A COMPARATIVE STUDY OF MODERN AND CUSTOMARY ARBITRATION IN NIGERIA

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DECLARATION

I declare that this thesis entitled: ***A Comparative Study of Modern and Customary Arbitration in Nigeria*** has been carried out by me in the Department of Private Law, Faculty of Law. The information derived from the literature has been duly acknowledged in the text and list of references provided. No part of this thesis was previously presented for another degree or diploma at this or any other institution.

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Safiya Etsu Date

CERTIFICATION

This Thesis titled **A Comparative Study of Modern and Customary Arbitration in Nigeria** by Safiya ETSU, meets the regulations governing the award of the degree of Master of Laws LL.M, Degree of Ahmadu Bello University and is approved for its contribution to knowledge and literary presentation.

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DEDICATION

Dedicated to my late brothers and sister; Major BM Etsu, AliyuShettima Etsu (Ya-Zaure) and Amina Etsu (Ummu Ashraf). May Allah bless them with AljannahFirdaus.

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ABBREVIATIONS

AC	Appeal Cases
FSC	Federal Supreme Court
FWLR	Federation Weekly Law Report
ICC	International Chamber of Commerce
LFN	Laws of the Federation of Nigeria
NWLR	Nigeria Weekly Law Report
SC	Supreme Court
SCNJ	Supreme Court of Nigeria Judgements
UNCITRAL	United Nations Commission on International Trade Law
WACA	West Africa Court of Appeal
WALR	West African Law Reports

ABSTRACT

This thesis conceptualized dispute as an integral part of man's existence and a common occurrence in human societies which could arise as a result of differences in opinion, political ideologies, bad governance, ethnic nationalism, land matters, family issues, some economic or religious reasons, and in some cases a combination of two or more of these factors which may lead to conflicts. These conflicts may result in strained relationships, loss of lives and/or properties, hence the need for a dispute settlement mechanism which may be modern or traditional. The major issues for determination are, whether arbitration is a necessity and has been a successful tool in amicable resolution of disputes; and whether customary arbitration is more effective than modern arbitration. It is in the light of the foregoing that this work compared modern arbitration to customary arbitration. The comparison is with a view to realizing which option would be more practicable in terms of amicable resolution of disputes. The research methods adopted are doctrinal and empirical. Judicial decisions, statutes and books on arbitration were useful to this research. Data was also collected through distribution of questionnaires. This thesis examined the concept of arbitration as a dispute resolution process. It also examined some provisions of the Arbitration and Conciliation Act, Cap A18, LFN 2004 and some case laws on the essential ingredients of arbitration. It noted that arbitration has been used successfully over the years to achieve amicable resolution of disputes. However, inspite of its tremendous achievements, arbitration is faced with some challenges. These include the attitude of Nigerian courts towards enforcement of customary arbitral awards, high level of illiteracy of the customary arbitrators, highly formalized and legalistic nature of modern arbitration. At the conclusion of the research, it was found among other things that modern arbitration is expensive and may not be accessible to the common man. It was also found that feuding parties in traditional communities use traditional approaches to resolve their conflicts because they find customary arbitration more accessible, quick and cheap. Consequently, the thesis recommended for the promotion of modern education and capacity building in the form of paralegal training for the operators of customary arbitration and that priority should be given to customary arbitration which is cheaper, faster, less formal and accessible to the common man.

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CHAPTER ONE

GENERAL INTRODUCTION

1.1 Background to the Research

Disputes are generally inevitable resulting from human interactions. They may be family disputes, land related disputes or disputes resulting from commercial transactions. Whenever dispute arises between two persons or more, there may be need for a neutral party, independent or non interested person as the case may be to intervene between the disputants with a view to solving the misunderstanding or dispute. This ensures peace, harmony, order, security and overall development of the society. However, if dispute arises and effort is not made to resolve it, it can lead to break down of law and order in the society.[1]

The advent of colonialism in Nigeria did not merely distort the culture of Nigerians, but brought with it many long lasting effects on the people. One area in which this distortion is most noticeable is in the area of administration of justice, particularly in the methods or mechanisms for dispute resolution.[2]

In the process of litigation, parties incur a lot of costs in the form of filing fees, professional fees of their lawyers and other incidental expenses. As human activities and interactions increased, people became more aware of their rights and also desirous of protecting those rights. All these had an impact on litigation. Therefore, the courts became congested and the process, slower.

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[1] Oluduro, O. (2011) Customary Arbitration in Nigeria: Development and Prospects. Retrieved from www.eupjournals.com/ajicl. accessed on 16 January, 2012 at 5.00pm

[2] Ibrahim, I. (2010)*The Legal Regime of Customary Arbitration in Nigeria* retrieved from www.unilorin.edu.ng/publications/imami accessed on 10 January, 2012 at 2.18pm

Despite the rise in the inherited colonial modes of justice and dispute resolution in Nigeria, indigenous or traditional modes of dispute resolution persist.[3]

The practice of arbitration has always been a more economical and friendly method of resolving disputes both in traditional and modern settings. Dispute settlement through the process of arbitration had been with various indigenous communities in Nigeria before the advent and introduction of English Legal System of court litigation or what we call adversarial process. The various indigenous methods of resolving disputes include but not limited to negotiation, mediation and intervention by heads of clans or family heads and indeed arbitration.[4]

Arbitration has been used successfully over the years to achieve amicable resolution of disputes without recourse to the tedious process of litigation. However, inspite of its tremendous achievements, arbitration is faced with some challenges. These include the attitude of Nigerian courts towards enforcement of customary arbitral awards, high level of illiteracy of the customary arbitrators, highly formalized and legalistic nature of modern arbitration etc.

1.2 Statement of the Research Problem

Disputes may arise in the course of daily human interaction. These disputes may emanate from commercial activities, trade related disputes, contracts, family, land or communal disputes among neighbouring villages.

[3] Ladan, M.T. (1998). Alternative Dispute Resolution in Nigeria: Benefits, Processes and Enforcement.

In: Akinseye-George, Y. (Ed.) *Current Themes in Nigerian Law. Essays in Honour of Prof. A.H Yadudu*. ILARN, Ibadan, Nigeria, P.262.

[4] Peters, D. (2006) *Arbitration & Conciliation Act Companion.* Dee-Sage Nigeria Limited, Lagos, Nigeria, P.368

Whenever dispute of any nature arises and effort is not made towards amicable resolution, it may pose serious problems to the society. It can lead to killings, partial or total collapse of economic activities and break down of law and order which may ultimately lead to anarchy.

Customary arbitration proceedings have some major deficiencies. For example, it was a common practice for parties to contest their initial submission and to also abandon the decision of the arbitration. This was due largely to the leeway created by some decisions of our superior courts regarding voluntary submission and the rights given to parties to withdraw midstream.[5]

While there is no contention about the existence and legitimacy of modern arbitration under Nigerian law, there are some judges who believe that customary arbitration is unknown to the law of the land.[6] One reason why modern arbitration is settled is the power of the statutes that it enjoys. Customary law, let alone customary arbitration is generally not a written law and that constitutes a weakness because the records are not kept for easy reference. Furthermore, customary arbitral processes are usually administered by elders and chiefs who are mostly illiterate and as such may not keep to the basic rules of natural justice.

Modern arbitral process seems to have lost its early simplicity. It has become more complex, more legalistic and more institutionalized. In spite of these short comings, customary arbitration which predates and is simpler than modern arbitration seems to have been relegated to the background.

The questions for determination are, whether arbitration is a necessity and has been a successful tool in amicable resolution of disputes; and whether customary arbitration is more effective than modern arbitration.

[5] Awosile v Sotunbo (1992)5 NWLR (pt. 243) P.514; Agu v Ikewibe(supra)

[6] Okpuruwu v Okpokam (1988) 4 NWLR (pt. 90) 554 at 572 per Uwaifo JCA (as he then was)

1.3 Objectives of the Research

The research objectives are:

1. Examine the laws on modern and customary arbitration of commercial, civil, family, land and communal disputes.
2. Determine the provinces and application of customary and modern arbitration.
3. Identify the problems and challenges of customary and modern arbitration and determine whether these systems can produce the desired result.
4. Provide recommendations for improvements that would lead to an improved, richer and more elaborate justice administration system, for peaceful coexistence and development.

1.4 Justification

There is always need for laws and issues to be examined from time to time for development. Human activities are not static, so also is the law. Settlement of disputes by modern and customary arbitration is a living issue which needs to be researched. There is the need to constantly engage in research for human orderliness and advancement.

This research on comparative study of modern and customary arbitration will invariably be useful to judges, traditional rulers, arbitration panels and institutions, legal practitioners, academics, traders, students and the general public. This research will be a useful material for further research on the subject and will also serve a guide to practitioners of arbitration.

1.5 Scope of the Research

The research focused on a side –by-side examination of the aspects of modern and customary arbitration as relates to commercial activities, land related disputes, family and communal disputes etc. other alternative disputes resolution mechanisms are also discussed.

In terms of scope, the thesis is restricted to Nigeria, with emphasis on the three major ethnic groups in Nigeria i.e. Yoruba, Igbo and Hausa. However, since most African countries have similar cultures and customs, recourse may be had to other countries in the continent.

1.6 Literature Review

Quite a number of authors have written on Alternative Dispute Resolution (ADR). Prominent Nigerian authors in this area include Ajomo, Orojo,[7] Peters,[8] Ladan,[9] Akanbi. [10] Foreign authors in the area of ADR include Allot and[11]Leo[12]. Thus ADR as a concept has been discussed extensively within and outside Nigeria. The work and contributions of these authors are explained below.

Peters , in his book,[13] discussed ADR extensively, especially under the Nigerian Arbitration and Conciliation Act. The learned author also discussed Nigerian cases decided under customary arbitration.

In his article titled ''Alternative Dispute Resolution in Nigeria: Benefits, Processes and Enforcement'' Ladan, [14] posits that most indigenous systems of customary law in Africa knew and recognized resort to traditional arbitration before neighbours or elders of a clan or tribe. The author stated further that Nigerian courts recognize and enforce the results of

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[7] Orojo, J.O and Ajomo, M.A. (1999). *Law and Practice of Arbitration and Conciliation in Nigeria*. Mbeyi & Associates Nig Ltd, Lagos, Nigeria, P.5

[8]Peters, D. Op. cit.

[9] Ladan, M.T. Op.cit.

[10] Akanbi, M.M (2005) *Clash of Concepts, Differences and Challenges*. Unpublished Ph.D Thesis. Kings College University, London, England.

[11] Allot, A.N. (1960). Essays in African Law. Butterworth, London, England, P.126

[12] Kanowitz, L. (1985) *Cases and Materials on Alternative Dispute Resolution.* West Publishing, Minnesota, U.S.A, P.141

[13] Peters, D. op.cit. P.368

[14] Ladan, M.T. op.cit. p.256

customary arbitration. He cited the case of ***Nwoke v Okere*** ,[15] where the Supreme Court held that customary arbitration constitutes estoppel *per rem judicatum*, if the subject matter, parties and cause of action are the same in the arbitration as in the court action.

Ajomo and Orojo[16] stated that arbitration is in a curious position when discussing ADR processes. They argued that in ADR processes such as mediation and conciliation, the parties retain the responsibility for and control over the dispute to be resolved, while in arbitration, the arbitrator has responsibility for controlling the process and making a binding award. They concluded that arbitration should be left out of the ADR process.[17] This is a position that is rather curious, because arbitration like other processes is an alternative to court litigation. The learned authors presented a broad procedure for dispute resolution through arbitration. They made a distilled analysis of statutory and case law positions regarding arbitral proceedings with greater emphasis on modern arbitration.

Allot on his part observed that arbitration as known to English law, is not part of customary law and that the so-called customary arbitration is nothing but mere negotiation of settlement.[18] He went further to say that customary ideas do not permit parties committing themselves, before proceedings begin, to accepting the decisions of the arbitrator, whatever it might be. Equating customary arbitration with mere negotiation for settlement is flawed in that even if there are instances where native people are engaged in negotiation or conciliation in which selected chiefs, elders or other disinterested persons strive to resolve disputes between persons without necessarily handing down binding awards, it is common for established native institutions or groups or even non- established groups of persons to be

[15] (1994)5 NWLR 169

[16] Orojo, J.O and Ajomo. op. cit. P.5

[17] ibid

[18] Allot, A.N. op. cit. P.126

chosen by native disputants to adjudicate over such differences with a mandate to give a binding decision, outside the usual formal courts.[19]

Ezejiofor[20] examined the essential ingredients of customary arbitration as laid down by the Supreme Court in some decided cases.[21] He contended that the position of the court is contradictory because in one and the same breath, the court is saying that a valid customary arbitration takes place when the parties agree beforehand to be bound by the resultant award and at the same time that parties are free to reject the award when it is made. He added that if this ugly development is not arrested, customary arbitration which is a very useful institution will be emptied of its meaningful contents.

Yagba in his article[22] discussed the issue of the relevance of *juju* trials in customary arbitration. He urged our courts to accommodate customary procedures that are simple, cheap and relevant to the needs of the individual case.

Ladapo in his book[23] described customary arbitration as a binding African traditional dispute resolution mechanism. He analysed the scholarly and judicial arguments for and against the existence of a binding, non-judicial dispute management indigenous to Africa with emphasis on studies conducted among the Yoruba people of western Nigeria.

The study derives it foundation from various contributions on the subject matter of research. This thesis went further to discuss the essential ingredients of arbitration, the advantages and

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[19] Onikoro, F.J. (2005) *Customary Law Arbitration and Oath Taking: The Crisis of Validity*. Ikeja Bar Journal, P.53

[20] Ezejiofor, G. (2005). *The law of Arbitration in Nigeria*. Longman Nigeria Plc, Lagos, Nigeria, P.28

[21] Agu v Ikewibe(1991) 3NWLR (pt.180)385 at 407; Ohiaeri v Akabeze (1992)2 NWLR (pt.221) at P.24

[22] Yagba, T.A.T (1995). Arbitration of Foreign Investment Disputes in Nigeria: Some Alternatives considered. In: Ayua, I.A. (Ed) *Law, justice and the Nigerian society. Essays in honor of Justice Mohammed Bello.* NIALS, Lagos, Nigeria, P.266

[23] Oladapo, O.A. (2008) where does Islamic Arbitration fit into the Judicially Recognised ingredients of Customary Arbitration in Nigerian Jurisprudence? *African Journal of Conflict Resolution*. P.18

disadvantages of arbitration, etc. The thesis also made a comparative analysis of modern and customary arbitration.

1.7 Research Methodology

The research methodology adopted is doctrinal and empirical. Doctrinal method adopted is both primary and secondary.

Primary sources of data are obtained from several judicial decisions i.e. case laws, especially on customary arbitration were used. Also several other decisions relating to modern arbitration were useful to the research. Statutes in this area have been studied and analysed. These include the Arbitration and Conciliation Act[24]The English Arbitration Act, 1889 and The United Nations Conventions on the Recognition and Enforcement of Foreign Arbitral Awards, 1959.

Secondary sources of data: - This includes books, conference/seminar papers, internet sources and articles on the subject matter. Empirical method was used to collect data through distribution of questionnaires.

1.8 Organizational Layout

The whole work is divided into five chapters.

Chapter one deals with such general introduction, objectives, scope, literature review, methodology and scope of the research.

Chapter two takes is on modern ADR mechanisms. It examines the concept of ADR, wherein the definition and processes are analysed. The processes include arbitration, mediation, conciliation, negotiation, mini-trial, med-arb and other hybrid processes, with emphasis on modern arbitration and its advantages and dis-advantages. Chapter three is on customary arbitration, including the essential ingredients, the advantages and disadvantages of

[24] Arbitration and Conciliation Act, Cap A18. LFN 2004

customary arbitration. Chapter four deals with the similarities and differences of customary and modern arbitration. Chapter five deals with the summary of findings and recommendations.

CHAPTER TWO

CONCEPTUAL CLARIFICATION

2.1 Introduction

ADR is not a strange concept that has just been introduced in Nigeria. It dates back to the pre-colonial period. Generally, ADR is all encompassing. It includes arbitration, mediation, negotiation, conciliation, mini trial, expert determination, early neutral evaluation, med-arb, ombudsman and other hybrid ADR processes.[25] ADR was practiced in many indigenous societies in Nigeria by chiefs, community leaders, family heads, Obas, emirs etc. Before colonization, each community had its own way of resolving disputes according to their customary law. Research has shown that family heads mediate certain marital disputes as well as resolution of boundary dispute between households.[26]

Movement for modern Alternative Dispute Resolution began in the early sixties, when a lot of developed countries developed interest in the area.[27] In pursuit of the actualization of this new area of interest, several conferences were held by eminent jurists and lawyers. One such conference was the Pound Conference held in Minnesota, USA in 1979, where leading jurists gathered to address the dissatisfaction with the justice system.[28] It was at that conference that the idea of "multi-door court house" was first proposed by Professor E.A Sander, a proponent of Alternative Dispute Resolution.[29]

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[25] Goldberg, Sander and Roger. (1992) *Dispute Resolution.* Little Brown & Co. Boston, USA, P.21

[26] Uwazie, E. (1994) *Modes of Indigenous Disputing and Legal Interactions Among the Ibos of Eastern Nigeria*. Journal of Legal Pluralism school of Justice Studies, Arizona State University, P.89

[27] Kehinde, A. (2004). *The Lagos Multi-Door Court House and the Judge: A New Beginning.* MPJFIL (8) p.340

[28] Peters, D. op. cit. P.17

[29] ibid

2.2 Meaning, Goals and Processes of ADR

2.2.1 Meaning

The acronym 'ADR' means Alternative Dispute Resolution. This refers to a group of flexible approaches to resolving disputes more quickly and at a lower cost than going through the tedious road of adversarial proceedings.[30]

Black's Law Dictionary defines ADR as "procedures for settling disputes by means other than litigation."[31] In essence, it refers to a range of procedures that serve as alternatives to litigation for the resolution of disputes which usually involves the intercession of an impartial third party.

The term "ADR" has become associated with a variety of specific dispute resolution options such as arbitration, negotiation, mediation, conciliation, mini trial, case evaluation, expert determination and other hybrid mechanisms.[32]

Prof. Ladan is also of the view that "ADR" is a useful short hand expression, as long as it is understood to refer to a system of multi-option justice in which a wide range of dispute resolution processes are available to parties in the public justice system.[33]

2.2.2 Goals

ADR processes as alternative to court adjudication is aimed at achieving certain goals. It is an attempt to provide a fresh set of tools available to Nigerian courts and to revive the overburdened judicial system and restore public confidence in it. A range of non-adjudicatory alternatives will go far towards improving the quality of justice in Nigeria.

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[30] Ibid

[31] Garner ,B. (1997). *Black's Law Dictionary.* West Group Publishers, St Paul, USA. P.10

[32] Ladan, M.T. op. cit. P.249

[33] ibid

The ADR movement is also aimed at providing multiple options for resolving disputes in Nigeria. This means that the poor and the moderate income persons have broader access to justice. Many ADR processes result in lower cost for the parties.[34]

Also where conflicts arise within on-going relationship such as families, neighbours and business associates, ADR techniques readily support the positive maintenance of the relationships. Often times, the process teaches them new ways to deal with future conflicts.[35]

Some of the most commonly used ADR processes include Conciliation, Mediation, Negotiation, Mini-trial, Med-Arb and Arbitration.

2.3 Conciliation

Conciliation is a process of settling disputes by consensus rather than by adjudication. The Arbitration and Conciliation Act provides that notwithstanding the other provisions of the Act, the parties to any agreement may seek amicable settlement of any dispute in relation to the agreement by conciliation.[36] Conciliation has been defined as:

> An informal process in which the parties to a dispute agree to use the services of a conciliator. He tries to bring the parties to an agreement by lowering tensions, improving communications, interpreting issues, providing technical assistance, exploring potential solutions and bringing about a negotiated settlement, either informally or in a subsequent step through formal mediation.[37]

Therefore, the conciliator does not intervene directly, rather he does so indirectly by providing a conducive terrain for the disputants to sort out the differences by themselves.

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[34] ibid

[35] Ibid

[36] Section 37, Arbitration Act op. Cit.

[37] Kanowitz, L. (1985) *Cases and Materials on Alternative Dispute Resolution*. West Publishing, Minnesota, U.S.A, P.12

Conciliation is an old method of dispute resolution which is very common among the traditional societies. It is mostly used to resolve volatile conflicts and also in cases where parties are unwilling to negotiate to settle their differences.[38]

A party who wishes to initiate conciliation process shall send a written request to conciliate to the other party under the provisions of the Act.[39]The request shall briefly state the subject of the dispute. Once the request is accepted, the parties shall refer the dispute to a conciliation body. The conciliation body shall consist of one or three conciliators. Where there is only one conciliator, the parties jointly appoint him. In the case of three conciliators, each party shall appoint one conciliator, while the third one will be jointly appointed by the parties.[40]

The conciliator must acquaint himself with the details of the case and all other facts relevant to the settlement of the dispute. Parties may appear for conciliation in person or through legal representation.[41]

2.4 Mediation

Mediation is generally defined as the intervention in a conflict of an acceptable third party who has limited or no authoritative decision making power, but assists the involved parties in voluntarily reaching a mutually acceptable settlement of issues in dispute.[42] Mediation therefore is a process whereby a third party called the mediator is appointed by parties to a dispute to assist them reach an agreement in the resolution of dispute(s) between them.

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[38] Peters, D. op.cit. P.141

[39] Section 38(1) Arbitration and conciliation Act. op. Cit.

[40] ibid

[41] ibid

[42] Cho, F.F. (2006). *Alternative Dispute Resolution and the Legal Profession in Nigeria: issues, Problems and Prospects*. Unpublished Ph.D. Thesis. Faculty of Law, ABU Zaria, Nigeria, P.181

Mediation is also a facilitative process that attempts to overcome all barriers to successful negotiation. Therefore when disputants are not disposed to any of the adversarial procedures, they may call in the intervention of a neutral third party to guide them to a mediated settlement.[43]

A mediator controls the process and the parties control the outcome, in the sense that the mediator cannot impose a decision on the parties.

The mediator has a duty to encourage parties to focus on their interests rather than what is perceived to be their legal rights or legal entitlement. The mediator and the parties or their representatives usually meet face to face. The mediator opens the session stating the order of the session.[44]

There are three major forms of mediation. The first form can be termed rights based. Here, the mediator considers the rights that the disputants would have in court and with that as a yardstick, he tries to help the disputants to resolve the dispute(s) with those parameters.[45]

The second approach is one that focuses on the interest or needs of the parties. While the last approach is the therapeutic style which focuses more on the problem solving skills of the parties involved.[46]

It is worthy to note that the role of the mediator is not akin to that of a judge in judicial proceedings or that of an arbitrator in arbitration. A mediator is impartial, trained and experienced in the mediation process and by definition has no decision making authority.[47]

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[43] Peters, D. op. cit. P.98

[44]Ladan, M.T. op. cit. P.256

[45] Ibid

[46] ibid

[47] Grassby, J.H. (2010) The U.S. Civil Court System – the other crisis. Retrieved from http://www.northamericanmediation.com.htm Accessed on 15 December, 2011 at 3.00pm

2.5 Negotiation

Negotiation basically means to bargain. It is a voluntary, informal and an unstructured process used by disputants to reach a mutually acceptable agreement for the resolution of their disagreement.[48]

The ultimate goal of negotiation as an ADR process is agreement. When an agreement is reached, negotiation is said to be successful, on the other hand, if an agreement is not reached, then the negotiation is said to have failed or dead locked.[49]

In negotiation, there may not be a third party facilitator. Disputants may or may not appoint third party representatives. There is no limit to the presentation of evidence, arguments or interests.[50] The process is usually informal and where decisions are arrived at, parties are bound to accept it.

Negotiation styles are broadly classified into distributive bargaining and integrative bargaining.[51]

1. Distributive Bargaining

Distributive bargaining assumes a relatively fixed pie to be shared by the parties. Thus, indicating that the more the pie that goes to one party, the lesser the share of the other. Here there is tendency on the part of each negotiating party to endeavour to have a larger portion of the pie than what goes to the other party.[52]

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[48] Peters, D. op. Cit. P. 19

[49] Nwaneri, A.C. (2010). An Appraisal of the ADR Process in Nigeria. In:Aliyu I.A(Ed.) *ADR and some Contemporary Issues: (Legal Essays in Honour of Hon. Justice Ibrahim Tanko Muhammad)*. M.O Press and Publishers Ltd, Kaduna, Nigeria, P.351

[50] Goldberg, Sander and Rogers. op. cit. P. 102

[51] Ladan, M.T op. Cit. P.254

[52] ibid

At the extremes is competitive bargaining in which a negotiator is concerned primarily with winning. Accommodative bargaining is one in which a negotiator is concerned primarily with preserving relationships between parties. A middle course is co-operative bargaining, where both winning and preserving relationships are important.[53]

In competitive bargaining, parties attempt to maximize personal gain. They prefer to win, emphasis is not on relationships, accordingly, the other side is treated as an adversary and parties hardly change their positions. This model takes a form of contest in which there will be a winner and a loser and it often tends towards a hostile and confrontational approach and response. Furthermore, the contentious nature of competitive bargaining often results in deadlock and a breakdown of negotiations.[54]

In accommodative bargaining, the goal is to maximize chances for agreement. Emphasis is on preserving relationships rather than winning, thus the other party is treated like a friend.

In co-operative bargaining, winning and preserving relationships are both important. Parties treat one another as business partners. They look for joint concessions and insist on mutual changes in positions.

2. Integrative Bargaining

This is a problem solving approach in which both sides seek a solution that meets their interests.[55] It is a joint problem solving approach in which the parties share information and brain storm with a view to finding a solution.

The underlying interests of the parties are considered reconcilable, even if their positions appear to be conflicting. The pie can sometimes be expanded to accommodate the interests of

[53] ibid

[54] Peters, D. op. cit. P.78

[55] Ladan, M.T. op.cit. P. 255

both parties. Here, the goal is to reach a reasoned resolution. People are separated from the problem and the other party is treated as collaborative problem solver.

According to Fisher and Ury[56], the five basic elements of the integrative bargaining are as follows:

1. Separate the people from the problem:

   The negotiators should attack the problem not each other.

2. Focus on interests not positions:

   The position is what the negotiator wants and interest is the reason he wants it. Attention is not on the position of the parties, rather conducive environment is created to seek out reason behind the position. Focusing on interests may uncover the existence of mutual interests that will make agreements possible.

3. Invent options for mutual gain:

   Negotiation need not be a competitive game in which each party seeks to get the biggest slice of a fixed pie. On the contrary, there may be bargaining outcomes that will advance the interests of both sides. A good example is that of two children who are trying to decide which of them should get the only orange in the house. After some frustrating negotiations, they decide to divide the orange into two halves. If they had realized that one person wanted to squeeze the orange for its juice and the other wanted to grind the rind to flavour a pastry, an agreement that maximized the interests of each person would have been clear.

   4. Insist on using objective criteria:

   There are some negotiations that are not susceptible to a win-win approach. To minimize the risk of failure to reach agreement on such issues, Fisher and Ury

[56] Fisher, R. and Ury, W. (1991). *Getting to Yes: Negotiating Agreement without giving in.* Retrieved from www.colorado.edu/conflict accessed on 16 December, 2011 at 9.00pm

suggested that the parties focus on objective criteria to govern the outcome, because focusing on objective criteria may narrow the range of disagreement.

5. Know your best alternative to a negotiated agreement (BATNA):

   The reason you negotiate with someone is to produce better results than you could obtain without negotiating with that person. Therefore, if he is unaware of the best he can obtain if the negotiation is unsuccessful, invariably, he runs the risk of entering into an agreement that he would be better off rejecting, or rejecting an agreement that he would be better off entering into. For example, it will be unwise to agree to buy an item for a certain amount without knowing how much a similar item would cost elsewhere.

   Where the alternative to negotiation is very strong, the negotiator can do without the negotiation and still be okay. Thus, he will have to insist on a deal which is close to his best scenario. [57]

   One of the important benefits of negotiation is that the disputants have control over the process and the outcome. They decide what the important facts are and they also decide together on the best solution.[58]

2.6 Mini-Trial

This is a form of evaluative mediation which as a non-binding process assists the parties to a dispute to gain a better understanding of the issues in dispute, thereby enabling them to enter into settlement negotiations on a more informal basis.[59] Mini trial usually takes the form of presentation of legal, factual and evidentiary stance in support of the parties by their counsel. This proceeding is usually before an official with authority to effect settlement of disputes

[57] Cho,F.F. op. cit. P. 145

[58] Ladan, M.T op. cit. p.258

[59] Orojo, J.O. and Ajomo, M.A. op.cit P. 10

and a neutral third party who serves as an adviser. The presentation affords all disputants an opportunity to assess the strengths and weaknesses of their position. They can then make a decision on whether or not to settle out of court or resort to adversarial procedure. If at the end of the presentations parties do not reach an agreement on settlements, the third party neutral advisor evaluates the case for both sides by examining the facts as presented and the position of the law on the issues. Thereafter the advisor gives an opinion which is strictly speaking not binding on the disputants.[60]

2.7 Med-Arb

Med-arb is an abbreviation for "mediation arbitration". Here, attempt is made to resolve a dispute by agreement through mediation, and if that fails, it proceeds to a binding arbitration.

It is a process under which a med-arbiter is authorised by the parties to serve first as a mediator and secondly as an arbitrator. When the med-arbiter serves as an arbitrator, he is given other powers to resolve any issue not resolved through mediation. Thus med-arb is often resorted to so as to resolve all outstanding issues not resolved during mediation process.[61]

2.8 Litigation

The process and procedure for resolving different types of disputes through the court is known as litigation. Black's Law Dictionary defined litigation as the process of carrying on a suit.[62]

Litigation can also be defined as the intervention of a third party neutral, acting in an official capacity as a judge, with wide powers to examine the facts of a dispute as presented and on

[60] Peters, D. op. cit at P.21

[61] Ibid at P.22

[62] Garner, B. op.cit. P. 252

the basis of applicable law, make a binding pronouncement on the rights, obligations and liabilities of disputants.[63]

Adversarial system is at the core of the common law system of justice as practiced in the United Kingdom, which was received into Nigeria. It is a colonial legacy which is still found in most common wealth countries.[64]

Litigation as a dispute resolution mechanism is one of the many functions of the Nigerian Judiciary. The major function of the judiciary is the adjudication of disputes between parties. This adjudicatory function is the responsibility of the courts and special tribunals which are presided over by men and women specially trained in the art and language of law.

When a dispute has to be resolved through litigation, an aggrieved person called the plaintiff or claimant files an action in court against an adversary called the defendant. Both parties have the right to call witnesses in proof of the claim and defence respectively. The parties go through the process of examination in chief and cross examination and are also given the opportunity to address the court on issues arising and the laws applicable thereto. Thereafter, the judge gives his judgement.

2.9 Arbitration

Arbitration in a modern sense has been defined as "a method of dispute resolution involving one or more neutral third parties who are usually agreed to by the disputing parties and whose decision is binding''[65].

It has also been defined as "the process of resolving disputes between people or groups by referring them to a third party either agreed on by them or provided by law, who makes a judgement.''[66]

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[63] Ibid

[64] Peters, D. op. cit. P.54

[65] Garner, B. Op.cit. P.100

The Arbitration and Conciliation Act defines arbitration to mean "A commercial arbitration whether or not administered by a permanent arbitral institution''[67]

Also in the case of ***NNPC v Lutin Investment Ltd***[68] arbitration was defined as: "the reference of a dispute between not less than two parties for determination after hearing both sides in a judicial manner, by a person other than a court of competent jurisdiction." The arbitrator, who is not an umpire, has the dispute submitted to him by the parties for determination. If he decides something else, he will be acting outside his authority and consequently, the whole of the arbitration proceedings will be null and void and of no effect. This will include any award he may subsequently make.[69]

Black's Law Dictionary defines arbitration as a method of dispute resolution involving one or more neutral third parties who are usually agreed upon by the disputing parties and whose decision is binding.[70]

Ladan[71] defined arbitration as a process of dispute resolution in which a neutral third party, who is not a judge, hears both sides to a case during an informal hearing and then decides who wins and who loses.

The Arbitration and Conciliation Act[72] is the main Nigerian statute that deals with arbitration. The long title of the Act provides that, it is:

> An Act to provide a unified legal frame work for the fair and efficient settlement of commercial disputes by arbitration and

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[66] Halsbury's Laws of England (1994) Butterworths, London.P.2

[67] Section 57(1), Arbitration and Conciliation Act. Op.cit.

[68] NNPC v Lutin Investment (2006) 2 NWLR (pt. 965) 50

[69] Ibid at PP 542-543

[70] Garner ,B. op.cit P. 10

[71] Ladan, M.T. op.cit. P.258

[72] Arbitration and conciliation Act. op.cit.

> conciliation and to make applicable the Convention on the recognition and enforcement of arbitral awards (New York Convention) to any award made in Nigeria or in any contracting state arising out of International commercial Arbitration.

The Supreme Court in the case of ***Kano State Urban Development Board v Fanz***[73] adopted the definition offered by learned authors of the Halsbury's Law of England. In that case, the Supreme Court held that arbitration is the reference of a dispute or difference between not less than two parties for determination, after hearing both parties in a judicial manner by a person other than a court of competent jurisdiction. It could therefore be summed up as the process of hearing and determining an issue in controversy by an arbiter.

The Supreme Court in ***Agu v Ikewibe***[74]defined 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.''

The question can be asked as to what exactly is modern arbitration as compared to customary arbitration? To this writer, modern arbitration means all types of arbitration which are a product of the west. "Western means from or in connection with the western part of the world or of a society".[75] It is therefore understood that modern arbitration would include common law arbitration and statutory arbitration. While customary arbitration is that which is practiced in accordance with the customary law of the indigenous people.

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[73] (1990) 4 NWLR (Pt. 142)1 at 12

[74] (1991)3NWLR (Pt. 180) at 407

[75] Longman Dictionary of Contemporary English. Retrieved from www.longmandictionaries.com accessed on 16 January,2012 at 4.15pm

From these definitions, it can be deduced that arbitration whether customary or modern is a process of dispute settlement (in a judicial manner) by a third (neutral) party voluntarily appointed by the disputing parties or by law, with commitment to the binding effect of the outcome of the arbitration by the disputants.

Modern arbitration arises out of a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not.[76]

Romily M.R in the case of ***Collins v Collins***[77] defined arbitration as "reference to the decision of one or more persons either with or without an umpire, a particular matter in difference between the parties."

From the two decisions given above, certain essential elements must be present before a form of dispute resolution can be styled as arbitration. Firstly, there must be existence of a dispute and parties who may have envisaged the existence of a dispute in future. Secondly, the parties have voluntarily agreed to refer such existing or future disputes to arbitration. Thirdly, the decision of the arbitrator would be binding on the parties

2.9.1. Types of Arbitration

Arbitration can be divided into four major categories, viz: International, Domestic, Institutional and Ad hoc Arbitration.[78]

[76] Section 54(1) Arbitration and conciliation Act, op.cit.

[77] (1858)28LJ CH 184

[78] Ajomo, M.A. (1997) *Arbitration Proceedings*. Paper presented at the 17th advanced course in Practice and Procedure at the Nigerian Institute of Advanced Legal Studies. P. 8.

2.9.1.1 International Arbitration

International arbitration in Nigeria developed with the rise of international commercial transactions. As a developing country, Nigeria had to enter into various commercial contracts with people and companies from more developed countries of Europe, America and Asia. These contracts mostly provided that disputes arising from their performance be resolved by arbitration. The arbitration clauses in these contracts were usually based on the law and practice of international arbitration in those countries.

However, in Nigeria, there was no statutory provision governing international arbitration, until 1988 when the Arbitration and Conciliation Decree was promulgated. The decree was later re-enacted and is now known as the Arbitration and Conciliation Act, 2004. "Hereinafter referred to as the Act"

The Act provides that "arbitration is international if:

(a) the parties to an arbitration agreement have, at the time of the conclusion of the agreement their places of business in different countries, or

(b) one of the following places is situated outside the country in which the parties have their place of business-

1. the place of arbitration if such place is determined in, or pursuant to the arbitration agreement,
2. any place where a substantial part of the obligation of the commercial relationship is to be performed or the place with which the subject matter of the dispute is most closely connected;

(c) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country; or

(d) the parties, despite the nature of the contract expressly agree that any dispute arising from the commercial transaction shall be treated as an international

arbitration.''[79] S. 57(3) further provides that "where a party has more than one place of business, the place of business shall be deemed to be that which has the closest relationship to the arbitration agreement, and that if a party does not have a place of business, reference shall be made to his habitual residence."

It can therefore be deduced that arbitration is international if the parties to the arbitration agreement have their places of business in different countries or where the subject matter relates to more than one country or where the parties expressly agree that disputes that may arise between them be treated as international arbitration.

2.9.1.2 Domestic Arbitration

The term "domestic arbitration" is not defined by the Arbitration and Conciliation Act. But by defining international arbitration in section 57, the Act delimits what is domestic arbitration, for both are mutually exclusive. Thus, it can be said that a domestic arbitration is one which is not international.

A domestic arbitration will therefore, be one between persons who at the time of concluding the contract are doing business in the same country and the contract is to be performed in the same country where they carry on business. The nationality of the parties and their place of residence are not relevant to this determination. Thus arbitration in Nigeria between Nigerians or Nigerian companies or persons carrying on business in Nigeria is a domestic one. Similarly, even if the parties are foreigners and nationals of different countries, provided they both carry on business in Nigeria at the conclusion of the contract and the arbitration is to be held in Nigeria, it will be regarded as domestic.[80]

[79] Section 57 (2) Arbitration and Conciliation Act. op. Cit.

[80] Orojo, J.O. and Ajomo, M.A. op.cit. P. 52

2.9.1.3 Institutional Arbitration

Parties to this form of arbitration provide in their contract, for the arbitration to be conducted in accordance with the rules of certain arbitration agency. In this case, arbitration is conducted under the auspices of an arbitration institution which administers the arbitral process. Nigeria is yet to have such institution. However, there are many arbitration institutions scattered all over the world and these are also used by Nigerians. These Institutions include, The Asian African Legal Consultative Committee (AALCC) which has a regional centre in Lagos, Nigeria. Others include; The International Chamber of Commerce (I.C.C) in Paris, The London Court of International Arbitration (L.C.I.A), The American Arbitration Association (AAA).[81]

Apart from the routine administrative and logistic support, the supervisory roles of these institutions vary greatly. While some of these institutions insist on reviewing the terms of reference of the arbitral tribunal, others insist on vetting the draft awards and making recommendations as to their substance before the tribunal hands them down. While some others, do not involve themselves in such issues.[82]

2.9.1.4 Ad hoc Arbitration

As the name implies, there are no permanent institutions to administer and supervise the arbitral proceedings. This form of arbitration is conducted pursuant to an agreement which is self executing. The parties to an ad hoc arbitration make provisions for the procedure to be followed in the arbitration.[83]

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[81] Ibid

[82] Ezejiofor, G. op.cit. P.173

[83] Orojo, J.O and Ajomo, M.A. op.cit. P.55

Ad hoc arbitration agreement may be difficult to draft, because it has to spell out a comprehensive set of rules that will govern the arbitration. It is obvious that making comprehensive provisions may result in a cumbersome document. In order to avoid this, parties may incorporate the provisions of the Act by reference, for instance by providing that the arbitration shall be governed by the Act.

Parties may also incorporate the United Nations Commission on International Trade Law (UNCITRAL) rules by reference.[84]

One major advantage of ad hoc arbitration is that, if there is co-operation between parties, they can fashion out an arrangement which will be best suited for their peculiar dispute.

2.10 Advantages and Disadvantages of Modern Arbitration

2.10.1 Advantages

2.10.1.1 Privacy

In arbitration, negative publicity that sometimes goes with trials in open court can be avoided. Confidential nature of the process tends to protect sensitive business information from commercial rivals. It also protects large companies that will not want any stigmatization of their good will. This would be otherwise if the matter is taken to court, because documents filed may be accessible by the public.[85]

[84] Ezejiofor, G. op. cit. P.173

[85] [85] Roberts, S. and Palmer, M. (2005) *Dispute Processes: ADR and the Primary Forms of Decision-Making.* Cambridge University Press, New York, USA, p.10

2.10.1.2 Convenience

The parties usually select a convenient venue for their deliberations rather than the often congested court rooms. The serene atmosphere impacts positively on the outcome of the exercise.[86]

2.10.1.3 Speed

Arbitrators are experts in the field of dispute; as such the need to explain all the background features of the case will be largely unnecessary. Also arbitrators are likely to adhere to the time table fixed by the parties by avoiding time consuming procedural formalities.[87]

2.10.1.4 Simplified Procedures

In arbitration, the parties are at liberty to choose their own tribunal, procedural rule and even decide on how the dispute should be presented. They are also at liberty to ask the arbitrators not to adhere strictly to the rules of evidence, subject to the rules of natural justice and fairness.[88]

2.10.1.5 Autonomy

Parties are at liberty to choose the applicable laws, arbitrators and many other issues governing their relationship unless otherwise agreed by them. They can choose an arbitrator who is an expert in the field in which the dispute arises.[89]

2.10.2 Disadvantages

Some of the features that make arbitration desirable may also make it undesirable.

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[86] ibid

[87] Emiola, A. (2006). *Principles of African Customary Law.* Emiola Publishers Ltd, Ogbomosho, Nigeria, p. 35

[88] ibid

[89] Mazirow, A. *The advantages and disadvantages of Arbitration compared.* Retrieved from http://www.mazirow.com Accessed on 20 February, 2012 at 8.00 pm

2.10.2.1 Autonomy

Unlike developed countries which have organised arbitration associations, for instance the American Arbitration Association (AAA) from where parties can select, there is yet no such body in Nigeria. So exercising the right to select an arbitrator from nowhere can lead to excessive hardship.[90]

2.10.2.2 Speed

The advantage of speed which is often associated with arbitration may also be a hindrance to the process. This is because by opting for simplified procedure which saves time, the arbitrator may not do justice to the issues in contention.[91]

2.10.2.3 Cost

Parties to arbitration have to pay for practically everything. For instance, parties have to pay for the use of premises for the conduct of the arbitration, the recording of evidence, the daily fees of arbitrators and the cost of preparing the award. These costs sometimes discourage parties from opting for arbitration.

2.10.2.4 Finality[92]

The provision of finality tends to give arbitrators an assuming position. Bias is very rampant in this part of the world. The absence of the possibility to review an award which was given in error or in clear disregard of the terms and conditions of the contract can discourage parties from arbitration.

[90] ibid

[91] ibid

[92] ibid

CHAPTER THREE

OVERVIEW OF CUSTOMARY ARBITRATION

3.1 Introduction

Customary arbitration is not a strange concept that has just been introduced. The courts have held in several cases that arbitration is not alien to customary jurisprudence. Prior to colonialism, there were different ways of dispute resolution in various communities. The mode depended to a large extent on the type of community, that is, whether centralized or not centralized.[93] Also, the choice of a dispute resolution mechanism within a particular society is strongly influenced by the peculiarities of traditions, culture and legal evolution of that society.[94] Therefore, within any given culture, appropriate mechanisms of conflict resolution are cultivated to meet the society's practices and legal traditions. The dispute settlement of a particular society is usually the sum total

of peculiar circumstances of that particular society.[95]

In the light of the above, three major ethnic groups in Nigeria are considered below:

3.1.1 The Yorubas

Disputes were resolved among the indigenous Yoruba of western Nigeria through the appointment of chiefs by the Oba. The eminent chiefs served as arbitrators between disputing neighbouring villages. Occasionally, the Oba hears disputes in his palace by way of review, usually at the request of a party who alleges bias on the part of the arbitrator.[96]

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[93] Amazu, A. (2001). *International Commercial Arbitration and African States: Practice, Participation and Institutional Development.* Cambridge University Press, P.115

[94] Akanbi, M.M. op. cit. P. 104

[95] Quashigah (1989) *Reflections on the Judicial Process in Traditional Africa.* 4 Nigerian Juridical Review. Retrieved from http://www.icirs.org/docs accessed on 15 February,2012 at 3:00pm

[96] Abdul, O.Y. (2002). *Arbitration in Nigeria: Problems, Challenges and Prospects.* Ilorin Bar Journal vol. 1 P.5

The maintenance of peaceful co-existence among the people is a responsibility placed on the elders. The Yoruba juristic thought is one that views a conflict between two parties or individuals as a challenge upon the competence of the elders to maintain the "cord that binds humanity" and resolve broken ties of friendship.[97]

The aim and objective of law from a juristic perspective transcends the mere resolution of dispute or conflict. It has a wider scope, which is the maintenance of the equilibrium of the society as a whole. In African conception of law, emphasis is laid on the promotion of reconciliation and re-adjustment of the disturbed social relationship.[98]

There are in existence formal and informal courts of arbitration. The informal courts include public tribunals meeting under trees, in market places and other places for public settlement of disputes. The elders listen and help to settle difficult matters affecting their community. In the past, cases of fighting among adolescents were settled impromptu by passers-by. It was the responsibility of elders present to arbitrate for the parties. Where the issue involved can not be immediately resolved, the elder must report it to more elderly people in the families of the parties involved in the dispute. The formal courts include Baale's court, the tribunal of the ward chief and the central tribunal. The central tribunal is the last 'Court of Appeal'. In this court, the king and his council handle serious cases like rape, murder, arson, adultery and land cases.[99] The King and his council may delegate may delegate the role of the arbitration to lesser chiefs within the kingdom or heads of families to exercise. The decisions of the delegates are however subject to the King's court if the situation arises.[100]

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[97] Adewoye, O. (1986). *Proverb as a vehicle of juristic thought among the Yoruba. Obafemi Awolowo University Law Journal* vol. 3 P.4

[98] Elegido, J.M. (2001) *Jurisprudence.* Spectrum Law ,Lagos, Nigeria P.128

[99] Oluduro,O. op. cit. P.312

[100] Ibid

3.1.2 Igbo Community

The structure and organization of the Igbo community of Eastern Nigeria gives one an insight into what constitutes customary arbitration among the people of that region. Each family is made up of territorially kin based units called "Ummuna".[101] The family is made up of a number of compounds consisting of an economically independent house hold each with a man or a woman as a house leader. A degree of harmony and order is achieved through the respected office of the head of the compound. All the house holders and their dependents recognise the full authority of the compound head and are expected to consult him before taking decisions. The head has numerous ritual, moral and legal rights and obligations towards the other members of the family. He does not however usually impose his authority over the internal affairs of other members but rather, he gives his opinion as regards the customs and traditions of the community in the event of conflicts.[102]

Schapera succinctly puts the position of the family head as follows:[103]

> The elder of a family group is merely an arbitrator whose authority is persuasive and moral rather than compulsory and legal. His primary concern is to administer justice as to reconcile the quarrelling members of his group and in attempting to achieve this, he appeals to their family sentiments rather than to strict legal principles.

Although established formal institutions were absent, there were laws in place made through ad hoc institutions such as age grades which exercised legislative functions. The enforcement of the laws in these communities was done on adhoc basis. The societies had rudimentary arrangement whereby authority is wielded by a leader, who is often the head of the most

[101] Akanbi, M.M op.cit P.114

[102] Akanbi, M.M. op. cit. p.108

[103] Schapera, A. (1995) *Hand book of Eswana Law and customs*. Journal of African Law vol.21, P. 91

important family in the local community and who probably enjoys seniority among other family heads.

There are various classes of offences such as negligence (Mmehe), criminal offences (Alu) and abomination (Nso Ani). While minor disputes are handled by the family heads and members, the major disputes between families or villages are handled jointly by elders, title men and chief priests and other reputable oracles.[104] Where a party is dissatisfied with a decision, he may appeal to the head of the house of the offender, or as the case may be, to a body of native arbitrators.[105] Final appeal lies to the spirit world. Here, justice is administered in the form of oath swearing before an oracle to establish the guilt or innocence of a suspect.[106]

3.1.3 North: The Hausas

In the Northern region of Nigeria, even though there are various tribes that make up this region, the majority are predominantly Muslim. A large proportion of the area consists of emirates, headed by kings who are referred to as emirs. Although, the emirs maintained a court, most cases are usually administered through Islamic judges. Islamic law being the personal law of the Muslim provides for arbitration in the resolution of disputes. In ***Maidara v Halilu***[107] , the court of Appeal held that Islamic personal law applies to all Muslims. However, for Islamic law of contract to apply, the Court stated that the parties though Muslims all have to consent to its application. Hence the basis of arbitration under the

[104] Okogeri, O. and Oaikhena, G.E. *A Legal Reappraisal of Customary Adjudicatory System in Nigeria.* Retrieved from http://www.nigerianlawguru.com/articles/customary. Accessed o 10 January,2011

[105] ibid

[106] Oluduro,O. op.cit. P.315

[107] (2000) 13 NWLR (Pt. 684) P.257

Shariah is submission and this must be mutual and emanate from the volition of all parties.[108] Some scholars have questioned the classification of Islamic Law as part of customary law and the basis of their query has been that the *Shariah* being a divine Law ought not to be classified with other customary laws which are man made.[109]

Also the Supreme Court of Nigeria in the case of ***Alkamawa v Bello***[110] held that Islamic law is not part of customary law as it does not belong to any particular tribe. It is a complete system of universal law, more certain and permanent and more universal than the English Common law.

Furthermore, it is worthy to note that the term *As-Sulhu* (settlement) is an Arabic word *which* literally means determining a dispute or settling a disagreement. It stands for all methods of reconciling disputing parties[111]. It has been in use among Muslim societies long before the inception of western practices. There are many Qur'anic verses as well as traditions of the Prophet Muhammad (peace be upon him) that encourage Muslims to effect *Sulh* among disputing parties. Allah (S.W.T) says: "And keep your duty to Allah and reconcile the disputing parties among you and obey Allah and his messenger, if at all you are believers."[112]

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[108] Oladapo, O.A. op. cit. P.118

[109] Oba, A.A. (2002). Islamic Law as Customary Law: The Changing Perspective in Nigeria, International and Comparative Law quarterly 817-825. Retrieved from http://www.eupublishing.com. Accessed on 15 February,2012 at 1:00pm

[110] (1998) 6 SCNJ 127

[111] Wali, A.B. (2010). The Viability of Sulh to Sharia based States in Nigeria. In: Aliyu I.A(Ed) *Alternative Dispute Resolution and some contemporary Issues, Legal Essays in honour of Hon. Justice Ibrahim Tanko Muhammad.* M.O Press & Publishing Ltd Kaduna, Nigeria, P. 121

[112] Qari, M. Holy Qur'an, Raj P. Nigeria Ltd, Qur'an 8:1

The general principle under Islamic law is that contracting parties, including parties to reconciliation are at liberty to stipulate their terms and conditions, provided such terms or conditions do not permit what the *Shariah* forbids or forbid what the *Shariah* permits.[113]

3.2 Customary Arbitration in Nigerian Jurisprudence

The Court of Appeal in ***Okpuruwu v Okpokam*** [114]held that Nigerian law does not recognise customary arbitration. One of the issues that came up for determination in this case was whether customary arbitration had ever been part of the Nigerian legal jurisprudence and whether it could therefore be said to have a place in the administration of justice in Nigerian courts. Uwaifo, JCA (as he then was) who read the lead judgment, held that:

> …to talk of customary arbitration having a binding force as judgment in this country is therefore somewhat a misnomer and certainly a misconception . . . 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…[115]

With due respect, the view expressed by the court is rather strange when it is considered that lots of cases on customary arbitration, including those that were decided by the courts established by colonial administrators[116] as well as by a line of cases decided by Nigerian courts after independence have recognised the practice of customary arbitration.

However, the Supreme Court proclaimed the constitutionality of customary arbitration in the case of ***Agu v Ikewibe.*** In this case, the appellant's counsel relied on the views of the majority in the ***Okpuruwu*** case to contend that the Nigerian legal system does not recognise the practice of customary arbitration. According to Karibi-Whyte, JSC in his lead judgment:

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[113] Akanbi, M.M. op. cit. P.128

[114] (1988) 4 NWLR (pt 90) P.554

[115] Okpuruwu v Okpokam (1988) 4 NWLR (pt90) P.554

[116] Inyang v Essien (1957) 2 FSC 39, Assampong vs Amuaku (1932) 1 WACA 192

> …there seems to be some misconception about some of the provisions of the Constitution of 1979, and the freedom between disputing parties to settle their differences in the manner acceptable to them. It is clearly unarguable that the judicial power of the Constitution in section 6(1) is by section 6(5) vested in the courts named in that section, not so a customary arbitration . . . It is well accepted that one of the 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 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. This is a common method of settling disputes in all indigenous Nigerian societies.[117]

It is important to note that customary law is by virtue of section 315(3) and (4)(b) of the Constitution of the Federal Republic of Nigeria 1999 an existing law being a body of rules and customs in force immediately before the coming into force of the 1999 Constitution. Customary law, which includes customary arbitration, is saved by section 315(3) and (4)(b) of the 1999 Constitution which are *ipsissima verba* with section 274(3) and (4)(b) of the 1979 Constitution.[118]

It is clear from these cases that arbitrators are not a court and are not clothed by the Constitution with any judicial authority as same is conferred on the courts by virtue of section 6 of the 1999 Constitution. This position was also confirmed in ***Awosile v Sotunbo***[119] where the court held that: Under section 6 of the Constitution of the Federal Republic of Nigeria 1979 (as well as of 1999), it is to courts and not to non judicial bodies that judicial powers of the Federal Republic of Nigeria are vested. So the courts take the view that it is open to the parties to choose whether to follow the normal channel for determination of controversy

[117] Agu v Ikewibe (supra) P. 407

[118] Edu K.L. (2004). *The Effect of Customary Arbitral Awards on Substantive Litigation: Setting Matters Straight*. The Journal of Private Property Law, P. 46

[119] (1992) 5 NWLR (part 243) P.514

through the machinery of the courts or to submit the matter voluntarily to the non-judicial body for a decision.

3.3 Essential Ingredients of Customary Arbitration

Judicial pronouncements of the appellate courts in a number of cases have tended to lay down some essential ingredients or requirements of a valid customary arbitration. In the case of ***Agu v Ikewibe*** the respondent as plaintiff instituted an action in the Umuahia High court against the appellant, claiming a declaration of title to a piece of land called "Okroto Aguzie" and fifty pounds damages for trespass. The respondent based his claim on traditional history, acts of possession and ownership. The respondent also relied upon the issue of arbitration in accordance with customary law carried out sometimes in 1970. The respondent averred in his statement of claim that when the defendant trespassed into the land in dispute, he was summoned before the chiefs and elders of the town who gave judgment in favour of the plaintiff and warned the defendant not to trespass again into the land. The defendant denied the plaintiff's contention. At the end of the hearing, the trial judge rejected all the grounds relied upon by the respondents and dismissed all his claims. The respondent appealed to the Court of Appeal where it was held that there was an arbitration and that the result was binding on the parties and consequently, the appellant was estopped from denying the respondent's title. The Court of Appeal therefore set aside the judgment of the trial judge. The appellant then appealed to the Supreme Court and the appeal was dismissed.

On whether the respondent properly raised a plea of binding arbitration against the appellant, the Court identified the following as the essential ingredients of a valid customary arbitration:

1. That there had been voluntary submission of the matter in dispute to an arbitration of one or more persons.
2. That it was agreed by the parties either expressly or by implication that the decision of the arbitrators would be accepted as final and binding.

3. That the said arbitration was in accordance with the custom of the parties or of their trade or business.

4. That the arbitrators reached a decision and published their award.

The above stated ingredients were reiterated by the Supreme Court in the case of ***Ohiaeri v Akabeze***[120]. In that case, another ingredient was added to those listed above. That is: That the decision was accepted by the parties at the time of the award.

It is however submitted with respect that the addition of this fifth ingredient will cause some confusion. The Supreme Court failed to realise that even in arbitral award, the losing party is likely to reject an unfavourable award.

A decision of a customary arbitration is binding on the parties to it, so long as the ingredients constituting precondition for its bindingness are complied with.

It should be noted that unless the above mentioned conditions are fulfilled, an arbitration award would be unenforceable. In ***Eke v Okwarainya***[121], the appeal was from the judgment of the Court of Appeal, Port Harcourt Division. The case originated from the High Court of Imo State. It was in respect of land dispute between two families; namely, Umuokwaraku family as plaintiffs and Umuduruohome family as defendants. The plaintiffs sought for a declaration that they are entitled to rights of occupancy to the disputed land. They contended that the land devolved through inheritance from older generation of their family. They gave three instances in which they permitted members of the defendant's family to build on the land in dispute. The defendant's on the other hand claimed that the land was founded by their ancestors and devolved by inheritance. The defendants also pleaded and gave evidence that there was arbitration in respect of the land which was in their favour. One of the issues for determination was whether there was a binding customary arbitration which the Court of

[120] (1992) 2 NWLR (Pt. 221) at P. 24

[121] (2001) 4 SC (Pt. 11) P.71

Appeal ought to up hold. The Supreme Court held that for there to be a valid customary arbitration, the five ingredients must be pleaded and proved.

Thus the Supreme Court, per UWAIFO JSC stated as follows: "Anything short of these conditions will make any customary arbitration award risky to enforce. In fact it is better to say that unless the conditions are fulfilled, the arbitration award is unenforceable".[122]

The court further held that in this case, both the pleadings and evidence on the alleged arbitration are completely defective. He therefore answered the issue for determination in the negative.

Also in ***Ohiaeri v Akabeze*** the respondents as plaintiffs in the High Court, representing the Otogbolu family sued the appellants as defendants for declaration of title to a piece of land , damages for trespass and injunction. The appellants were sued in representative capacity, as representing the Ohiaeri family. The cases for the parties were based on evidence of traditional history and acts of ownership and both sides founded their title to the land on being descendants of the first settlers on the land both relying on different ancestors. An important issue which arose at the trial was in relation to customary arbitration. The appellants claimed that the matter had been previously adjudicated upon by the Oluoha and his cabinet and that the decision was in their favour. At the conclusion of the trial, and after evaluating the evidence adduced, the trial judge was satisfied that the plaintiffs had not established their claim to the land in dispute. The learned trial judge also believed that the arbitrators that earlier looked into the dispute between the parties adjudged the defendants owners of the land. He accordingly dismissed the plaintiff's claim. The plaintiffs, being dissatisfied with the trial court's decision appealed to the Court of Appeal. The Court of appeal unanimously allowed the appeal, where upon the appellants appealed to the Supreme

[122] Eke v Okwarainya (2001) 4 SC (pt11) P.71

Court. The appeal was unanimously dismissed. In the lead judgment, Akpata Jsc stressed the need to be circumspect about customary arbitration, when he said that it is essential before applying the decision of customary arbitration as an estoppel for the court to ensure that parties had voluntarily submitted to the arbitration, consciously indicated their willingness to be bound by the decision and had immediately after the pronouncement of the decision unequivocally accepted the award.

It is pertinent to state as a general principle that the onus is on the party who alleges that the transaction leading to a dispute is a case of customary arbitration and must prove all the ingredients of customary arbitration. Therefore the aphorism, "he who asserts must prove" is readily applicable.

The crucial issue now is, whether the ingredients of customary arbitration must not only be proved by the party relying on it but also pleaded.

In the case of ***Eke v Okwaranyia***, the Supreme Court held, per Uwaifo JSC, that the ingredients for a valid customary arbitration "must be pleaded and proved."

The same Supreme Court had earlier held in ***Ohiaeri v Akabeze*** that:

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

It is observed that the Supreme Court in ***Eke v Okwaranyia*** cited and relied on its decision in ***Agu v Ikewibe*** to arrive at its conclusion that for there to be a valid customary arbitration, the five ingredients must be pleaded and proved. However, it is submitted that the decision relied upon in ***Agu v Ikewibe*** is a dissenting judgment delivered by Nnaemeka Agu JSC, where the learned justice held that before a party in a case in the High Court can defeat the right of his

adversary to have his case adjudged upon by the courts on the ground that there has been a previous binding arbitration which raised an estoppel between them, the ingredients of a binding customary arbitration must be pleaded and established. The majority opinion as expressed in the lead judgment delivered by Karibi Whyte JSC that prevailed was not that the ingredients must be pleaded but that such ingredients should be established by evidence. It was the view expressed in the majority judgment in ***Agu v Ikewibe*** that was expressly put by Akpata JSC in ***Ohiaeri v Akabeze***.

Recently, the same Supreme Court reviewed the cases of ***Agu v Ikewibe*** and ***Ohiaeri v Akabeze*** in the case of ***Egesimba v Onuzirike***[123] and it tilts in favour of the position that the ingredients of customary arbitration need not be pleaded but that such ingredients should be established by evidence.

In that case, the appellant sued the respondent in the High Court of Imo State, claiming a declaration of title to a piece of land. The appellant's case was that the land in dispute was owned and farmed by his ancestor, one Obom, from whom it descended on him by inheritance. He relied on several acts of ownership and possession such as farming and building on the land. The respondent's case on the other hand was that the land in dispute was his, also by inheritance from his father.

The respondent relied on a previous arbitral settlement of the dispute between the parties over the land which went in his favour and he pleaded that the appellant was estopped from relitigating the same question which had been resolved in his favour by arbitration. The trial court ruled in favour of the appellant on the several issues that arose in the case, holding that there was no credible evidence adduced by the respondent to support the arbitration he alleged. The respondent then appealed and the Court of Appeal disagreed with the view of the

[123] (2002)15 NWLR (Pt. 791) 446

trial court and came to the conclusion that the respondent had called credible evidence to establish the fact that the elders mediated over the dispute and found in his favour. The appellant was in turn dissatisfied with the decision of the Court of Appeal and he appealed to the Supreme Court. The Supreme Court held that where it is clearly averred by a party that there was a previous customary arbitration which was in his favour and that he will rely on it, it will not be necessary for him to plead the ingredients establishing the estoppel. The party will have to adduce credible evidence of the relevant ingredients to sustain the material plea of estoppel by customary arbitration.

Thus, the law is not that the party relying on customary arbitration as estoppel must plead the ingredients thereof, but that such ingredients should be established by evidence.

At this juncture, the research proceeds with an examination of each of the five ingredients of customary arbitration.

3.3.1 Voluntary Submission to Arbitration

The submission of the parties to arbitration must be voluntary. The issue of voluntariness is very important not only in customary arbitration but also in other types of arbitration. Parties should not be induced, coerced, intimidated or unduly influenced in submitting to customary arbitration. In ***Aguocha v Ubiji***[124], the court relied on native law and custom in the case of three arbitrations between the parties and the only condition impliedly required by the court was the fact that the parties voluntarily submitted to the arbitrations. In confirming the decision of the arbitrations, it was held that it was commonly accepted by the plaintiff and the defendant in evidence that where a party had agreed to swear a juju oath produced by his opponent, and he later on its production refused to swear to the oath upon the terms

[124] (1975)5 SESCR 221

prescribed and agreed, he would *ipso facto* under native law and custom lose the *Reslitigosa* to his opponent.[125]

In the case of ***Yaw v Amobie***[126], The plaintiff and the first defendant were owners of adjoining lands. A dispute arose between them as to the boundary. The defendants reported the matter to one Kwame Adade and his elders sitting as arbitrators and the parties stated their cases. They then agreed that the arbitrators should go with them to the land and demarcate the boundary between them and each of them paid a sum of 25s to the arbitrators to indicate their consent. The arbitrators there upon went with the parties to the land and after seeing what each of them pointed out, the arbitrators decided upon what the boundary was. They had it demarcated and fixed poles on the boundary line. When the matter came before the court, it was argued that the defendant had not voluntarily submitted to customary arbitration. Rejecting the argument, Olienu JCA held that the fact that the defendant attended the arbitration, gave evidence before it, agreed that the boundary which would be decided be demarcated on the land and also paid fees of 25s to indicate that agreement proved voluntary submission to customary arbitration. It was further 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, then the party to whom the complaint is made arbitrates upon the dispute.[127]

From the foregoing, it can be inferred that if the party sent for, agrees to answer the call, it may be taken that he has agreed that there should be arbitration. However, it was held that

[125] Aguocha v Ubiji (Supra)

[126] (1958) 3 WALR 406 @408

[127] Yaw v Amobie(1958) 3 WALR P.406 @ 408

there must be evidence that the full implication of the purpose of the meeting was explained to him as well as to the complainant and that they both agreed that the persons before whom they appear should give a decision thereon. It was held[128] that the mere presence of a party to a dispute at a meeting which purports to arbitrate between a party and another person is not a conclusive evidence or proof of submission to arbitration. For one thing, the party summoned may have attended the proposed arbitration call only out of respect for their dignified social position and with the limited intention to merely explain himself or of giving his own version of the dispute. Or on the other hand, he may attend with the intention of submitting to the proposed arbitration, being aware of the meeting and the implications. It all depends on the circumstances and evidence adduced.[129] The arbitrators could be village head or traditional ruler, council of chiefs or some elders in the community.[130]

What is important or material in all circumstances is that parties must voluntarily submit to customary arbitration.[131]

3.3.2 **Agreement by the Parties that decision of the Arbitrators would be accepted as Final and Binding**.

It is immaterial whether the parties expressly agreed that the decision of the arbitrators would be binding or not. The agreement could be by conduct of the parties. It could be that particular transactions such as land matters are usually referred to customary arbitration by the parties. It would therefore not be a defence for any party to contend that there was no agreement that the decision of the arbitrators would be final and binding on them, merely because the agreement was not express, whether orally or in writing.

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[128] Nyaasemhuwe v Afibiyesan(1977) 1GLR 27

[129] ibid

[130] Ohiari v Akabeze (Supra)

[131] Onyege v Samuel(2005)7 NWLR (Pt. 924) 365

In ***Onyege v Ebere***[132], the parties agreed to customary arbitration of oath taking and it was even the Defendant/Applicant that were instrumental to the exercise of oath taking and they were trying to resile from it despite their willingness and intention that the decision of the customary arbitration would be final and binding on them. In that case, Niki Tobi JSC, delivering the lead judgment held as follows: "one fairly curious aspect in this case is that the appellants who were instrumental to the exercise of oath taking are trying to resile from it. I do not think that such position is available to them in law".

Similarly, the Supreme Court in ***Oparaji v Ohanu*** [133] per Iguh, JSC held thus:

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

3.3.3 Arbitration was in accordance with the custom of the parties or their trade/business

Custom differs from place to place and from community to community. What is culture today may be outdated in the nearest future. Hence, the custom of the parties must be considered and proved to the satisfaction of the court.

Customary law must either be proven or taken judicial notice of. Thus in the case of ***Okpowagha v Ewhedoma***[134], the Supreme Court held that custom or customary law is a question of fact to be established by evidence.

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[132] (2004) 6 SC 52

[133] (1999)NWLR (Pt. 618) P.290

[134] (1990) ANLR 208 at 213

Section 18 of the Evidence Act[135] provides: "a custom may be adopted as part of the law governing a particular set of circumstances if it can be noticed judicially or can be proved to exist by evidence. The burden of proving a custom shall lie on the person alleging its existence."

A custom which is being relied upon by a party must pass the validity tests of customary law, that is that the customary law is not repugnant to natural justice, equity and good conscience, incompatible either directly or by implication with any law and that it is not contrary to public policy.[136]

Therefore in every case where customary arbitration is intended to be relied upon, the tests of validity and proof must follow. And it is the customary law that will determine whether or not the body of elders, chiefs or priests constituting customary arbitration is recognised.

3.3.4 The Arbitrators reached a decision and published their award

A party asserting the existence of a customary arbitration must establish that a decision was reached and that an award from such decision was published. The question that arises is what is a decision?

Section 318 of the 1999 Constitution of the Federal Republic of Nigeria defines decision in relation to a court as any determination of that court and includes judgment, decree, order, conviction, sentence or recommendation.

On the other hand, a decision of the arbitrators in customary arbitration may be defined as any determination of the arbitration in relation to the matter referred to it. An important issue here is, in a situation where there are more than one arbitrator and they are not unanimous in their decision, whether unanimity can be used in determining the bindingness or otherwise of the decision of the arbitrators.

[135] Evidence Act, Cap E14, LFN 2011

[136] Section 18(3) Evidence Act

In ***Nwosu v Nwosu***[137], the trial court referred a matter before him to a group of arbitrators who arrived at a majority and minority decisions. The Court of Appeal held that the learned trial judge was wrong in accepting the majority decision and that the arbitration was not acceptable because the arbitrators were not unanimous.

The question that arises is whether the relevant native law and custom requires unanimity in the arbitral decisions. It is humbly submitted that the duty of the court in such circumstances would be to refer to the relevant native law and custom to find out whether unanimity is the hallmark of arbitral decisions in the community in question.

On the issue of publication of an award, one may conclude that publishing arbitral award in customary arbitration presupposes that the award will be documented and made known to the public. But having regards to the fact that customary arbitration is usually inseparable from customary law, the requirement for publication of award could be said to be alien to customary law. This is because the use of a document or even writing of decision or publishing same is uncommon to customary law. Therefore, once the arbitration is customary, the need for publication of arbitral award should not ordinarily be a condition precedent to the validity of customary arbitration.

In ***Gaji v Paye***[138], the Supreme Court held that section 4 of the English Statute of Fraud 1677 which requires writing as a pre-requisite for a valid disposition of land is inapplicable to a transaction made under customary law. It suffices to say that once there are witnesses to the customary arbitration proceedings who can testify to the existence of the award of the decision of the arbitration, the requirement of publication of the award becomes unnecessary.

[137] (1996) 2 NWLR (Pt. 64)

[138] (2003) 5 SC pt53@46

3.3.5 That Decision was accepted by the Parties at the time of the award

A party asserting the existence of a customary arbitration must establish that the decision was accepted by all parties at the time the award was made.

In ***Okereke v Nwankwo***[139]**,** the parties stated that their differences over the parcel of land was referred to elders known as Umunna okolobi-imoko, who arbitrated and later gave their decision in favour of the appellant, which award was reduced into writing and tendered in court as exhibit 'B'. The respondent, who was not favoured by the decision, rejected it and later commenced action in the court. The Supreme Court rejected the appellant's claim to *estoppel* on the basis of the customary law arbitration, holding that there was no valid customary law arbitration as the decision of the elders who arbitrated was rejected by the respondent immediately it was made.

The implication of the above decision is that a party can resile from an arbitral process which he voluntarily and jointly constituted with the other party at any time before the conclusion of the arbitral proceedings, thereby rendering null and void the entire process.

This right of a party to withdraw from the arbitral proceedings midstream and to freely reject the award when it is made has been criticised by various scholars on the subject. As stated by Ezejiofor,[140] it is clearly devastating, contradictory and retrogressive for the Supreme Court to say in one and the same breath that a valid customary arbitration takes place when the parties agree beforehand to be bound by the resultant award and at the same time that the same parties are free to reject the award when it is made. This writer agrees with Ezejiofor on this point.

Like any other type of arbitration, once all the conditions precedent to be fulfilled for the validity of customary arbitration are met, the parties to it are bound by the decision of the

[139] (2003) 9 NWLR (Pt. 228)

[140] Ezejiofor, G. op. cit., P. 24

arbitration and they cannot resile from it. In the case of ***Agudoro Ekpe v Ben Oke***,[141] the plaintiffs contended that the land in dispute was submitted to customary arbitration by both parties and that the arbitrators reached a decision and awarded the land to them (i.e. the plaintiffs). The defendants however denied the fact that they had submitted to customary arbitration. But the record of proceedings which showed that the defendants submitted to arbitration and participated in the proceedings was tendered in evidence through the plaintiff's witness. The court noted that both parties submitted to arbitration, made statements and called witnesses. The Supreme Court agreed with the position of the trial court and the Court of Appeal that the arbitral proceedings were without bias and malice. The Supreme Court per Kutigi JSC held as follows:

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

Having analysed all the essential ingredients of a valid customary arbitration as laid down by the Superior courts in all the cases discussed above, this writer finds it difficult to agree with the courts. It appears the courts have introduced new elements to the whole idea of customary arbitration. It would have been sufficient to have restricted the essential ingredients of customary arbitration to the rules of natural justice.

[141] (2001)5 SC (Pt. 1) p 180

3.4 Advantages of Customary Arbitration

It has being observed and established by writers[142] of repute that courts litigation system in resolution of disputes has the disadvantages of being time consuming, expensive, less friendly to mention but few. These accounted for the global acceptance of the option of arbitration mechanism as an alternative dispute resolution of disputes. In the realm of customary arbitration for instance, because it is part of the community and being the customary method of administration of justice, customary arbitration has the advantages of being quicker and not too technical. All the cumbersome procedures in litigation system are not usually applicable to customary arbitration, the disputing parties have the choice of selecting their arbiter, the venue of arbitration and determining the procedure to be followed, it is friendlier in nature and preserve personal relationship in community and less expensive. Also there is no requirement to hire a legal practitioner to stand for parties. Additionally, customary arbitration is more susceptible to be respected and submitted to than modern arbitration because of the tendency or an obligation to respect customs and traditions and fear of sanction and or as in Islamic law respect and acceptance of arbitration is considered as religious obligations and or fear of sanction like banishment.[143]

It is equally submitted that dispute resolution under the customary arbitration brings about an amicable settlement of dispute without creating further acrimonies between the disputing parties.

[142] Gadzama, J.K. (2004) *Inception of ADR and Arbitration in Nigeria*. Paper presented at NBA Conference Abuja; Peters, D. op.cit.

[143] Emiola, A. op. cit. p. 36

3.5 Disadvantages of Customary Arbitration

It is important to observe that despite the above mentioned advantages of customary arbitration, it has some shortcomings. These include the fact that, the inherited English legal system in Nigeria has affected its applications in dispute settlement. It is now the slogan of any citizen whose right has been, is being or likely to be infringed to say that he is going to court. Customary arbitration like all customary law is not codified except Islamic arbitration which has its laws contained in the Holy Quran, the traditions of the Holy Prophet Mohammed (PBUH) and other subsidiary Islamic legislations. Lack of codification of customary law is of course disadvantageous to its application in Nigeria.

Most people handling customary arbitration are not trained arbitrators; consequently therefore, the procedure and the award may be faulted if appealed against in court. Similarly a customary arbitration award cannot be enforced except upon the application of a party to court for it; this negates the advantage of customary arbitration as being quicker and less expensive.

It is instructive to note that one of the striking shortcomings of the binding effect of customary arbitration is the freedom that parties enjoy not to accept the decision or the award at the time it was made. Any of the parties who is dissatisfied with the decision of the arbitrators has the freedom to abandon it. In ***Awosibe v Sotunbo*** [144] where the Supreme Court per Nnaemeka Agu JCA (as he then was) observed as follows: ‘’…his (dissatisfied party) filling of a writ of summons was a positive demonstration that he never believed there was a binding arbitration and his abandonment of the gentlemen’s agreement reached between them.’’

[144] Supra

This position of the Supreme Court on customary arbitration is a sharp contrast to modern arbitration regulated by the Act[145] or contained in an agreement especially commercial agreement wherein once an award is made it is final and binding and parties have no right to rescind the gentle man agreement having subscribed to it, as rightly posited by the Supreme Court in the case of ***Ras Pal Gas Ltd v FCDA***[146] per Katsina Alu JSC, that:

> A valid award on a voluntary reference no doubt operates between the parties as a final and conclusive judgment upon all matters referred. It should be remembered that when parties decided to take their matter to arbitration, they are simply opting for an alternative mode of dispute resolution. It must be emphasized that the parties have a choice to either go to court or refer the matter in dispute to an arbitrator for resolution.

The voluntary nature of the arbitration agreement which is validly conducted limits the jurisdiction of the court to either setting aside of an arbitral award or remitting same to arbitration for reconsideration[147]as opposed to the court attitude to customary arbitration where a party to a customary arbitration may abandon the arbitral decision.

[145] Arbitration and Conciliation Act. op. cit.

[146] (2001) 6 NSCQR (pt1) 560 at 573

[147] Sovias v Sonubi (2003) 3 NSCQR P.381 at 389

CHAPTER FOUR

COMPARATIVE ANALYSIS OF CUSTOMARY AND MODERN ARBITRATION

4.1 Introduction

Modern and customary arbitration have been discussed extensively in the previous chapters. Therefore, this chapter focuses on the similarities and differences between modern and customary arbitration. This is with the aim of realizing which option is more practicable in terms amicable resolution of disputes. This chapter will therefore bring out the areas of resemblance and conflicts so as to discern which option will work better in Nigeria.

4.2 Similarities

The similarities of modern arbitration to customary arbitration are highlighted and discussed below.

4.2.1 Reason for Arbitration

Modern and customary arbitration arise as a result of disputes between persons. That is, there must be formulated dispute between the parties when the arbitrator is appointed.[148] Therefore, if a dispute or disagreement does not arise, there will be nothing to arbitrate upon.

4.2.2 Aim of Arbitration

Modern and customary arbitration are aimed at amicable resolution of disputes between feuding parties. [149]

It is submitted that in both systems, arbitration transcends the mere resolution of disputes or conflicts. It has a wider scope which is the maintenance of the equilibrium of the society as a whole. Furthermore, in African conception of law, emphasis is laid on the promotion of reconciliation and re-adjustment of the disturbed social relationships.

4.2.3 Parties to Arbitration

[148] Collins v Collins (Supra); Kano State Urban Development Board v Fanz (Supra)

[149] Agu v Ikewibe (Supra)

There must be parties to the process. The presence of parties is essential to arbitration. Those who are parties to the arbitral process are those whose rights and obligations are in issue and are bound by the decision.[150]

4.2.4 Impartiality of Tribunal

An arbitration proceeding is a judicial proceeding. Thus, a cardinal principle in the proceedings is that it must be fair. The rules of natural justice must be observed and parties must be given fair hearing. Each party must be given an opportunity to present his case.[151] The arbitral body is expected to act fairly towards parties. In modern arbitration, the parties refer their dispute to an impartial third person selected by them for a decision based on the arguments to be presented before the arbitration tribunal. Similarly, under customary arbitration, the matter is usually taken before family heads, chiefs or village heads as the case may be. The arbitrators are usually uninterested in the subject matter of arbitration and must not be bias towards any of the parties For example, among the Yoruba, the *Oba* hears disputes in his palace by way of review usually at the request of a party who alleges bias on the part of the arbitrators.[152]

4.2.5 Binding Nature of Arbitration

Decisions are intended to be binding. The essence of submission is that the parties will honour the decision of the arbitrators. In ***Agu v Ikewibe,*** On whether the respondent properly raised a plea of binding arbitration against the appellant, the court held that one of the essential ingredients of a valid customary arbitration is that it was agreed by the parties either expressly or by implication that the decision of the arbitrators would be accepted as final and binding.

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[150] Collins v Collins (supra)

[151] Section 15 Arbitration and conciliation Act op.cit.

[152] Abdul, O.Y. op. cit. P.5

The law stipulates that arbitral awards shall be binding on the parties thereto.[153] The award is the final decision arrived at by the arbitrators with regard to the dispute brought before them. Furthermore, in addition to making a final award, the modern arbitral tribunal is entitled to make interim, interlocutory or partial awards all of which are binding on the parties.[154]

4.2.6 Submission

Submission is a central feature of arbitration. Modern arbitration arises out of agreement to submit present or future differences to arbitration. Also, submission has been part of customary arbitration from antiquity. The Supreme Court stated that, "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.''[155] Thus the requirement of submission is common to both modern and customary arbitration.

The items discussed above are the meeting points of modern and customary arbitration.

4.3 Differences

Regardless of the noticeable similarities of modern arbitration to customary arbitration, there are fundamental differences with respect to the role of parties, the right to resile, voluntariness of submission, oath taking and legal effect of award. Some of the differences between the two are:

4.3.1 Submission under Customary Arbitration Vis-a-Vis Modern Arbitration

Submission is the underlying basis of modern arbitration. Article 28.6 of the International Chamber of Commerce (I.C.C.) Rules provides thus:

[153] Article 32 1st Schedule Arbitration and Conciliation Act. Op.cit

[154] ibid

[155] Agu v Ikewibe(supra)

> Every award shall be binding on the parties. By submitting the dispute to arbitration under these rules, the parties undertake to carry out the award without delay and shall be deemed to have waived their right to any form of recourse in so far as such waiver can validly be made.

Consensual arbitration is based on an agreement between parties. The agreement under English law could be an independent agreement on its own or a clause in (business) agreement between the parties. United Nations Commission on International Trade Law (UNCITRAL) model law defines such agreement as "one between the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship whether contractual or not".[156]

Normally, under common law, an agreement to refer future disputes to arbitration is referred to as arbitration agreement, while an agreement to arbitrate dispute which has already arisen is called submission.[157]

Nigerian courts have mixed the issue of submission as relates to customary arbitration with that of modern arbitration. The principle of prior agreement to arbitrate, which is the basis of modern arbitration, is not in all cases essential to customary arbitral proceedings. Akanbi posits that:

> The inference by the courts that voluntary submission of both parties of the dispute between them to arbitration is a basis to a binding arbitration conducted under customary law has impacted negatively on the nature of customary arbitration and

[156] Article 8 UNCITRAL Rules; Section 4 Arbitration and Conciliation Act op.cit.

[157] Andrew, K. (2009). *Conducting Arbitral Proceedings in Nigeria*. Paper presented at NBA Ilorin Continuous Education Programme. P.8

> the effect of which is the uncertainty pervading the judgement of the courts.[158]

Akanbi went further to cite the example of typical arbitral process in Yoruba land of western Nigeria, in which the aggrieved party takes the initiative of reporting to the head of the compound or a body of arbitrators depending on the nature of the dispute. The other party is thereafter summoned or invited by the tribunal to state his own side of the case.[159] In this type of situation, It is difficult to draw the line on the one hand, between the attendance of a party whose intention was merely to explain himself or give his version of the dispute or on the other hand whose intention was to submit himself to the investigation and decision of a chief, elder or other persons.

Unfortunately, in ***Agu v Ikewibe***, the court insisted on voluntary submission, stating that it has been part of customary arbitration from the beginning. It is however submitted with respect that the court provided no proof in support of this statement.

It is submitted that the theory of social contract which permeates the communal society of traditional Africa seems to reflect in a special way in arbitration in that parties are taken to have submitted to the communal spirit in a general way. The presence of an invited party before an arbitral tribunal is a kind of submission, but it may not be voluntary submission, yet without which customary arbitration would still be valid. In ***Mbagu v Ajochukwu***[160], the plaintiff and defendant provided the food and drink to the arbitrators, this was held to be a kind of submission.

Subjecting 'submission' under customary law to the criteria of party autonomy is to treat customary law as a contract between parties and that is inconsistent with the purpose of

[158] Akanbi, M.M, op.cit. P.124

[159] Ibid

[160] (1973)3 ECLR

customary arbitration. Custom demands that parties submit to the jurisdiction of customary arbitration in order to ensure harmony and stability in the society. Therefore while submission under modern arbitration is based strictly on party autonomy with minimal state intervention, in customary arbitration, the influence of the society is dominant.

It is submitted that submission under customary arbitration is quite different from what it is under modern arbitration.

4.3.2 Right to Resile

The rule on the right of parties to resile from arbitral awards under modern arbitration is predicated on the principle of *rei public utsit litium*. This means that a party who has submitted to arbitration cannot later resile. This was stated in the case of ***Fusler v Fenwick***.[161]

In the case of customary arbitration, probably no issue has generated as much controversy as the issue of right to resile, not only among academics but also in decided cases. In the ***Eke v Okwaranya***, it was held that one of the ingredients of a valid customary arbitration is that the decision was accepted by the parties at the time it was made. This means none of the parties resiled from arbitration midstream. The effect of this is that a party who together with another voluntarily constituted an arbitral panel can work out on arbitral panel for any reason or none at all, thus rendering the arbitral exercise, prostrate. This certainly is contrary to customary honour and respect accorded to agreements and institution and cannot stand the test of justice. This may create a loop hole for any party who in the course of arbitration perceives that his case lacks merit to abdicate to the chagrin of both the other party and the neutral arbitral body. To truncate an arbitral panel in this manner is unjustifiable. Is it being suggested that

[161] (1846) 3 CCLR 900

customary law admits of such callousness? However, it must be observed that Nnaemeka Agu JSC dissented in his own judgement in that case and this researcher agrees with him.

It is respectfully submitted that it is inappropriate that parties who beforehand agreed expressly or by communal implication to be bound by an award would be allowed to resile.

4.3.3 Role of the Parties

Modern arbitration is a party based arbitration system. It is based on party autonomy in which parties have considerable freedom to decide a lot of things before, during and after arbitration.

As Andrew puts it, that part of the preliminary matters in modern arbitration is the freedom of the parties to agree to arbitration.[162]

Also, parties have a great role to play in the appointment of arbitrators.[163]

Appointment of arbitrators under modern system is largely a matter between parties to the arbitration agreement as stated in the case of ***Kupolati v New Central Law Publishers Ltd***[164] and a third party could not be allowed ordinarily to come in between, as it is a contractual relationship involving those who are privy to it. The implication of this is that only a party to an arbitration agreement can enforce rights under it. A non-party, no matter his status in the society cannot initiate arbitration.

In the case of ***Niger Progress Ltd v North East Line***[165], the Supreme Court held that: The party who makes demand for arbitration must show that he is a party to the agreement containing the arbitration clause which confers the right to make demand on him.

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[162] Andrew K. op. cit. P.12

[163] Section 7(2) Arbitration and Conciliation Act op.cit.

[164] (2007) FWLR (pt. 278) 1811

[165] (1989) 4 SCNJ 232

Under the customary system on the other hand, arbitration can be initiated at the instance of the parties, relatives, clan-heads or chiefs. It is a practice derived that the stability of the group is more important than the right of individuals. The individual identity is derived from group identity. Therefore the roles of the parties in the two variants of arbitration stand different.

4.3.4 Oath Taking

Oath-taking is a common feature of detecting crime and resolving disputes in Africa. It is undertaken in respect of very serious crimes.[166] It is often resorted to when a crime is committed and no one is willing to confess to it. When this happens, the suspects are assembled together before the medicine man who then administers a portion of the *concoction* to them to drink. Among the Yorubas, it is believed that whoever succumbs to the influence of the *Juju* is the culprit. Refusal by a party to take the oath is often taken as an admission of guilt, while is participation in the oath-taking is seen as proof of innocence.[167]

However, in ***Nwoke v Okere***,[168] the Supreme Court, per Kutigi, JSC rejected the *Juju* African form of alternative dispute resolution, on the ground, *inter alia*,

> 'that the 'juju' method as cheap and quick as it might appear to have been had its own disadvantages .For example, you cannot put juju in the witness box for any purpose. Its activities, methods and procedure would appear to belong to the realm of the unknown even though the effects may be real in the end. The worst of it all is that 'Juju' decision or judgment is not subject to an appeal like the one we are witnessing now in the suit. So that unless and until the juju descends to the level which we can all understand its workings, it would be difficult to enforce its decision in a law court. We have come a long way from the oracle'[169]

[166] Emiola, A. op.cit. P.35

[167] Quashigah, op.cit. at P.8

[168] (1992) 2 NWLR (part 249) P. 561

[169] ibid

Without making a case for *Juju* trials, Yagba[170] asserted that:

> our system of justice must accommodate customary procedures that are simple, cheap, speedy, fair and relevant to the needs of the individual case. In all cases, the adversarial element should be reduced. Adjudicators should play a more interventionist role, especially in smaller claims. The need for lawyers could be much reduced. The concept of conducting battle to precipitate the truth is the antithesis of what African Justice and even private, commercial arbitration is all about.

It is wrong to condemn the practice of swearing upon a *Juju* as being uncivilised, barbaric and an affront to any other religious belief. Customary arbitration is valid when both parties willingly partake in swearing to an oath where the arbitration process so demands in order to confirm the genuineness of the parties' claims. The Constitution of the Federal Republic of Nigeria recognises freedom of religion, that is, the right of individuals to worship and profess their faith. However, oath-taking has been recognised by the Nigerian courts. In ***Ofomata & Ors v Anoka & Ors***,[171] Agbakoba, J. held that:

> oath-taking is, however a recognised and accepted form of proof existing in certain customary judicature. Oath may be sworn extra judicially, but as a mode of judicial proof. Its esoteric and reverential features, the solemnity of the choice of an oath by the disputants and imminent evil visitation to the breaker if he swore falsely, are the deterrent sanctions of the form of customary judicial process which commends it alike to the rural and urban indigenous courts. It is therefore my view that the decision to swear an oath is not illegal...

In ***Onyenge v Ebere***, the Supreme Court again maintained a similar position that oath-taking is a recognised part of customary law arbitration. Tobi, JSC held that:

> Where parties decide to be bound by traditional arbitration resulting in oath-taking, common law principles in respect of proof of title to land no longer apply. In such a situation, the proof of ownership or title to land will be based on the rules set out by the traditional arbitration resulting in oath-taking . . . I

[170] Yagba, T.A. op.cit. P.266

[171] (1974) 4 E.C.S.L.R 254

> think it is good law that in arbitration under customary law, the applicable law is customary law and not common law principles with their characteristics, certainty and ossification.

It is submitted that the declaration of the Supreme Court per Nikki Tobi JSC on oath-taking represents the proper position, more so when the parties are not under compulsion to swear to an oath. The parties are at liberty to opt for it under native law and custom.

Conversely, it is the writer's opinion that the concept of oath-taking is unknown to modern arbitration.

4.3.5 WRITING

One important feature of customary arbitration is that the agreement to conduct it is essentially oral, and the arbitral proceedings and decisions are usually not in writing, and therefore do not come within the provisions of the Arbitration and Conciliation Act. Section 1 of the Act expressly provides that every arbitration agreement must be in writing.[172]

4.3.6 Effects of Customary and Modern Arbitration

A decision or an award of a customary arbitration, though binding on the parties and their privies, is not a judgment of a court of law, and therefore, its decisions cannot be equated with those of courts of law capable of creating judicial precedent. In ***Ufomba v Ahuchaogu***,[173] Tobi, JSC noted that:

> a customary arbitration does not qualify as a court of law within the Constitution. It is not even an inferior court outside the Constitution, as for example, the Magistrate Court. Apart from the fact that the members of the body are not learned in the law, it is a notorious fact that the procedure adopted in adjudication is simple, and clearly outside the technical procedure of courts of law. This apart, the decisions they give do not qualify as judgments in the real technical sense of the expression in our jurisprudence and, therefore, cannot pass the test of judicial precedent. Decisions of Magistrate Courts in Nigeria do not come within the purview of stare decisis, not to talk of decisions of native or customary arbitration. A

[172] Cap A18 LFN 2004

[173] (2003) F.W.L.R (Pt. 157) P. 1013

> customary arbitration is essentially a native arrangement by selected elders of the community who are vast in the customary law of the people and take decisions, which are mainly designed or aimed at bringing some amicable settlement, stability and social equilibrium to the people and their immediate society or environment. Native or customary arbitration is only a convenient forum for the settlement of native disputes and cannot be raised to the status of a court of law.

Customary arbitration thus lacks intrinsic or inherent force, and it cannot be enforced like the judgments of regular courts until it is pronounced upon by a competent judicial authority. Before such an award can create estoppel *per rem judicata* or issue estoppel, it must have been specifically pleaded and proved in proceedings before the court, involving the parties to the arbitration, or their Privies.[174] With due respect, this writer disagrees with the position of the Supreme Court on this point. Though a native arrangement, customary arbitration has all the valid essentials to qualify as a court. It is governed by the native law and custom of the particular community and is seen by the people as binding. The arbitrators are usually the selected elders of the community who are vast in the customary law of their land. There is also some form of appeal structure in some communities. For instance, appeal may lie from the family elders to the family head, council of elders and to the chief respectively.

On the other hand, it may not be necessary under the modern form of arbitration to plead estoppel in any particular form so long as the matter constituting the estoppel is stated in such a manner as to show that the party pleading relies upon it as a defence or an answer.[175] However, it is essential that before applying the decision of a customary arbitration as an estoppel, care is taken to examine it as the arbitrators may be interested in it.[176]

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[174] Ohiari v Akabeze (supra)

[175] Ilona v Idakwo (2003)11 NWLR (pt. 830) P. 53

[176] Ohiari v Akabeze (supra)

Under modern arbitration, a valid award creates an estoppel and operates as *res judicata*. Accordingly, either party will be prevented from pursuing such matters in subsequent proceedings.[177] Where a valid award is made as between the parties, it is conclusive evidence of the law and facts found by it and so long as it is not impeached, evidence to contradict the award or any of the individual issues of law or fact with which it deals will be inadmissible.[178]

4.3.7 Qualification of Arbitrators

Customary arbitrators are mostly elders, chiefs and traditional rulers who more often than not are uneducated, but are vast in the customary law of the people. On the other hand, modern arbitrators are mostly professionals who are trained and experienced in the practice of arbitration.[179]

4.3.8 Sources of Arbitration

In Nigeria, modern arbitration is governed by the provisions of the Arbitration and Conciliation Act, 2004, the received English law etc. On the other hand, customary arbitration is governed by customary laws of a particular community; which are largely unwritten. It is rendered and handed down by history and oral tradition. Despite its unwritten nature it is still very popular among the indigenous communities.

4.3.9 Theoretical Difference

[177] Fidelitas Shipping Co. Ltd v V/O Exportchleb(1965)1 Lloyd's Rep. 223, C.A(pt.9) p.630

[178] Orojo, J.O. and Ajomo, M.A. op.cit. P.128

[179] ibid

There is a theoretical difference between modern and customary arbitration. While customary arbitration is based on the communal conception of life in the traditional societies, modern arbitration is based on individualistic conception of life.[180]

The western society is essentially individualistic; the individualism adequately expresses itself in capitalism which is an influential driving force of commerce and commercial arbitration. The wave of privatization and commercialization united by the train of individualistic capitalism has contributed to the growth of commercial arbitration.[181]

Interestingly, the communal customary arbitration is now being explored for its prospects of resolving disputes arising from modern transactions, which some refer to as commercial customary arbitration.[182] This shows that despite the fundamental difference in concept between the two, the communality of customary arbitration is such a potent tool that it can be invoked for resolving disputes in modern business intercourse.

The conceptual difference reflects in the concept of law and justice in the two systems. In that the interest of the community is elevated above that of the individual and justice is dispensed on the basis that it is a communal requirement in the traditional societies. The underlining philosophy and purpose of customary arbitration is to secure a solid basis for ordering social and commercial relationship, unlike modern arbitration which is based on the will-theory and contractual obligation.[183]

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[180] Akanbi, M.M.(2004). Nigeria's Commercial history-Quo Vadis Domestic Commercial Arbitration. In: Kupolati (ed) Current Issues in Nigerian Jurisprudence. Essays in Honour of Chief Adegboyega Awomolo(SAN), Renaissance Publishers, Lagos. P.41

[181] Ibid

[182] Ibid

[183] Ibid

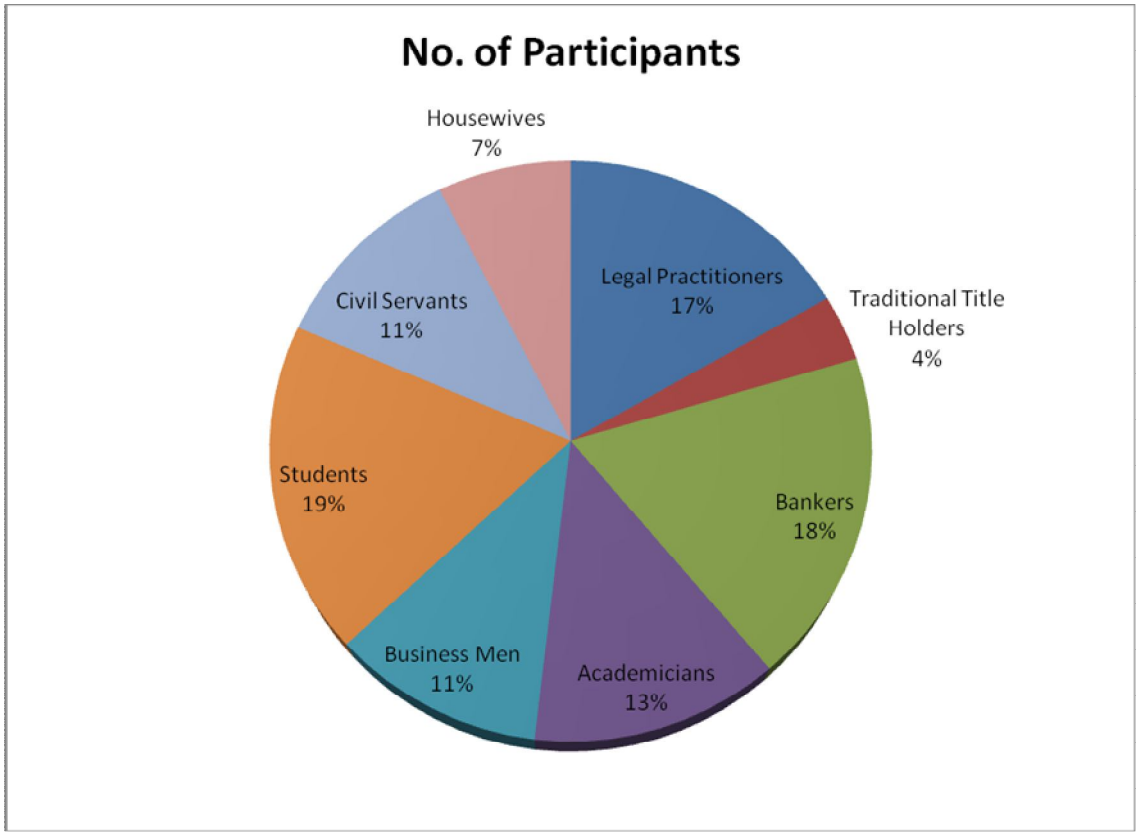
The most fundamental difference between customary arbitration and western arbitration is the difference arising from the different world views from which the duo emerged, an overview of which shows that they are culturally different in essence.

In order to appreciate the topic better, questionnaires were prepared, distributed and responses collected using the random sampling technique.

A total of 300 questionnaires were administered on respondents. Out of these numbers, only 270 were completed and returned.

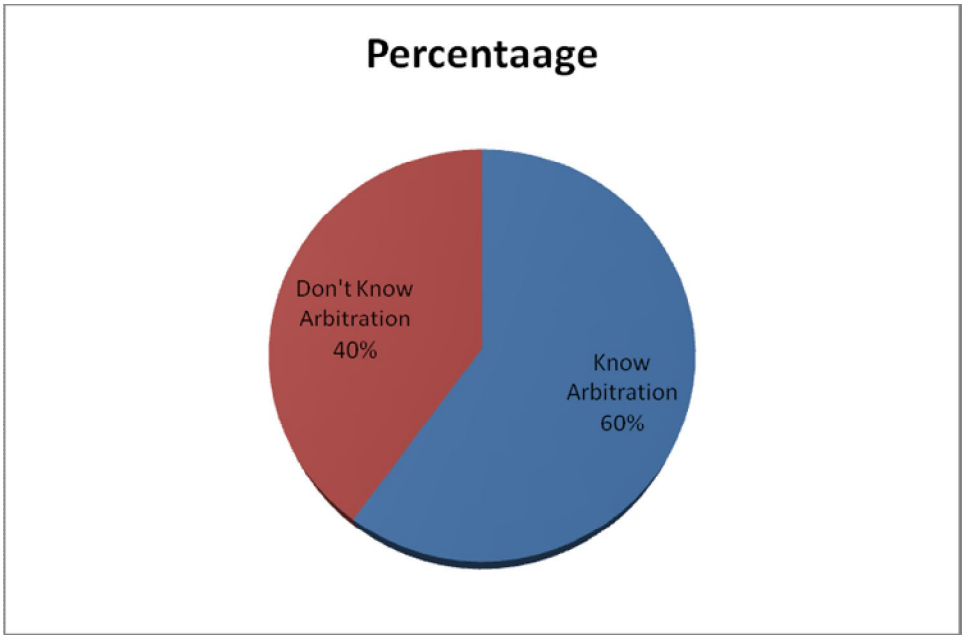
Based on the analysis of the data received, it was discovered that majority of the respondents are in their 40s and 50s, while few are in their 30s and 60s. Also, the respondents include 45 legal practitioners, 10 traditional title holders, 50 bankers, 35 academicians, 30 business men, 50 students, 30 civil servants and 20 housewives. Majority of the respondents are graduates.

Participants	No.of Participants
Legal Practitioners	45
Traditional Title Holders	10
Bankers	50
Academicians	35
Business Men	30
Students	50
Civil Servants	30
Housewives	20



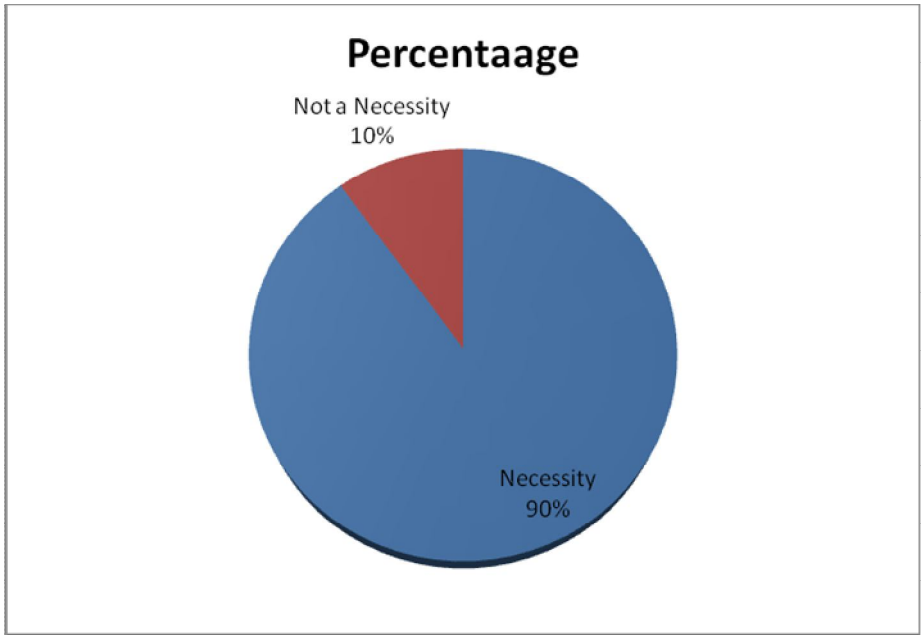
60% of the respondents know what arbitration is.

Arbitration Knowledge	**Percentaage**
Know Arbitration	60
Don't Know Arbitration	40



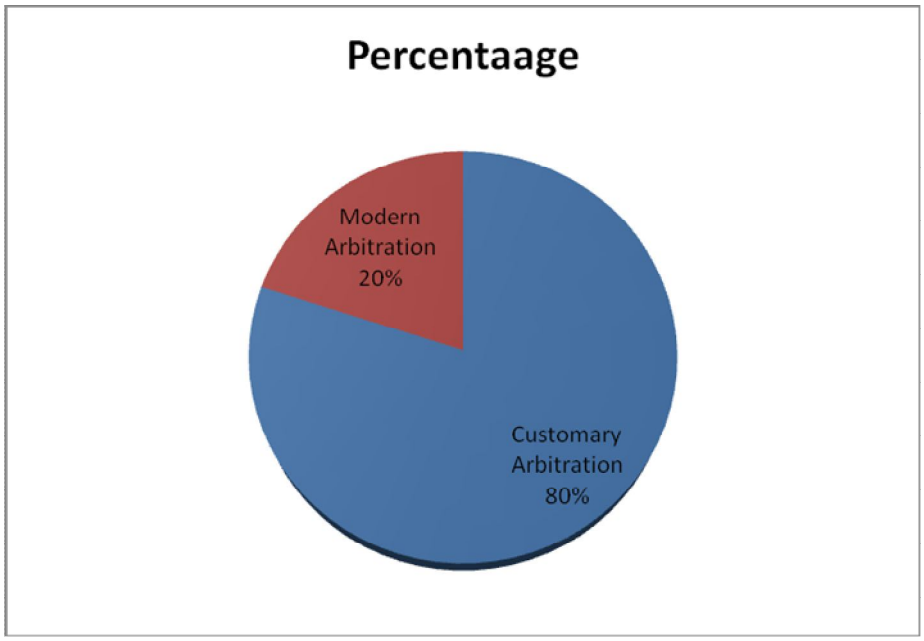
However, majority do not know the workings of modern arbitration. While 90% of respondents consider arbitration a necessity, 10% do not consider it a necessity.

Modern Arbitration Consideration	**Percentaage**
Necessity	90
Not a Necessity	10



80% of the respondents prefer to resolve disputes through customary arbitration while 20% would prefer modern arbitration.

Dispute Resolve Preference	Percentaage
Customary Arbitration	80
Modern Arbitration	20



Some of the fears expressed by 90% the respondents on modern arbitration are issue of costs, delays, and formalities involved. Also, 85% respondents are of the view that there is the need for an alternative to modern arbitration. Whereas 60% respondents know what modern arbitration is but majority would prefer to refer their disputes to customary arbitration. However, some of the reservations expressed by the respondents on customary arbitration are: Its informal nature, the attitude of Nigerian courts towards enforcement of customary arbitral awards.

From the research, it was revealed that although modern arbitration is the principal type of arbitration in practice, indigenous communities resort to the customary way of arbitration and there are calls by individuals that greater emphasis should be placed on the customary form

of arbitration because of its immense benefits of being simpler, cheaper and quicker than modern arbitration.

CHAPTER FIVE

CONCLUSION

5.1 Summary

This thesis commenced with a general introduction wherein the background of the research, statement of the problem, aims and objectives of the research, justification, scope of the research, the research methodology adopted, literature review and organizational layout were examined.

In the course of this research, conscious effort was made to trace the origin of modern and customary arbitration and other ADR mechanisms in Nigeria.

Additionally, some of the provisions of the Constitution of the Federal Republic of Nigeria, 1999, Arbitration and Conciliation Act, 2004, judicial pronouncements of superior courts of record etc were examined and restated with a view to highlighting those provisions that are relevant to arbitration.

The research showed that prior to colonialism of Nigeria, each community had its own way of resolving disputes according to their various customary laws. However, the advent of colonialism brought with it many long lasting effects on the people which include arbitration.

It is interesting to note that arbitration is a necessity in view of the fact that disputes are likely to occur in the course of human interaction and arbitration has been a way of resolving these disputes. Suffice to say that the importance of arbitration cannot be overemphasized. The practice of arbitration has always been a more economical and friendly method of resolving disputes both in traditional and modern settings.

The research in its chapter two gave a general overview of Alternative dispute resolution mechanisms. Stressing that the term ADR is all encompassing, as it includes, arbitration, mediation, negotiation, conciliation, mini trial, expert determination, early neutral evaluation, med-arb and other hybrid processes. The chapter highlighted the essential elements of

modern arbitration to include; presence of parties, dispute, referrals and binding. Various types of modern arbitration were also discussed.

The research in its chapter three gave a general overview of customary arbitration in Nigeria. The practice of arbitration as it relates to three major ethnic groups in Nigeria was considered. Additionally, the essential ingredients of customary arbitration were analyzed. The advantages, disadvantages as well as the shortcomings of customary arbitration were examined.

The research in its chapter four compared modern arbitration to customary arbitration which is the main objective of this work. This is with a view to realizing which option is more practicable in terms of achieving amicable resolution of disputes and to discern which option will work better for the Nigerian society at large. Modern and customary arbitration are similar in the sense that both are aimed at achieving amicable resolution of disputes, there must be an impartial tribunal, the parties must submit to arbitration. Nevertheless, there are differences with regard to the role of the parties, the right to resile, submission, oath-taking, qualification of arbitrators, sources and effect of arbitration etc.

5.2 Findings

1. Acceptability of the Panelist of Arbitration: It is a found that customary arbitration tribunal is controlled and conducted by elders, chiefs and title holders who are part of the daily experiences of the communal life and whom the ordinary citizens easily have access to. Though the elders and chiefs are the leaders of the society, the status they enjoy as the custodians of the social culture does not derogate them from the society thereby making the parties feel comfortable and relaxed to take matters to them.

2. Lack of education of members: It is observed that one of the major challenges is that the operators of customary arbitration are mostly elders, chiefs and traditional rulers who more often than not do not have western education.
3. Unwritten award: Customary arbitration is rendered and handed down by history and oral tradition, and memory may fade with respect to the unwritten word.
4. Oath taking: Another challenge is the issue of oath-taking. This may create problems for Muslims and Christians who are the majority in Nigeria. If part of the arbitration process demands swearing upon a *Juju*, unless the parties willingly partake in swearing upon the same, such an award may not be valid. For instance, it is not likely that a hard-core traditionalist will be persuaded to swear on the Holy Quran or Bible, being instead more at home with *Juju*. The conflict of religions – namely, Islam, Christianity and Traditional Religion – may create problems as to which form of oath to be taken by parties to customary arbitration. But this conflict should not be grounds for total condemnation of oath taking, which now constitutes part of customary justice mechanisms in different traditional communities in Nigeria. The fact that a lot of people prefer swearing upon *Juju* to resolve their disputes on a daily basis is a pointer to the type of faith and confidence which the local people have in it to dispense justice. Local people prefer oath-swearing by *Juju* as they believe in its potency to do justice and inflict severe punishment on any party that gives false testimony. This forms the basis of its continued existence among the traditional communities in resolving their disputes. It is submitted that the position taken by Kutigi in ***Nwoke v. Okere*** (supra) that the practice of juju is unknown to our law is not really practicable.
5. Social Equilibrium is maintained: feuding parties in traditional communities use traditional approaches to resolve their conflicts because they still find customary arbitration more accessible, quick and cheap. It also reduces tension in the society.

Indeed, the majority of people in Nigeria, particularly in the local communities, as a matter of fact and practice resolve their disputes through the customary arbitration process. They are often motivated by the need to preserve friendliness and neighbourliness.

6. Cost: Modern arbitration is expensive and may not be affordable to the common man. For instance, parties have to pay for the venue of arbitration, daily fees of the arbitrators and cost of other issues that may crop up in the course of proceedings.
7. Formalized structure: The modern arbitral process is very complex, legalistic and institutionalized. The practice is so formal and too similar to what we have in the courts today.

It is observed that unless the issues of unwritten nature of customary arbitration award, lack of education of members and attitude of Nigerian courts are addressed, the practice of customary arbitration will not thrive in Nigeria.

In summary, the introduction of modern rules of arbitration and other alternative dispute methods and the establishment of the regular courts has not suppressed the burning desire of feuding parties in traditional communities to pursue traditional approaches to resolving their conflicts. Disputants still find customary arbitration closer to them and more accessible, quick and cheap, leading to enormous savings in time and money for rural populations that can be put into development. It is satisfactory and reliable in resolving most matters such as family, land disputes and other civil or domestic matters. Indeed, the majority of people in Nigeria, particularly in the local communities, as a matter of fact and in practice resolve their disputes through the customary arbitration process. They are often motivated by the need to preserve friendliness and neighbourliness by the elimination of grievances and creating a win–win situation. It is submitted that customary

arbitration exists in our society both at the rural and urban areas and should be recognised without much ado, once it passes the necessary tests of natural justice.

5.3 Recommendations

The following recommendations are hereby made with a view to improving our justice administration system of Nigeria.

1. There is a need for capacity building for those who operate the customary arbitration fora in the form of paralegal training that would educate them in the basics of the rules of natural justice, namely fair hearing.
2. Arbitrators should be learned in modern education. There is equally the need to promote the recording of proceedings and decisions, which to some extent is already in operation in several ethnic unions and can be facilitated by the fact that increasingly, traditional stools are being occupied by well-educated persons including professionals. Upgrading the capacity of the traditional institutions will greatly enhance the quality of justice coming from them.
3. Customary arbitrators should have a role to play in legislative drafting. This is because they are well grounded in the customary laws of their communities and as such can make quality contributions to any legislative process.
4. Oath-taking should be promoted in customary arbitration and should not be a basis for total condemnation because it now constitutes part of customary justice mechanisms in different traditional communities in Nigeria. The fact that many people prefer swearing upon *Juju* to resolve their disputes on a daily basis is a pointer to the type of faith and confidence which the local people have in it to dispense justice. Local people prefer oath-swearing by *Juju* as they believe in its potency to do justice and inflict severe punishment mysteriously on any party that gives false testimony. This forms the basis of its continued existence among the traditional communities in

resolving their disputes. Rather than a continued reliance on the inherited colonial legacy of administration of justice, perhaps Nigerians and Africans in general as a people should look inwards and reform their traditional justice system.[184]

5. Nigerian courts should change their attitude of using foreign system as a yard stick for determination of customary arbitration in Nigeria.
6. Cheaper and Expedient: For some of the fears expressed by people on modern arbitration like the issue of cost and delays, it is imperative that priority should be given to customary arbitration which is cheaper, faster, less formal and accessible to the common man.
7. It is recommended that whenever the issue of publication of a customary award as an essential ingredient for validity is raised, a mere pronouncement of the award should be deemed sufficient publication.
8. Finally, it is recommended that arbitration should be introduced into the curriculum of secondary schools and universities in Nigeria.

[184] Ibid

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APPENDIX I

QUESTIONNAIRE

TOPIC:A COMPARATIVE STUDY OF CUSTOMARY AND MODERN ARBITRATION IN NIGERIA.

Please kindly assist in filling in your response to the following questions:

1. Age:
2. Occupation:
3. Are you literate?
   a. Yes No
4. Do you know what Arbitration is?

   …….
5. Do you consider Arbitration a necessity?

   ……
6. Do you know what modern arbitration is?

   ……
7. What are your reservations about modern arbitration?

   ……
8. Is there a need for an alternative to modern arbitration?

   ……
9. Do you know what customary arbitration is?

   ……
10. Would you prefer to refer disputes to :

    (a) Modern arbitration; or

    (b) Customary arbitration?

11. Do you have any reservation (s) on customary arbitration?

……..

12. What are they?

……..

13. Is oath-taking practiced in your community?

……..

14. Do you consider oath-taking effective in dispute resolution?

……..

- This questionnaire is a field study to determine whether arbitration is a necessity, the level of awareness of customary and modern arbitration, whether more priority should be given to customary arbitration.

THANK YOU FOR SPARING YOUR TIME TO FILL OUT THIS QUESTIONNAIRE.