v. Akabeze; Agu v. Ikewibe; Eke v. Okwaranya.

5.0 AN ANALYSIS OF SOME CHALLENGES OF THE PRACTICE OF CUSTOMARY ARBITRATION IN NIGERIA

Several practical challenges stand in the way of the growth of customary arbitration as a potent dispute resolution mechanism in Nigeria. These challenges range from issues of imposition of features of statutory arbitration on customary arbitration to problems of uncertainties in Nigerian customary practices. This part of the paper x-rays some of these issues and analysis how they constitute challenge to the growth of customary arbitration as a dispute resolution mechanism in Nigeria.

a. Imposition of the features of statutory arbitration on customary arbitration

The imposition of the features of statutory/common law arbitration on customary arbitration is arguably one of the major challenges of the practice of customary arbitration in Nigeria. Various yardsticks have been placed by statutory courts to determine the validity of a customary arbitral awards. These yardsticks form the conditions for the validity of such customary award as has been stated above. The implication of these yardsticks is that any one that is absent will render a customary award invalid. The pertinent question in this regard is that are these conditions compatible with the customary law of the disputing parties subject to customary arbitration? This question is important because forcefully imposing a yardstick

of one legal system on another will absolutely raise issues of compatibility. It is clear that these conditions are brought from statutory arbitration which is based on the English law.⁴⁰ Scholars have argued that the practice of customary arbitration under statutory law is fundamentally different from that under customary law.⁴¹ This is because the concept of law and justice under English law arbitration is individualistic in Nature while that under Nigeria native law and customs is essentially communal in nature.⁴² The underlying philosophy and purpose of arbitration under both legal systems is also fundamentally different.⁴³ These have practical implications which will be shortly examined.

Another issue with imposition of features of statutory arbitration on customary arbitration is the fact that the Nigeria customary practices is treated as one and the same criteria is used to determine the validity of a customary tribunal's awards not minding the pluralistic and highly divergent customary practices of the people. The implication of this is that a customary practice in a particular region may not *ipso*

⁴⁰ The ACA for example is based on the Arbitration Act of England. See also Akanbi M.M., 'Voluntary Submission under Customary Arbitration in Nigeria', *Nigerian Journal of Public Law*, vol.1, No.1, 2008, p. 77.

⁴¹ Akanbi M.M. *Domestic Commercial Arbitration in Nigeria: Problems and Challenges* p.113.

⁴² Even though there is no specific customary law of Nigeria. There are lots of native law and customs. But it can be argued that Nigerian communities have the same concept of law and justice. see generally Akanbi M.M. *Domestic Commercial Arbitration in Nigeria: Problems and Challenges* for more.

⁴³ While the underlying philosophy of arbitration under English law is for the smooth functioning of business, that under native law and customs is for the social ordering of the society so as to ensure peace and good neighbourliness.

facto be the same for another region.⁴⁴ Customary law is a mirror of accepted usage⁴⁵ as a consequence; it must reflect the wishes and aspirations of the people. Two of such conditions will be briefly examined to demonstrate this problem.

One of the conditions for the validity of a customary arbitral award is that there must be voluntary submission to the jurisdiction of the native tribunal. Voluntary submission forms the basis of arbitration as arbitration agreements are contractual in nature.⁴⁶ As such, there must be no element of force or duress. The question is can voluntary submission be said to be applicable under customary laws. A commentator observes that:

...among the Yoruba communities of Western Nigeria, a typical arbitral process starts by an aggrieved party taking the initiative of reporting to the Head of the compound or to a body of arbitrators depending on the nature of the dispute. The other party is thereafter *summoned or invited* by the tribunal to come and state his own side of the case.⁴⁷

From the act described above of a particular native law, it cannot be said that a party appearing before a native tribunal as a result of a summons has voluntarily submitted to the

⁴⁴ Akanbi M.M. *Domestic Commercial Arbitration in Nigeria: Problems and Challenges* 161, italics ours for emphasis

⁴⁵ See Akanbi M.M. *Domestic Commercial Arbitration in Nigeria: Problems and Challenge* p. 400.

⁴⁶ Ladipo O.A. 'Where does Islamic Arbitration fit into the Judicially Recognised Ingredients of Customary Arbitration in the Nigerian Jurisprudence?' p. 115

⁴⁷ Akanbi M.M. *Domestic Commercial Arbitration in Nigeria: Problems and Challenges* p.151-152.

jurisdiction of the panel. Summons in itself denote an order failure of which attracts a sanction. As a consequence, a customary tribunal award will most likely be nullified if it is unfavourable to a party by just simply claiming there was no voluntary submission. This is thus an inadvertent imposition of the features of statutory/common law arbitration which has serious effects on customary arbitration practices as it not in tandem with the wishes and aspirations of the indigenous people.

A more manifest example of the forceful imposition of the characteristics of statutory arbitration on customary arbitration is the requirement that the native tribunal must reach a decision and publish their award. The first part of this requirement is straightforward as it is only logical that arbitration should end with a decision or an award. What is however problematic is the second part of the requirement. An important question is what is the meaning of the arbitrators must publish their award? Two possible explanations can be given for this requirement. The first is that such award must be available in writing. Another explanation is that the award must be given and publicized. The second explanation is more plausible than the first as it impracticable to require native arbitrators, who are largely unlettered, to make their awards in a written form.⁴⁸ Regarding the second, in what

⁴⁸ Though Oluduro asserts that „though customary arbitration is largely unwritten, written is no longer alien to customary transaction. Today, it is possible for a customary law arbitration agreement to be in writing and thus fall under the Act. Oluduro O „Customary Arbitration in Nigeria: Development and prospects 311. That notwithstanding, it is doubtful if Nigerian

way should the award be publicized? Is it by making it in public or announcing it thereafter to the people? An argument in favour of this requirement is so as to satisfy the principle that „justice must be seen to have been done. However it does no justice to the growth of customary arbitration as one of the reasons people choose arbitration generally is it's relatively less publicity compared to litigation. It is more likely that publication here means conveying the award to the parties.⁴⁹ Be that as it may, this shows a forceful imposition of the values of statutory arbitration on customary arbitration with its attendant incompatibility.

b. Uncertainties in the application of native law and customs in Nigeria

Various issues of uncertainty of customary laws and practice in Nigeria affect customary arbitration. Customary arbitration is being practiced within the scope of customary law in Nigerian legal system. One of the issues of uncertainty in customary law is because of its unwritten and flexible nature. This unwritten nature of customary law brings multifaceted challenges to the practice of customary arbitration especially regarding uncertainty in the law. Disputing parties and the arbitrators will have nothing concrete to run to as a basis for an award. It may be argued that customary arbitrators are

customary arbitration practice has developed to a stage where parties to an arbitration and arbitrator documents their transactions in writing.

⁴⁹ Ladipo O.A „Where does Islamic Arbitration fit into the Judicially Recognised Ingredients of Customary Arbitration in the Nigerian Jurisprudence? p123

persons who are grounded in the native laws and customs of the people that is why they are the custodians of the law. The question then will be what becomes of these customs and tradition when the custodians are far gone? Obviously, a lot of native laws and customs of the people is being lost to its unwritten nature. This gives no room for systematic development of the law. Another dimension to the problem is that customs and traditions of the communities in Nigeria are diverse which makes its codification almost impossible.⁵⁰ This brings about uncertainties in the customary arbitration as a dispute resolution mechanism. Thus the uncertainty of customary law to which customary arbitration is a segment does not allow for confidence in dispute settlement method for business purpose especially from investors.

Islamic law on the other hand is codified and even exists side by side with the received law and is applicable in the Northern part of Nigeria.⁵¹

⁵⁰ Nigeria has more than 350 ethnic groups with each having different customs and practices. It is only the Muslim north that has the same customary practices based on the Islamic law.

⁵¹ During the colonial era, Islamic law was regarded by the courts as forming part of customary law, until the enactment by the Northern Nigerian government of the Native Courts Law and Moslem Court of Appeal Law, both of 1956, which introduced for the first time an explicit distinction between the Islamic law and the customary law. Subsequently however, the enactments of the states of the northern region of Nigeria have regarded Islamic Law as part of customary law. To enforce this position Shariah Penal Code Laws have been enacted in states of the northern part of Nigeria and this has retracted from the position held hitherto, for example, section 29(4) of the Kano State Shariah Penal Code Law 2000 provides thus: 'the provisions of existing laws in the state which define customary law to include Islamic or Muslim law are hereby accordingly amended and such provisions shall be deemed statutory laws wherever they occur'. Ladipo O.A., 'Customary Arbitration in the Nigerian Jurisprudence' p.5, <<http://www.ajol.info/index.php/ajcr/article/viewFile/39427/59591>> (Accessed on 24th April, 2014)

That notwithstanding, the challenge of uncertainty of arbitration under the Islamic law is first, regarding its exact status under Nigeria legal system. There are numerous controversies by scholars and jurist alike on whether Islamic law can be classified as part of customary law.⁵² The prevailing view is that Islamic law is a customary law and must be specially pleaded in courts.⁵³ This view does not go down well with Muslim majority in the northern Nigeria who regard the Shariah as a divine law and superior to any other law in the land. Whether Islamic law is classified as customary law or not is outside the scope of this article. What is important regarding the practice of customary arbitration is that disputing parties will find it difficult to subject themselves to the jurisdiction of a tribunal under this condition of uncertainty of the legal status of a principal law. Another issue of uncertainty brought about by the Shariah which affects the practice of customary arbitration is the diversity in opinions of the various schools of Islamic jurisprudence.⁵⁴ This is a challenge of Islamic arbitration as the various schools of Islamic jurisprudence have divergent views on issues before it. It thus brings about conflicting positions which will have the effect of confusing arbitrator and conflicting parties. Certainly, no party will feel comfortable under these uncertainties and it eventually affects the growth of customary arbitration.

⁵² See Oba A. A. 'Islamic Law as Customary Law: the changing perspective in Nigeria International and Comparative Law Quarterly 51 (4), (2002) pp. 817-850; Ladipo O.A. 'Where does Islamic Arbitration fit into the Judicially Recognised Ingredients of Customary Arbitration in the Nigerian Jurisprudence? African Journal on Conflict Resolution vol. 8, No. 2 (2008) p.108

⁵³ Oba A. A. 'Islamic Law as Customary Law: the changing perspective in Nigeria.

⁵⁴ There are four schools, Hanbali, Shafi, Hanafi, and Maliki Schools. George Sayen, Arbitration, Conciliation, and the Islamic Legal Tradition in Saudi Arabia

c. Restricted scope of customary arbitration: Issues of Arbitrability

The underdeveloped nature of customary arbitration in Nigeria appears to have relegated it to land related matters and domestic relations.⁵⁵ Also customary arbitration cannot be used to settle disputes arising from transactions that are considered contrary to the norms of the society.⁵⁶ Further still, issues of crime are clearly outside the scope of customary arbitration.

Arbitration under the Islamic law in Nigeria also has an extremely restricted scope. It is applicable in only matters of personal law and also limitation to adherent of Islamic faith only.⁵⁷ Other limitation of Islamic law arbitration is that disputes arising out of any transaction which is considered forbidden (Haram) by Islamic law⁵⁸ cannot be subject of arbitration. Also certain disputes are not arbitrable on account of Islamic public policy.⁵⁹ Still other instances where arbitration under Islamic law will not apply are matters of criminal nature especially where the law has provided for a

definite punishment.⁶⁰

From the discussion above, it will be clearly seen that issues that are within the scope of customary arbitration are clearly limited. This means parties will have to resort to litigation for the settlement of a large range of their disputes which is outside the scope of customary arbitration. This undoubtedly has a serious effect on the growth of customary arbitration as native tribunals are relegated to determination of disputes which are merely petty in nature. Furthermore, parties will not even take such tribunals seriously because of their extremely limited powers.

d. Relegation of customary arbitration to traditional societies

Another major problem or challenge of customary arbitration is it apparent but unconscious relegation to native or rural societies in Nigeria. Customary arbitration cannot thrive in a rural setting alone as the cities are the centre of commercial activities and commercially related disputes.⁶¹ The problem is further compounded by the fact that even in the indigenous communities; the practice of customary arbitration is fast on

⁵⁵ Asouzu A. *International Commercial Arbitration and African States Practice, Participation and Institutional Development*, (United Kingdom Cambridge University Press), 2001, p.146

⁵⁶ The Yoruba customary law dealing with sale of family land which has been judicially recognized, is to the effect that sale of family land can only be done by the head of family with the consent of the accredited representatives or principal member of the family. Therefore any alienation purporting to transfer family land without the requisite consents is void ab initio. *Adenle v. Olude* (2002) 18 NWLR (Pt.799) 413; *Adejuwo v. Ayantegbe* (1989) 3 NWLR (Pt.110) 417

⁵⁷ See section 277 of the constitution of the Federal Republic of Nigeria 1999(as amended)

⁵⁸ There is a classification of halal transactions, which are acceptable as lawful under the Shariah and haram transactions which are prohibited under the Shariah.

⁵⁹ Public policy consideration under the Shariah is determined by the Islamic code e.g. transactions

concerning alcohol, gambling and interest based banking are forbidden under the Shariah. This makes it difficult to enforce an arbitration agreement dealing with disputes arising from such prohibited transactions; and where it is arbitrated upon, the successful party may find it difficult to enforce the award due to the inarbitrability of the dispute in the first instance. *Lew et al, Commercial International Commercial Arbitration* (The Hague, Kluwer Law International 2003) p.221

⁶⁰ Akanbi M.M. „Examining the Concept of Arbitrability under Nigerian Domestic Arbitration Laws’ *Nigerian Bar Journal*, vol.3, No.1, (2005)p.116

⁶¹ Even in the urban centres, adoption of customary arbitration to settle commercially related disputes is extremely limited. Akanbi observes that “as a result of the ever-increasing complexities of commerce, the native arbitral system is fast declining as a preferred mode of resolving disputes

the decline. Because of its traditional features, only a very few people in indigenous rural communities adopt it as a dispute resolution mechanism. This problem is multifaceted and could be said to be brought about by an array of reasons. One of such reason is the uncertainties associated with customary law.⁶² Another reason is because of its general underdeveloped nature which makes it less attractive to the business community. Furthermore, the general trend of migration from rural to urban communities also affects the population of people that adopt customary arbitration. The general attitude of Nigerians towards litigation generally also diminishes the value of customary arbitration as a dispute resolution mechanism.

e. General attitude towards litigation

Nigerians are generally known to me very litigious. Rather than resolve a dispute in a gentleman's manner through arbitration, they prefer to adopt litigation. In most cases, many disputing parties are not after resolving disputes and restoring brotherhood rather, they seek vengeance at all cost. This stifles the growth of customary arbitration as a dispute resolution method as people will prefer to go to the courts to resolve their disputes. One of the reasons for the general embrace of litigation as a means of resolving disputes in Nigeria is because of the relatively low awareness of the

arising from modern commercial transactions."Akanbi M.M. Domestic Commercial Arbitration in Nigeria: Problems and Challenges P.276

62 As discussed above

(customary) arbitration and the numerous advantages that come with it. Even Islamic law arbitration (that should be more prevalent among the Muslims) suffers from low level awareness among the Muslims and the Judiciary in Nigeria;⁶³ the resultant effect of which is that even Muslims will prefer to adopt litigation to resolve their disputes. This without doubt does no good to the practice of customary arbitration in Nigeria and therefore affects its growth.

6.0 CONCLUSION AND RECOMMENDATIONS

This article examined customary arbitration as a dispute resolution mechanism. It however focuses on the growth of customary arbitration in Nigeria, the challenges and general obstacles that stand in the way of the growth. It has argued that part of the problems of customary arbitration is more conceptual as the features of statutory arbitration is being forcibly imposed on it when the two have manifest incompatible features. Moreover, it has been argued that there is no single customary law in Nigeria rather we have a multiplicity of customary practices with unique and divergent features. As a

63 In *Opebiyi & Ors v. Noibit & Ors.* (1977) NSCC p. 464 where it was pronounced that a dispute over leadership succession cannot be submitted to arbitration. It is regrettable that though the community seeking to arbitrate its dispute in this case was wholly a Muslim community, no evidence of the existence of Islamic customary arbitration (Tahkim) was led in evidence before the court, as required by law when seeking to prove the existence of any custom: section 14 Evidence before Act Cap 112 LFN 1990 (now section 70 of the Evidence Act (Cap E. 14) 2011). More so, the fact that Mohammed Bello JSC who delivered the lead judgment of the court was a renowned Islamic law jurist. Succession matter falls under types of disputes that can be resolved by Tahkim and this would have been a good opportunity for the judiciary especially the Supreme Court to pronounce on the arbitration under Islamic law.

consequence, treating all native customary awards as one and the same does no justice to the various customary practices of the people and their wishes and aspirations.

Other challenges to the growth of the practice of customary arbitration were also analyzed. The problems of the uncertainty that customary law generally brings to the Nigeria legal system was also discussed as a problem which affects the practice of arbitration too. Another major challenge is the extremely limited scope of issues that are arbitrable under in customary arbitration. This is a major obstacle to the growth customary arbitration as a dispute resolution mechanism.

It is suggested that placing the validity of customary arbitral awards on statutory courts is a multifaceted problem which must be tackled in a coherent manner. First, there is no universal customary law in Nigeria and as such each customary practice must be treated independently based on the particular customs and tradition of the people.⁶⁴ What this means is that only people who are natives of a particular ethnic group should be called upon to determine the validity of a custom either as expert witnesses or judges.⁶⁵ This is because it may be too much to ask that only judges grounded in a particular custom and tradition must be called upon to serve

⁶⁴ A commentator seems to share a similar view. He contend that courts can only determine customary arbitration practices of a particular community by reference first and foremost to the existing customary practices of the people in a particular community. Akanbi M.M. Domestic Commercial Arbitration in Nigeria: Problems and Challengesp 406-407

as panelist in determining the validity of a customary arbitral award. A recommendation of such nature opens a Pandora's Box regarding the competence of the normal court of records to determine the validity of customary arbitral awards. One may be forced to suggest that issues on customary arbitration should terminate at the Customary Court of Appeal or Shariah Court of Appeal but that will be asking for too much as it will mean altering the whole structure of the courts by amending the constitution. A milder and more practical suggestion is that judges should be trained in customary law and if possible, only a judge grounded in a particular custom must sit on a case in which a particular customary award is in issue. The most practical suggestion is that the use of expert witnesses (grounded in customs and practices in question) must be encouraged.

It is also recommended that a law reform commission must be set up to look into concerted development of customary laws and practices in Nigeria. Without doubt, customary law forms one of the major sources of Nigeria law and is applicable to a large section of the populace. This means its relevance under Nigeria jurisprudence cannot be casually dismissed. The scope of the work of the proposed commission should

⁶⁵ Igboke state that customary arbitration should be treated with regard to its own characteristics as known to those to whom it applies. It should not be subject to a validity test by reference to orthodox arbitration or arbitration under the received English law. Igboke V.C. „Law and Practice of Customary Arbitration in Nigeria: Agu v. Ikewibe and Applicable Law issues Revisited p. 213

be wide enough to look into how customary laws, including customary arbitration, can be developed so as to serve the wishes and aspirations of the people. This may include but not limited to reducing customary practices into writing.

It is further suggested that the scope of arbitrable issues in native tribunals should be expanded. Customary tribunals should be allowed to take of a wider range of issues. Yet, such awards even though final and binding should not foreclose the option of resort to the court by dissatisfied parties. Native tribunals should also be able to take on criminal issues especially for minor crimes. The power of punishment and sanction, especially for offences of a relatively grievous nature, should however reside in the courts. This will no doubt help reduce the case overload of the courts and boost the practice of customary arbitration in Nigeria.