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CHALLENGES OF THE PRACTICE OF CUSTOMARY ARBITRATION IN NIGERIA**

Abstract

Despite the numerous advantages of customary arbitration, there are certain practical challenges associated with its practice which has hindered its development as an alternative dispute mechanism in Nigeria. These challenges largely stem from the courts trying to infuse the features of arbitration under the Nigerian Arbitration and Conciliation Act into customary arbitration – with the two having obvious incompatible features. This paper makes critical review of some of these challenges with a view to suggesting a way forward so as to enhance the progressive development of customary arbitration as a dispute resolution process in Nigeria.

1. INTRODUCTION

Customary arbitration is one of the numerous methods of settling civil disputes in Nigeria. It is a traditional system of dispute resolution in which traditional rulers, elders, age groups and deities are actively involved 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 disputes to the family heads, elders or chiefs for a compromise solution based upon voluntary submission by the

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¹ A. A. Daibu, "Application of the Rules of Natural Justice in Arbitral Proceedings in Nigeria" *Ife Juris Review* (2013) vol. 1, p. 60; A. A. Oba, "Juju Oath in Customary Arbitration and their Legal Validity in Nigerian Courts" *Journal of African Law* (2008) Vol. 52, No. 1, p. 140 p. 142; V. C. Igbokwe, "Law and Practice of Customary Arbitration in Nigeria: *Agu v. Ikewibe* and Applicable Law issues Revisited" *Journal of African Law* (1997) Vol. 41, No. 2, p. 201.

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parties and the ensuing award which is binding and enforceable.² Customary arbitration entails the resolution of disputes by a body of persons within the community to whose authority the parties have voluntarily submitted their dispute with the agreement to be bound by the decision provided the process is conclusive and in accordance with the prevailing custom and practice of that community.³

Nigerian law recognizes customary law⁴ to include native law and customs administered in the southern part of the country and Islamic law administered in northern Nigeria which is predominantly Muslim.⁵ The legality of the practice of customary arbitration in Nigeria has been a subject of intense debate by jurists and legal scholars.⁶ Although, issues like its nature and scope,

² M. M. Akanbi, *Domestic Commercial Arbitration in Nigeria: Problems and Challenges* (Lambert Academic Publishing, Germany, 2012), p. 58; J. F. Olorunfemi, "The Effect of Arbitration Agreement on the Jurisdiction of the Court in Nigeria," *Nigeria Journal of Public Law* (2009) Vol. 2, No. 1, p. 310; T. O. Elias, *The Nature of African Law* (Manchester University Press, 1956) p. 212; A. A. Kolajo, *Customary Law in Nigeria through Cases* (Spectrum Books Ltd., Ibadan, 2000) p. 219; L. A. Ayinla, "ADR and the Relevance of Native or Customary Arbitration in Nigeria" *University of Ilorin Law Journal* (2009) Vol. 5, No. 1 p. 258; A. A. Daibu, "Application of the Rules of Natural Justice in Arbitral Proceedings in Nigeria" *Ife Juris Review* (2013) Vol. 1, pp 70-71

³ Oba, above note 1, pp. 142-143; G. Ezejiolor, *The Law of Arbitration in Nigeria* (Longman Nigeria Plc. Lagos, 1997) pp. 22-26, p. 70; Akanbi, *ibid*, pp. 62-63; Kolajo, *ibid*, p. 219; Ayinla, *ibid*.

⁴ The term customary law has been defined as any system of law not being the common law and not being a law enacted by any competent legislature in Nigeria but which is enforceable and binding within Nigeria as between the parties subject to its sway. – *Zaidan v. Mhassen* (1973) 11 S.C. 1 at 21. By virtue of sections 315(3) and (4)(b) of the Constitution of the Federal Republic of Nigeria (as amended), customary law is an existing law being a body of rules and custom in force immediately before coming into force of the Constitution. See also Section 122(2) (j) and section 70 of the Evidence Act (Cap E. 14) 2011

⁵ See the cases of *Njoku v. Ekeocha* (1972) ECCLR 199; *Ekwueme v. Zakari* (1973) ECCLR 631; *Larbi v. Kwasi* (1950) 13 WACE 81; *Oline v. Obodo* (1958) 5 SCNLR 298; *Inyang v. Essien* (1957) 2 FSC 3

⁶ See generally G. Ezejiolor, "The Prerequisites of Customary Arbitration," *The Journal of Private and Property Law*, (1992-1993) Vol. 16, p. 32; Ezejiolor, above note 3, pp. 22-26; Oba, above note 1, p 139; Akanbi, above note 2, pp. 113- 178; Ayinla, above note 2, p. 254; I. Imam, "The Legal Regime Of Customary Arbitration In Nigeria Revisited" (2010) Vol. 3, No. 2, *Confluence Journal of Jurisprudence and International Law*, Kogi State University, Ayingba available on line at <http://www.unilorin.edu.ng/publications/imami/UNIKOGI%20CUSTOMARY%20ARBITRATION%202.pdf>; D. A. Ariyoosu, "Customary Arbitration as a Dispute Mechanism and Its Operational Framework as Estoppel

features, conditions for its validity, effect and award have been pronounced upon and appears settled by plethora of decided cases,⁷ customary arbitration still faces a lot of challenges in Nigeria.

This paper examines the main challenges of the practice of customary arbitration in Nigeria. In so doing, the certain basis issues will first be examined such as historical evolution of customary arbitration in Nigeria, the basic characteristics or conditions necessary for validity or otherwise of customary arbitration. In discussing the challenges of the practice of customary arbitration, a comparative approach will be adopted of the position of customary arbitration⁸ vis-à-vis commercial arbitration under the Arbitration and Conciliation Act.⁹ The paper thereafter concludes by suggesting some recommendations to the challenges facing the practice of customary arbitration as dispute settlement mechanism in Nigeria.

Per Rem Judicatam," *University of Ilorin Law Journal*, Vol. 5, No. 1 (2009) p. 102; Igbokwe, above note 1, p. 201; C. I. Umeche, "Customary Arbitration and the Plea of Estoppel Under Nigerian Law" *Commonwealth Law Bulletin* (2009) Vol. 35, No. 2, p. 291; M. M. Akanbi, "A Critical Assessment of The History and Law of Domestic Arbitration in Nigeria" in *Trends in Nigeria Law: Essays in Honour of Oba DVF Olateru-Olagbegi III, Olowo of Owo Kingdom, Oluduro et al* (eds.) (Constellation Nig. Publishers) p. 462; O. Oluduro, "Customary Arbitration in Nigeria: History and Developments" in T. Kupolati (ed.) *Current Issues in Nigerian Jurisprudence Essays in Honour of Chief Adegboyega Solomon Awomolo SAN* (Renaissance Law Publishers, Lagos, 2007) p. 1; O. A Ladipo "Where Does Islamic Arbitration fit into the Judicially Recognised Ingredients of Customary Arbitration in the Nigerian Jurisprudence?" *African Journal on Conflict Resolution* (2008) Vol. 8, No. 2, p. 108 also available online at www.ajol.info/index.php/ajcr/article/viewFile/39427/59591 accessed on 29 May 2014; F. J. Oniekoro, "Customary Law Arbitration and Oath Taking: The Crises of Validity" *Ikeja Bar Journal* (2005) Vol. 1, Pt. 2, p. 54.

⁷ *Ido William Utong & Ors v. Edet Archibong Utong & Ors* (2013) LPELR- 20201(CA) at 34; *Ieka v. Tyo* (2007) 11 NWLR (Pt. 1045) 385 at 399, *Alibo & Ors v. Okusin & Ors* (2010) 3-5 SC (Pt. I) 41 at 81; *Achor v. Adejoh* (2010) 6 NWLR (Pt. 1191) 537; *Okereke v. Nwanko* (2003) 9 NWLR (Pt. 826) 592; *Egesimba v. Onwuzurike* (2002) 15 NWLR (Pt. 791); *Ohiaeri v. Akabueze* (1992) 2 NWLR (Pt. 221) 1; *Agu v. Ikwibe* (1991) 3 NWLR (Pt. 180) 385; *Onyege v. Ebere* (2004) 6 SCNJ 126; *Eke v. Okwaranyia* (2001) 4 SC (Pt II) 71; *Ufomba v. Ahuchaogu* (2003) 4 SC (Pt. II) 65; *Odonigi v. Oyeleke* (2001) 2 SC 184.

⁸ (under native law and custom applicable to the south and that which is obtainable under the Islamic law as applicable in the predominantly Muslim populated north).

⁹ Arbitration and Conciliation Act Cap A 18 Laws of the Federation of Nigeria 2004 (herein after referred to as ACA).

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**2. HISTORICAL DEVELOPMENT OF CUSTOMARY ARBITRATION
IN NIGERIA**

Before the advent of colonialism in Africa and Nigerian in particular, customary law operated freely in various African communities as a complete and independent legal system.¹⁰ Most communities have their peculiar structures of government in various forms and in varying degrees of perfection irrespective of their level of political and social development.¹¹ Since conflicts or disputes are inevitable in human relations, they are usually resolved through alternative dispute resolution processes¹² including customary arbitration which are faster, cheaper and devoid of unnecessary and avoidable technicalities associated with litigation.¹³ 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 the elders or chiefs of the various Nigerian communities through an organized traditional dispute resolution mechanism called customary arbitration.¹⁴

There are principally two types of traditional societies in Nigeria namely, the cephalous society that has a central authority like the kings and emperors mostly found in the northern, southern and western part of Nigeria and the a cephalous society which has a decentralized system of government but controlled through

¹⁰ A. A. Daibu, above note 1, p. 70; Oba, above note 1, p. 140; A. Okekeifere, "The Recent Odyssey of Customary Law Arbitration and Conciliation in Nigeria's Apex Court" (1998) *Abia State University Law Journal* (2002); Imam, above note 5. See also, Niki Tobi J.S.C in *Onyege v. Ebere* (2004) 6 SCNJ 126 at 143.

¹¹ A. Emiola, *The Principles of African Customary Law* (2nd edition, Emiola Publishers Ltd Nigeria, 2005) p.1; M. M. Akanbi, "A Critical Assessment of the History and Law of Domestic Arbitration in Nigeria," in Kwara State College of Arabic and Islamic Legal Studies Ilorin, 2006) pp. 40-41; Oluduro, above note 6, p. 4.

¹² Other methods of resolving disputes include Negotiation, Mediation, Oath taking, Divination, and Trial by ordeal among others. See *Emiola, ibid*, pp. 51-73; Ezejiolor, above note 3, pp. 27-29.

¹³ Daibu, above note 1, p. 70; Elias, above note 2, p. 212; *Agu v. Ikewibe* (1991) 4 SCNJ 56 at p. 78 or (1991) 3 NWLR (pt. 180) 385 at 417; *Onyege v Ebere* (2004) 6 SCNJ 126 at 143.

¹⁴ A. A. Daibu, "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.

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 their family 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 tribunals¹⁸ because they derive their authority from the custom and tradition of the community which are accepted by members of the communities as binding upon them.¹⁹

Apart from the above, there are other peculiar customary modes of resolving disputes in various cephalous indigenous communities in Nigeria. In Ilorin,²⁰ for instance, the 'Daudus' (District Heads), "Magaji",²¹ "Alangua"²² and family heads still perform the function of arbitrators within their respective domain.²³ The role played by these members of the community in resolving disputes among their subject is not only a practice but a significant element of customary law.²⁴ Thus, the exercise of this function by elders in the various

¹⁵ Akanbi, above note 2, p. 70.

¹⁶ Andrew I. Okekeifere, "The Recent Odyssey of Customary Law Arbitration and Conciliation in Nigeria's Apex Court" (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." -A. N. Allott, *Essays in African Laws*. London: Butterworth (1960) p. 126; O. K. Edu, "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.

¹⁸ The elders, chiefs and families head are generally referred to as native tribunals.

¹⁹ Akanbi, above note 6, p. 33.

²⁰ Ilorin is an ancient and cephalous city and now capital of Kwara State North Central Geo-Political Zone of Nigeria.

²¹ Community head.

²² Village head.

²³ Daibu, above note 14, p. 103.

²⁴ *Ibid* at p. 104.

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Nigerian communities lies in the philosophy that these respected members are vast in the customary law of their communities, the application of which ensures harmonious settlement of disputes, stabilities and most importantly the maintenance of social equilibrium within the community. The kings²⁵ however, play the role of final arbiter in the settlement of disputes arising within their domain.²⁶ The roles of an arbitrator in most cases are delegated to lesser chiefs or family heads within the kingdom to exercise subject to appeal at the king's court.²⁷

In the acephalous societies disputes are normally resolved through the elders and chiefs whose authority is wielded either by reason of headship of a very important and powerful family or clan or by being the oldest in the community.²⁸ This practice of settling dispute by indigenous people was recognized by the British colonialist judicial institution as far back as 1932 where customary arbitration was given judicial recognition in decisions from Ghana where it was held 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.²⁹

This decision was cited with approval by the Nigerian Courts in the cases of *Inyang v. Essien*³⁰, *Njoku v. Felix Ekeocha*³¹, *Mbagbu v.*

²⁵ Traditional kings are called 'Emir' in the Northern part of Nigeria save for the Sultan of Sokoto whose traditional title is 'Sultan'; virtually all traditional kings in the north are Emir. In the western and southern part of Nigeria traditional kings are generally referred to as Oba although with different titles e.g The Alafin of Oyo, Oni of Ife, Oba of Benni, Oba of Lagos, Olubadan of Ibadan, Alake of Egba and Timi of Ede to mention a few. See Daibu, above note 14, p. 104.

²⁶ Akanbi, above note 6, p. 41.

²⁷ The king's court serves as appellate court which can review the decision of the family heads, elders and chiefs at the instance of one of the parties. See Akpata E. The Nigerian Arbitration law in focus, p. 1 for an example in Benni Kingdom in the southern part of Nigeria

²⁸ Emiola, above note 11, p. 2; V. C. Igbokwe, "Dispute Settlement among Ibo and Community Justice in North America," p. 451; Akanbi, above note 6, p. 41.

²⁹ *Assampong v. Amuaku & Ors.* (1932) 1 WACA p. 192 See also *Foli v. Akese* (1930) 1 WACA p. 1; *Kwasi v. Larbi* (1952) 13 WACA 76.

³⁰ (1957) 2 SC 39.

*Agochukwu*³² and *Idika v. Erisi*.³³ Surprisingly in the 1980s, the Court of Appeal denied the existence of customary arbitration in Nigeria in the case of *Okpuwuru v. Okpokam*,³⁴ when 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.”³⁵

This erroneous decision has been corrected by the Supreme Court in subsequent decisions,³⁶ where the existence of customary arbitration was held to be part of Nigerian legal jurisprudence. Thus in the case of *Agu v. Ikweibe*³⁷ the Supreme Court held as follows:

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 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*³⁸, the Supreme Court held that:

The decision of the Court of Appeal in *Okpuwuru 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.³⁹

³¹ (1972) 2 ECCLR 90.

³² (1973) 3 ECCLR 90.

³³ (1988) 2 NWLR (Pt. 78) 563.

³⁴ (1988) 4 NWLR (Pt. 90) 554.

³⁵ *Ibid*, at p. 572.

³⁶ *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, *Igwegu v. Ezeugo* (1992) 6 NWLR (Pt. 249) p. 561 and *Osuigwe v. Nwihim* (1995) 3 NWLR (Pt. 386) p. 752.

³⁷ (1991) 3 NWLR (Pt. 180) 385.

³⁸ (2001) 6 NWLR (Pt. 708) p. 12.

³⁹ *Ibid*, pp. 27–28 para G-A.

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As stated earlier, customary law under Nigeria jurisprudence comprises native law and custom and the Islamic law (otherwise and generally referred to as Shariah).⁴⁰ Islamic law also has arbitration as one of the practical methods of dispute settlement⁴¹ known as “*Tahkim*”, a component of the Islamic law that has been in existence before the introduction of the English Common Law and promulgation of statutes. “*Tahkim*” is an agreement by parties to a contract on the premise that in the event of any dispute, such disputes should be brought before a “*Hakam*”⁴² for settlement. There is however few reference of disputes to “*Tahkim*” or Islamic arbitration in Nigerian courts for judicial review.⁴³

⁴⁰ The Supreme Court of Nigeria classified the Islamic Shairah 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, *Adesubukan v. Yinusa* (1971) NNLR p. 77; *Ahmadu Usman v. Umaru* (1992) 7 NWLR (Pt. 254) p. 377; and *Mariyama v. Sadiku Ejo* (1961) NRNLR 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 ourselves 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 A. A. Oba, “Islamic Law as Customary Law: The Changing Perspective in Nigeria” *International and Comparative Law Quarterly* (2002) 51 (4), pp. 817-850; O. A. Ladipo, “Where does Islamic Arbitration fit into the Judicially Recognised Ingredients of Customary Arbitration in the Nigerian Jurisprudence?” *African Journal on Conflict Resolution* (2008) Vol. 8, No. 2, p. 108

⁴¹ Arbitration as a concept of conflict resolution was assimilated by Islamic law from the practices of the communities of the pre-seventh century Arabia which had a virile mercantile culture and had developed arbitral mechanisms to facilitate trade in a community where there was no organized system of governance and judicial structure – H. M, Fathy, “Arbitration According to Islamic Law (Sharia),” (2000) *Arab Arbitration Journal*, p. 1.

⁴² An arbitrator.

⁴³ 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, 2013; Akanbi, above note 2, p. 68.

3. CHARACTERISTICS OF CUSTOMARY ARBITRATION

Customary arbitration is not regulated by the Arbitration and Conciliation Act neither is it based on a written contractual agreement, but rather a traditional agreement based on respect for norms and values of a particular society.⁴⁴ This mode of arbitration has some essential characteristics which must be followed for it to be valid and enforced. These characteristics have developed over time in both cases (that is, in native law and custom and *Tahkim*) and have been applied most especially by the courts in determining its validity.

From various judicial decisions dealing with validity and enforceability of customary arbitration, the following five basic characteristics have emerged:

- (a) There has been a voluntary submission of the matter in dispute to an arbitration of one or more persons;
- (b) It was agreed by the parties either expressly or by implication that the decision of the arbitration will be accepted as final and binding;
- (c) 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.⁴⁵

Some judicial decisions in Nigeria have reiterated the position that unless the above mentioned conditions are fulfilled, customary arbitral award would not be enforceable.⁴⁶

⁴⁴ The Arbitration and Conciliation Act however appears to recognize customary arbitration when it provides 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."

Hence, customary arbitration is a form of arbitration in accordance with "another law" i.e. customary law.

⁴⁵ *Ohiaeri v. Akabeze*, above note 7; *Agu v. Ikewibe*, above note 37; *Eke v. Okwaranyia*, above note 7.

⁴⁶ *Ibid.*

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For Islamic arbitration, it is a voluntary process in which the parties choose the arbitrators and an award will be binding only insofar as it is in accordance with Islamic law (i.e. the Shariah). In some jurisdictions like Saudi Arabia enforcement of decisions made by an *Hakam* has to be reviewed by qadis⁴⁷ before being enforced.⁴⁸

**4. CHALLENGES OF THE PRACTICE OF CUSTOMARY
ARBITRATION IN NIGERIA**

The practice of customary arbitration is facing a lot of difficulties in its operation and continuous use in Nigeria as a means of dispute settlement. This is evident from the various judicial pronouncements on the issue of its validity as well as conflicting and at times confusing decisions of the courts on the basic elements or characteristics of customary arbitration. It is in this light that the basic challenges facing the practice of customary arbitration will be discussed.

(a) Voluntary Submission

Voluntary submission is the basis of arbitration, and it forms one of the essential elements of customary arbitration which Nigerian courts use to determine the validity or otherwise of customary arbitration. The word “voluntary” connotes something “done by design or intention.”⁴⁹ Voluntary submission therefore implies that a party entered into the arbitration agreement based on his own free will without any external influence or force whatsoever from any quarters. Voluntary submission has been said to be the basis of arbitration and it is universal to the concept of arbitration under all legal system.⁵⁰ While this might be true of conventional arbitration, it is doubtful if the same can be said for customary arbitration as customary arbitration is not founded on the basis of a formal

⁴⁷ A judge (s)

⁴⁸ S. Saleh, “Commercial Arbitration in the Arab Middle East,” 4-6 (1984) cited in George Sayen, “Arbitration, Conciliation, and the Islamic Legal Tradition in Saudi Arabia,” *University of Pennsylvania, Journal of International Business Law*, Vol. 9, p. 2.

⁴⁹ *Black’s Law Dictionary*, 8th edition, p. 1605.

⁵⁰ Ladipo, above note 6, p. 115.

contract but social device for the maintenance of a stable and harmonious society.⁵¹

Voluntary submission under customary arbitration must be to body of persons recognized as having judicial authority under the custom of the parties. This ingredient was laid down in the case of *Inyang v, Essien*.⁵² For a customary arbitral award to be upheld by the court, the tribunal must be a body of persons having judicial authority. The question now is what group of body could be said to wield “judicial authority”? This requirement seems to be very vague and that could be a reason why it is not contained in many of the recent decisions on the elements or characteristics of customary arbitration.⁵³ Unfortunately, the courts in some other cases have continued to pronounce that submission to elders or Chief is an ingredient for the validity of customary arbitration. It is humbly submitted that the same problem of generalization of the yardsticks still apply here. Ladipo observes thus:

With respect, it is posited that this position is a generalization which is incongruous with the facts and realities of some arbitral customs. This is particularly the case in arbitrations based on oath-taking before priests, arbitrations before age groups, women’s groups, trade and business groups. The tribunals in the foregoing arbitral customs are obviously not constituted of elders and chiefs.⁵⁴

It is submitted that the requirement of voluntary submission is akin to the common law system of arbitration which regards private agreement of parties freely entered into by parties as sacred. The position of voluntary submission under customary arbitration is a bit dicey and that is why some scholars argue that customary arbitration has more of the features of litigation than arbitration properly so called. A typical customary arbitral processes in most Nigerian societies starts with a complaint by an aggrieved party to

⁵¹ Akanbi, above note 2, p. 151.

⁵² (1977) NSCC 464.

⁵³ See *Achor v. Adejoh* (2010) 6 NWLR (Pt.1191) 537 at 569; *Okereke v. Nwanko* (2003) 9 NWLR (Pt. 826) 592; *Egesimba v. Onwuzurike* (2002) 15 NWLR (Pt. 791).

⁵⁴ Ladipo, above note 6, p. 119.

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the appropriate authority after which the other party is summoned⁵⁵ or invited by a prospective arbitral tribunal based on a complaint made by an aggrieved party and he responds which may be by being forced to a meeting by a traditional summons to which a threat of sanction for failure to show up is attached, this in the sense of arbitration does not translate into a voluntary submission.⁵⁶ The question thus is “can a submission after a summons be termed voluntary submission?” It is submitted that the requirement of voluntary submission is an attempt by the courts to lay down a general rule for customary arbitration based on borrowed western principle of arbitration and that will have negative impact on the practice of customary arbitration in Nigeria.

The position for *Tahkim* under Shariah is different as submission is the basis of arbitration under the Shariah and thus must be mutual and emanate from the volition of all the parties. The Shariah prescribes that disputing parties are free to appoint any arbitrator of

⁵⁵ *Agu v. Ikewibe*, above note 37, where Nnaemeka-Agu JSC in his dissenting opinion picked on the portion of the plaintiff’s pleadings where it was averred that the plaintiff ‘summoned’ the defendant before the chiefs and elders of the parties’ community and he reasoned that the word ‘summoned’ employed in the pleadings, drafted by a lawyer, must have been deliberate, and should be interpreted technically because it originated from the old common law writ of summons. His Lordship went further to opine that since the word summons connotes a command to appear, a subsequent submission to such summons could not be voluntary. He however concluded that the arbitral panel in question, even if it had purported to summon the defendant, had no power to do so. Also in *Yaw v. Amobie* (1958) 3 West African Law Report p. 406 at 408; where it was held that it is very rare for two people who are quarrelling to meet and agree together that they would submit their dispute to arbitration. The usual thing is that one party makes a complaint to somebody, the other party is sent for, and if he agrees, the party to whom the complaint is made arbitrates upon the dispute.

⁵⁶ Emiola, above note 11, pp. 37-38. In *Asare v. Donkar & Serwah II* (1962) 2 Ghana Law Reports, p. 176 at 179-18, the Ghanaian Supreme Court found objectively from the evidence adduced that the party summoned responded to a chief’s call out of respect, but that he never agreed to submit the dispute to arbitration by that chief.

their choice and in fact parties may agree that a party to the dispute arbitrates, thereby relying on that party's conscience to do justice.⁵⁷

It is observed that why voluntary submission is and may remain a challenge to the practice of customary arbitration under native law and custom and deter its use by a wider and more enlightened audience stems from the fact that it is not usually based on a form of contract where by parties agree to bring any dispute/conflict or disagreement arising from the terms of a contractual agreement before a *Hakam* or arbitrator for settlement like under the *Tahkim* or western arbitration. Though it has been argued that modern arbitration which is founded on voluntary submission is based on the principle of party autonomy and that of the customary arbitration is determined by the customs and traditions of the communities; and that the courts are forcibly superimposing the common law principles on the customs of the people, which will affect the true nature and essence of customary arbitration,⁵⁸ it is not uncommon for natives to voluntarily submit their differences to non-judicial bodies freely chosen by them under native law and custom for adjudication.

(b) Prior Agreement to be Bound by the Arbitrator's Award

There are divided opinions on whether an agreement to be bound constitute part of the conditions for the validity of an arbitral award. Nevertheless, it is important that we discuss it because of the challenges it brings to the practice of customary arbitration. Agreement to be bound, though controversial, is fundamental to the validity of an arbitral award under English arbitration. However, it is submitted that this yardstick which was borrowed from the English common law system has now been made a requirement for customary arbitration. English style arbitration is strictly contractual, based on agreement of both parties. The yardstick is inextricably connected with the requirement of voluntary

⁵⁷ Zeyad, Alqurashi, "Arbitration under the Islamic Shariah," *Oil, Gas & Energy Law Intelligence*, 2003 Vol. 1, p. 2 cited in Ladapo O. A, Customary Arbitration in the Nigerian Jurisprudence, p. 16

⁵⁸ M. M. Akanbi, "Voluntary Submission under Customary Arbitration in Nigeria," *Nigerian Journal of Public Law*, 2008, Vol. 1, No. 1, p. 77.

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submission⁵⁹ as such the difficulties with voluntary submission are also applicable here.

(c) Option to Resile

Of all the conditions for the validity of customary arbitral awards, option to resile is the most heavily contested.⁶⁰ Nevertheless, it is arguably one of the ingredients of customary arbitration that must be present before a court can enforce it. The right of the parties to withdraw from the proceedings or to reject the resultant award serves as a protection against the possibility of bias. Before a party to a customary arbitration refuses to bow to social pressures to comply with the decision of the customary arbitrators, such a customary arbitral award must be manifestly contrary to the facts or tainted by arbitrator bias or by the violation of the parties' right to a fair hearing.⁶¹ This however varies from custom to custom and, if permitted, it will be determined within which time frame it should happen and which procedures should be followed.

For *Tahkim*, particularly of the Maliki School of thought, once parties voluntarily submit to arbitration, they cannot withdraw at any stage thereafter.⁶² Also, where an award is delivered, parties are bound by it⁶³ and such an award is enforceable in the same manner and to the same effect as a judgment of a court, by a Qadi.⁶⁴ The exception is that, where an award is contrary to tenets of Islam, then, a Qadi before whom the award is brought for enforcement may set it aside.⁶⁵

⁵⁹ Ladipo, above note 6, p. 120.

⁶⁰ This is demonstrated by the number of judicial opinion on it.

⁶¹ Daibu, above note 14, pp. 72-73; Igbokwe, above note 1, p. 214.

⁶² *Jika v. Jika* (1991) 3 NWLR (Pt. 182) 708 at 714 A-B.

⁶³ This may not be farfetched from the fact that parties in most cases are reluctant to contest such an award since it is anchored on religious tenets and is deemed as a sacred duty to be complied with. Akanbi M. M, "Constitutionality of Customary Arbitration in Nigeria – An Appraisal of *Okpowuru v. Okpokam*" (a work in progress with the author but kindly made available to these authors) p. 7.

⁶⁴ This is because an arbitrator has no such powers of enforcement. Zeyad, Alqurashi, *Arbitration under the Islamic Shariah*, p. 19.

⁶⁵ Sahcht Joseph, *An Introduction to Islamic Law*, (Oxford: Clarendon Paperbacks, 1996) p. 189.

It should be noted that the cardinal distinguishing factor of arbitration from other alternative dispute resolution (ADR) mechanisms is the binding effect of the decision of a private adjudicator voluntarily consented to by parties to a dispute. Anything short of this falls within the realm of other third party facilitated settlements like conciliation and mediation. This requirement of customary arbitration makes it appear to tilt to this other modes of ADR and also erodes the doctrine, that it is in the interest of the society that there be an end to adjudicatory proceedings.⁶⁶ The greatest danger this ingredient poses if it remains is that customary arbitral processes will be sentenced to a purgatory of some sort where their decisions are in an uncertain state or at worst in an unending flux.⁶⁷ This is because any of the parties who is dissatisfied with the decision of the arbitrators would be free to abandon it.⁶⁸

(d) Application of Customary Arbitration under the Nigerian Legal System

The practice of customary arbitration is part of customary law under the Nigerian Legal System. Customary law is largely unwritten, making its application subject to judicial review to test its enforceability. The customs and traditions of various Nigeria communities are diverse and this makes its codification almost impossible. Also knowledge of the customary law is not universal but only peculiar to its people and is not accepted by all Nigerians unlike the received English law and is therefore subjected to some applicability test for it to be enforced.⁶⁹ 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.

⁶⁶ This position of the Supreme Court on customary arbitration is a sharp contrast to modern arbitration regulated by the Arbitration and Conciliation Act, and albeit has compounded to the challenge of customary arbitration to meet the needs of modern commercial transactions.

⁶⁷ Ladapo, Customary Arbitration in the Nigeria Jurisprudence, p. 22.

⁶⁸ *Awosibe v. Sotunbo* (1992) 5 NWLR (Pt. 243) 514; *Okereke v. Nwanko* (2003) 4 SC p. 1 at p. 16.

⁶⁹ *Ohaeri v. Akabeze* (supra); *Agu v. Ikewibe* (supra); *Eke v. Okwaranyia* (supra).

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The Shariah 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.⁷⁰ However, its own peculiar challenge as regards arbitration (*Tahkim*) may be its limited application in Nigeria to matters of personal law and also limitation to adherent of Islamic faith only.⁷¹ Also the different views as expressed by the various schools of thoughts, albeit with slight variations as to practice and procedures may also constitute a challenge.⁷² Furthermore, there is little awareness on *Tahkim* among the Muslims and the Judiciary in Nigeria;⁷³ the resultant effect of which is that even Muslims use the western style arbitration than the *Tahkim*.

Arbitration under customary and Islamic law is still very much in existence, practiced and applied in Nigeria, even if not well pronounced upon by the courts. It is however being relegated to the

⁷⁰ 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.*" O. A Ladapo, "Customary Arbitration in the Nigerian Jurisprudence," p. 5, <http://www.ajol.info/index.php/ajcr/article/viewFile/39427/59591> accessed on 24th April, 2012.

⁷¹ See section 277 of the constitution of the Federal Republic of Nigeria 1999 (as amended).

⁷² There are four schools, Hanbali, Shafi, Hanafi, and Maliki Schools. George Sayen, Arbitration, Conciliation, and the Islamic Legal Tradition in Saudi Arabia.

⁷³ In *Opebiyi & Ors v. Noibi & Ors.* (1977) NSCC p. 464, 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.

background compared to the conventional arbitration recognized under Arbitration and Conciliation Act.⁷⁴

(e) Arbitrability

Not every dispute can be subject to the jurisdiction of the arbitration tribunal. This is more so for a customary arbitral tribunal. Thus, the underdeveloped nature of customary arbitration in Nigeria appears to have limited its scope to land related matters and domestic relations.⁷⁵ Also, customary arbitration cannot be used to settle disputes arising from transactions that are considered contrary to the norms of the society.⁷⁶ Therefore, quite a number of customary disputes are therefore not arbitrable on account of issues of non-arbitrability or limited scope.

On the other hand, *Tahkim* is applicable to all types of disputes⁷⁷ except those that are expressly forbidden by Islamic law⁷⁸ or on account of public policy.⁷⁹ Other instances where *Tahkim* will not

⁷⁴ Interestingly the Arbitration and Conciliation Act envisage other forms of arbitration like customary arbitration. See section 35(a) and (b) thereof.

⁷⁵ A. Asouzu, *International Commercial Arbitration and African States Practice, Participation and Institutional Development* (United Kingdom Cambridge University Press), 2001, p. 146.

⁷⁶ 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.

⁷⁷ However, under the Maliki school of Shariah to which Nigerian Muslims subscribed, it is mainly financial and property matters that are recognized as the subject matters that can be arbitrated upon under the Shariah. Majeed, "Good faith and Due Process: Lessons from the Shariah," *Arbitration International*, (2004) Vol. 20, No. 1 pp. 104-105.

⁷⁸ There is a classification of *halal* transactions, which are acceptable as lawful under the Shariah and haram transactions which are prohibited under the Shariah.

⁷⁹ 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.

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apply are matters of criminal nature especially where the law has provided for a definite punishment.⁸⁰

It is observed that arbitrability under *Tahkim* is generally applicable to Muslims⁸¹ and is quite definite compared to that of customary arbitration which is relatively flexible because it is not uniform and varies from one community to the other and is still subject to change within the life of a particular community depending on its level of development.⁸²

(f) Publication of Customary Arbitral Award

In discussing publication of an award as one of the challenges for the validity of a customary arbitration award, what readily comes to the mind is that the award must be declared publicly. However, this is antithetical to the spirit of arbitration as one of the main reasons parties resort to arbitration for the settlement of their disputes is to ensure privacy and confidentiality. Indeed, confidentiality has been identified as one of the major potentials of an ADR process.⁸³ Secondly, the award must be in a written form. This condition seems impracticable especially because of the largely unwritten and unsophisticated nature of customary law which customary arbitration belongs. The requirement of publication of customary arbitral award it is submitted means the act of conveying of arbitration award to the parties.⁸⁴

⁸⁰ M. M. Akanbi, "Examining the Concept of Arbitrability under Nigerian Domestic Arbitration Laws" *Nigerian Bar Journal*, 2005, Vol. 3, No. 1, p. 116.

⁸¹ The Shariah is not well understood in Western business circles, and the application of these ancient legal rules to complex commercial transactions presents elements of risk and uncertainty that must be weighed against the potential benefits of doing business in the area. George Sayen, "Arbitration, Conciliation, and the Islamic Legal Tradition in Saudi Arabia" p. 1.

⁸² Akanbi, above note 80, p. 117.

⁸³ M. M. Akanbi. "Kwara Multidoor House: An Idea Whose Time Has Come" being a paper delivered on the occasion of the formal inauguration of the Committee on the proposed Kwara State Multidoor Courthouse at the High Court of Kwara State on Tuesday, 29th July 2008.

⁸⁴ M. M. Akanbi, L. A. Abdulrauf, and A. A. Daibu, "Customary Arbitration in Nigeria: A Review of Extant Judicial Parameters And The Need For Paradigm Shift," Paper presented at the 4th Annual Faculty of Law International Conference, Faculty of Law, University of Ilorin, Ilorin, Nigeria on 16th October 2012, p. 22.

(g) Acceptance of Arbitral Award

This element was alien to customary arbitration but superimposed by the courts in Nigeria.⁸⁵ Acceptance of the award at the time it was made on the other hand indicates that none of the parties must have withdrawn from the arbitration after the award was made.⁸⁶ Consequently, a party is free to reject an award he finds unfavourable by this element. This element of customary arbitration appears to be the most controversial and unsettled among all the characteristics.⁸⁷ Oba⁸⁸ submits that this element was introduced in the case of *Agu v. Ikewibe*⁸⁹ where the court after a review of previous decisions on the subject matter, quoted Elias to the effect that arbitration is 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 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.

By the above authorities, parties to an arbitration have an unfettered right to reject an unfavourable award. The decision has generated heated controversy amongst jurists and scholars. Some opine that the decision is not in tandem with previous decisions on the subject matter as allowing a party to freely resile out of a valid arbitral award for which he has previously agreed to be bound is contrary to good sense and equity.⁹⁰ They further submitted that submission of

⁸⁵ For a detail discussion on this, see Akanbi, Abdulrauf., and Daibu, *ibid*.

⁸⁶ See N. Ikeyi & T. Maduka "The Binding Effect of a Customary Arbitration Award: Exorcizing the Ghost of *Agu v. Ikewibe*" (2014) 58 *Journal of African Law* p. 328-349.

⁸⁷ *Ibid*, The Supreme Court has in some cases ignored the requirement. See *Egesimba v. Onzuruike* (2002) 9 SCNJ 46 where the court did not consider post award consent as a condition.

⁸⁸ Oba, above note 1, p. 143.

⁸⁹ Above note 37. Emphasis added.

⁹⁰ A. Okekeifere, "The Recent Odyssey of Customary Law Arbitration and Conciliation in Nigeria's Apex Court" (2002) 4/1 *Modern Practice Journal of Finance and Investment Law*, p. 113-117.

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Elias relied upon was quoted out of context.⁹¹ Ezejiofor criticized the decision and submits that this element among others listed by the Supreme Court may not be consistent with customary practices of a particular community.⁹² This is because Nigeria is a country with various customs and the determinants of the conditions should be the customary law of the community under consideration.⁹³

Recent decisions of the courts support the opinions of the learned scholars. For instance, in the case of *Awonusi v. Awonusi*⁹⁴ concerning a dispute relating to a family land, the appellants initiated customary arbitral proceedings before the Ewusi-in council, a traditional customary arbitrator where the dispute was heard and determined. The appellant as defendants before the lower court thereafter sought to resile by refusing to abide by the decision of the council. The respondent as plaintiff before the lower court instituted an action at the High Court. The High Court granted all his claims. The appellant subsequently appealed to the Court of Appeal. Dismissing the appeal, Fabiyi JCA (as he then was) held that:

Where arbitration under customary law is pronounced valid and binding, it would be repugnant to good sense and equity to allow the losing party to reject or resile from the decision of the arbitrators to which he has previously agreed.⁹⁵

By the above decision and a host of several others following that line of reasoning, parties are not free to resile from a valid arbitral award. With humble respect, this paper disagrees with the above decision of the learned justice and agrees with the learned scholars only to the extent that the parameters for determining the validity of customary arbitration should be dictated by the particular customs and tradition of the community and not based on ones formulated by

⁹¹ Oba submits that the Supreme Court left out the question mark at the end of the above quoted decision; that the part of the decision emphasised was meant to be a question for which Elias answer was it *seems also that neither party can lawfully resile after the award has been made*. See Oba, above note 1, p. 143.

⁹² G. Ezejiofor, "The Pre-Requisites of Customary Arbitration" (1992-93) 16-18 *Journal of Private and Property Law* p. 1.

⁹³ Akanbi, Abdulrauf, and Daibu, "Customary Arbitration in Nigeria: A Review of Extant Judicial Parameters and The Need For Paradigm Shift" p. 22.

⁹⁴ (Supra) you have not cited this case before.

⁹⁵ *Ibid*, at p. 1657.

the courts. It is submitted that the courts are just attempting to lay down general characteristics for the validity of customary arbitration and that will do no good to the practice of customary arbitration. The fact that parties may be allowed to resile in one community does not necessarily mean the parties could do so in another community. For instance, a party cannot back out of arbitration under Islamic law which is largely adopted by communities in Northern Nigeria.⁹⁶ This may not follow in the eastern or western communities of Nigeria. Thus, where a party alleges acceptance of the award as a condition of validity, there should be specific proof of that custom. This is what makes the award valid. If there is no such specific proof, such a party should not be allowed to resile. This is what the court should inquire into before pronouncing on the validity or otherwise of the arbitral award.

Hence to lay down a general rule that parties cannot resile from an arbitral award is akin to importing the British common law elements of arbitration which sees arbitration as a strict contract for which parties are bound and cannot back out at will. This is not in conformity with some of the customs and tradition of the indigenous people whose idea of arbitration is not only a mechanism to ensure smooth running of the system but to also ensure that peace and good relations is maintained in the society.⁹⁷ Thus, superimposition of foreign element in an attempt to formulate general principles for the validity of customary arbitration runs contrary to the philosophy of arbitration under customary law and creates more difficulty to the effective practice of customary arbitration in Nigeria.

5. CONCLUSION

The paper has examined some practical difficulties associated with the practice of customary arbitration in Nigeria. It discussed the history and characteristics of customary arbitration which varies from one community to another.

In light of the issues enumerated in this paper it is obvious that arbitration has become a globalized phenomenon in the world today

⁹⁶ Sahcht, J *An Introduction to Islamic Law* (Clarendon Paperbacks, Oxford 1996) p. 10.

⁹⁷Daibu, above note 1, p. 60.

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and the most resorted to mechanism for settlement of international and domestic commercial agreements. This therefore accounts for the need to revisit arbitration under the Nigerian customary law to look at how it can be a continuous veritable tool in settlement of disputes in Nigeria. It is unfortunate that the courts in Nigeria treat customary arbitration rules as a single body of rules (mainly because most judicial reviews are from cases emanating from the Eastern region of Nigeria), whereas the customary laws of the different Nigeria communities vary in detail from one community to the other. The courts should consider the geographical limits of the customary law in issue and customary arbitration should be treated with regards to its own peculiar characteristics as known to those to whom it applies. Also it should not be subjected to a validity test by reference to arbitration under the conventional arbitration. Customary arbitration must be in accordance with the customs and tradition of the particular society in question. An attempt to lay down borrowed criteria will be fatal to the practice of customary arbitration in Nigeria.

There is also the need for capacity building for those who operate the customary arbitration. This should include a form of para-legal training that should educate them on rudiments of rules of justice and also to promote recording of proceedings and decisions which to some extent is already being done in some communities and can be facilitated by the fact that increasingly traditional stools are being occupied by all educated persons including professionals. This is because the main obstacle lies in the development of this sector of the justice system because it is rendered and handed down by history and oral tradition and memory may fade with respect to the unwritten word and will not be useable in the global commercial world of today.

The court should enforce the awards if it is satisfied that the doctrine of natural justice has been fulfilled and a party should not have any right to abandon the award of the arbitration tribunal. It is equally suggested that customary arbitration be included in the various window of ADR in states that have established multi-door courts; this will ensure its growth, development, awareness and confidence in the system.