SUMMONS AND VOLUNTARY SUBMISSION IN ARBITRATION PROCEEDINGS: A CONTEXTUAL OVERVIEW AT CUSTOMARY ARBITRATION*

Abstract

One of the most fundamental elements of arbitration, whether native or orthodox, is voluntary submission pursuant to mutual consent or arbitration agreement freely reached by the disputing parties. Where this basic element is lacking, then the proceedings is anything but arbitration. Could this approximate to a tendency towards technicality? It is in this wise that the paper interrogates the contemporaneous use of the words 'summons' and 'voluntary submission' and questions the compatibility approvingly accorded same in the vexed, or rather celebrated case of Agu v Ikewibe (1991) 3 NWLR (pt.180) 385 against all known basic conceptions of arbitration. African societies have many modes of resolving disputes apart from arbitration. To extrapolate the flexibility of native adjudication procedures in the guise of arbitration will, with all due respect, result in crass miscarriage of justice. Accordingly, expressions such as 'summons', 'commands', 'compulsion', and the like, which are antithetic to voluntary submission cannot approximate to arbitration. The paper urges the apex court as the guardian of Nigerian jurisprudence to right the wrongs and set proper perspectives in this regard at the earliest opportunity.

Keywords: Summons, Voluntary Submission, Arbitration Proceedings, Customary Arbitration, Compatibility

1. Introduction

Dispute and disagreement are quite recurrent in the conduct of human affairs and daily living *inter se*. This phenomenon appears to constitute a formidable challenge to peaceful and harmonious co-existence in human societies. Lord Jesus Christ emphasises the importance of peace in his Sermon on the Mount at the inception of His earthly ministry. Christ teaches mankind that 'blessed are the peacemakers for they shall be called the children of God'[1] and enjoins His followers to '… have peace one with another'.[2] In summary, the Holy Bible enjoins all to '… seek peace and pursue it'.[3] Thus, the dialectics of disputes and dispute resolution has remained a central concern of man. And so, of all mankind's adventure in search of peace and justice, arbitration is among the earliest. Long before law was established, or courts were organized, or judges formulated principles of law, men had resorted to arbitration for the resolving of discord, the adjustment of differences and the settlement of disputes.[4] Arbitration is a private adjudicatory process voluntarily chosen by the disputing parties as an effective means of resolving their disputes, without recourse to the courts of law.[5] It involves the reference of a dispute(s) to private person(s) appointed by the disputants. It is a process whereby arbitrators act in a judicial fashion, devoid of legal technicalities, but applying existing laws, rules or norms agreed by the parties to hand down an award to resolve the dispute.[6] The arbitrators derive their authority from the agreement of the parties and their decision is binding upon the disputing parties.[7] Arbitration is thus, conceived as an alternative approach to litigation

2. Historical Evolution of Arbitration

The origin of the concept and practice of arbitration as a means of dispute resolution comes naturally to primitive bodies of law and continues even after the establishment of formal state courts. Resort to arbitration nonetheless continues because disputing parties want to settle with less formality and expense, less rancor and delays, than is involved in recourse to the courts.[8] Arbitration has also been conceived as an 'apparent rudimentary method of settling disputes, since it consists of submitting them to ordinary individuals whose only qualification is that of being chosen by the parties'.[9] Thus, arbitration as a form of dispensation of justice was seen particularly in the civil law jurisdiction as being ' too primitive'. 'Primitivity' in this regard could be visualized in ' the nature of the arbitral process in its early history'.[10] In practice for instance, two disputing merchants contesting the price,

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[1] *The Holy Bible,* (King James Version) (Towa Falls: World Bible Publishers Inc, 1986) Mathew Chapter 5, Verse 9.

[2] *Ibid,* Mark Chapter 9, Verse 50.

[3] *Ibid,* Psalms 34, Verse 14.

[4] F. Kellor, 'American Arbitration, its History, Functions and Achievements' (1948) cited in Henry P. De Vires, *International Commercial Arbitration: A Contractual Substitute for National Courts*, *Tulane Law Review*, 1962, Vol.57, p.43.

[5] A. Redfern and M. Hunter et al, *Law and Practice of International Commercial Arbitration*, (4th edn, London: Sweet & Maxwell, 2004), p.1.

[6] I. Fulton Maxwell, *Commercial Alternative Dispute Resolution*, (Sydney: The Law Book Co Ltd, 1989) p.55.

[7] Henry P. De Vires, *op cit* (n.4) p.43.

[8] A.Redfern and M.Hunter *et al, op cit* (n.5) p.2. it appears that reference to 'primitive bodies of law' extend beyond the frontiers of English law to native laws of other jurisdictions.

[9] *Ibid.*

[10] *Ibid,* p.3.

quality or quantum of goods supplied would turn same to a third party in whom they both repose confidence for settlement. The disputing merchants would readily accept the verdict of the third party, not on account of the promptings of any legal sanction, but simply because it was expected of them to do so in accordance with the norms of the community in which they carried on business.[11]

Appreciating arbitration of the olden days as a self regulated system of dispute resolution devoid of the necessity of legal sanctions to compel compliance, Rene David, a famous French commentator on arbitration opines:

> Arbitration was mainly conceived of the past as an institution of peace, the purpose of which was not primarily to ensure the rule of law but rather to maintain harmony between persons who were destined to live together. It was recognised that in some cases the rules and procedures provided by the law were too rigid. The law was therefore willing to give effect to an arbitration agreement entered into by the parties to settle their disputes. Parties were authorised to submit a dispute to an arbitrator only after this dispute had arisen. The arbitrator was chosen *intuitu personae,* because the parties trusted him or were prepared to submit to his authority, he was a squire, a relative, a mutual friend, or a man of wisdom, of whom it was expected that he would be able to device a satisfactory solution for the dispute.[12]

Thus, within local communities, the authority of the local leadership are recognized and acknowledged in some cases as sacrosanct. The force of such authority as for example a squire of an English county,[13] the primordial *Ozor* title holder or chief or elder in a native African community,[14] or a Sheikh in an Arabian enclave[15] have provided somewhat safeguards to move the disputing parties to accept and carry out the verdicts of their arbitrator. Trade guilds or associations provided similar safeguards in the area of trade and commerce. It is in the light of the foregoing that it appears, with all due respect, that the views of Sir Michael Mustill to the effect that 'looking first at its history, the origins of contemporary private arbitration lie in medieval Western Europe'[16] are quite unsettled. Native arbitration as a means of dispute settlement had been part and parcel of communal co-existence in pre colonial Africa, although the arbitral processes were largely not chronicled in a written form. This can also be said of the Americas and some other indigenous communities outside Western Europe.

3. Imperatives of Arbitration

With the passage of time and the increasing volume of transactions subject to arbitration as a means of dispute settlement incidental thereto, many modern states could not stand by and allow such system of private justice dispensation to be entirely dependent on the goodwill of its participants. Thus, the increasing importance of commercial activities dictated the imperative enacting statutory frameworks to regulate the conduct of arbitration.[17]

The importance of agreement arbitration agreement cannot be overemphasized. It is the foundation upon which arbitral proceedings are built. It shows that the parties have willingly agreed to resolve their dispute through the instrumentality of arbitration. This element of consent is vitally important because it confers validity on the arbitration. Without it, there cannot be a valid arbitration. Thus, arbitration is anchored on the agreement of the parties without which the arbitral proceedings is emptied of an essential and fundamental element of expression of the will and volition of the parties.[18]

It is also important to emphasise that once the parties have freely given their consent to arbitration without any element of coercion, such consent cannot be unilaterally revoked or withdrawn. Even in instances where the arbitration agreement forms part of an original contract *inter partes* and that contract comes to an end, the

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[11] *Ibid*.

[12] R. David, '*Arbitration in International Trade'*, Kluwer (1985) p.29 cited in A. Redfern and M. Hunter *et al, ibid*.

[13] *Ibid.*

[14] This has been acknowledged in a number of cases following the dictum of Ikpeazu J in *Njoku v Ekeocha* (1972) 2 ECSLR 199; and Karibi-Whyte JSC in *Agu v Ikewibe* (1991) 3 NWLR (PT.180) 385.

[15] In pre- Islamic Arabian societies, disputes were resolved by some sort of native arbitration based on voluntary submission. This was essentially a private arrangement predicated on the good will of the disputing parties. This view was captured by N. Majeed, 'Good Faith and Due Process: Lessons from the Shariah' (2009), Vol.20, No.1, *Arbitration International*, p.104.

[16] M. Mustill, 'it is a bird…' at Liber Amicorum Claude Reymond, Editions du Juris- Classeur, Paris, 2004, p.209 cited in A. Redfern and M. Hunter *et al, op cit* (n.5) p.3.

[17] See for instance the Arbitration Acts of the United Kingdom, the United States, Germany, Spain, Australia, Brazil, the Netherlands, and of course, the Nigerian Arbitration and Conciliation Act Cap A18, Laws of the Federation of Nigeria 2004.

[18] A. Redfern and M. Hunter *et al*, op cit (n.5) p.7.

obligation to arbitrate nonetheless survives as an independent obligation separate from the rest of the contract.[19] As a corollary to the foregoing, an arbitration agreement does not merely serve to provide evidence of the consent of the parties to arbitration and *a fortiori* establish their voluntary obligation in that regard, it also provides a basic source of the power and jurisdiction of the arbitrators. Through the arbitration agreement, the parties decide the composition, appointment, powers and procedure of the arbitral tribunal.[20]

4. Summons and Voluntary Submission at Customary Arbitration

Voluntary agreement is the legal hob of all arbitration. It must therefore be shown that there was voluntary submission of the matter in dispute to arbitration. Thus, the parties must have agreed expressly or impliedly to accept the decision of the arbitrators as final and binding.[21] It is a basic conception of arbitration that once consensual submission of the dispute to arbitration is established, then without an express reservation of a right to resile, it is not open to any party to resile.[22] The general principle is that parties took their arbitrators for better or for worse as to decisions of facts and law.[23] The position of the law with respect to 'voluntary submission' to arbitration has been quite consistent under the Nigerian law. What has continued to agitate the minds of many a scholar is the consequence of such voluntary submission as opposed to summons, particularly after the decision of the apex court in *Agu v Ikewibe supra*. The position of the law prior to the decision in the *Agu* case is that since the legal basis of all arbitration is voluntary agreement, then once the choice is made in favour of adjudication by the arbitral body, the courts hold the parties bound by the decision of such a body. This has been the attitude of the courts.[24] The West African Court of Appeal per Deane CJ in *Kweku Assampong v Kweku Amuaku & Ors*[25] emphatically reiterated this principle. According to His Lordship: '…where matters in dispute between parties are by mutual consent, investigated by arbitrators at a meeting held in accordance with native customary law, and a decision is given, it is binding on the parties and the supreme court shall enforce such decision'.[26]

In our quest to examine the compatibility or otherwise of the contemporaneous use of the operative concepts of 'summons' and 'voluntary submission' at customary law arbitration, it is instructive to attempt to unravel the 'importation' of the 'former' in *Agu v Ikewibe supra* in the light of the acknowledgement of the 'latter' in the case. Thus, it becomes necessary to examine the vexed, or rather celebrated case of *Agu v Ikewibe* at some length. In the *Agu* case, the respondent as plaintiff commenced this action at the then East Central State High Court, Umuahia against the appellant as defendant 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 as well as customary arbitration. In paragraph 8 of his Statement of Claim, the respondent averred that: 'In April 1970, the defendant trespassed into the land in dispute and plaintiff *summoned* him before the chief and elders of the town who gave judgment in favour of the plaintiff and warned the defendant not to trespass again into the said land'. In his Statement of Defence, the appellant stated: 'Paragraphs 8 and 9 are hereby denied. The defendant will at the trial put the plaintiff to the strictest proof thereof'. At the conclusion of hearing, the learned trial judge, Nwokedi J, rejected all grounds relied upon by the respondent and dismissed the claim in its entirely. On appeal, the Court of Appeal held that there was binding arbitration between the parties and consequently, the appellant was estopped from denying the respondent's title to the land in dispute. It set aside the judgment of the learned trial judge. And on appeal to the Supreme Court, two main issues were canvassed, namely:

(1) Whether the respondent's pleading in paragraph 8 of the Statement of Claim properly raised a plea of binding arbitration against the appellant;
(2) Whether on the evidence, the appellant was estopped by the decision in the customary arbitration from denying the respondent's title to the land in dispute.

The appellant contended *inter alia* that the said paragraph 8 of the statement of claim did not properly raise a plea of binding arbitration in favour of the respondent nor were the necessary facts to be relied upon to establish the validity of arbitration specifically pleaded. The majority of the Supreme Court held that customary arbitration was

[19] *Ibid*, p.8.
[20] *Ibid*, pp.8-9.
[21] *Gyesiwa v Kobina Mensah* (1947) WACA Cyclostyled Reports (Nov/Dec) p.45.
[22] *Kwesi & Ors v Larbi* (1952) 13 WACA 76 at p.80. See also *Kobina Foli v Obeng Akese* (1930) I WACA I. Contrast this position with the majority decision in *Agu v Ikewibe Supra* (n. 14) p. 408.
[23] Lord Justice Smith in Montgomery Jones & Co and *Libental in re* (1898) 78 LT 407 at p. 408 cited in *James Okpuruwu & Ors v Kieran Okpokam & Anor* (1988) 4 NWLR (pt.90) 554 at p. 566.
[24] See Nnaemeka – Agu JSC in *Agu v Ikewibe supra* (n.5) p. 417. See also *Ozor Ezejiofor Oline & Ors v Jacob Obodo & Ors* (1958) 3 FSC 84; *Ojibah v Ojibah* (1991) 5 NWLR (pt.181) 216 at p. 314.
[25] (1932) I WACA 192.
[26] *Ibid*, p. 201. See also *Kwesi & Ors v Larbi supra, Kobina Foli v Obeng Akese* supra, (n.22) to the same effect.

properly and sufficiently pleaded by the respondent since he disclosed that the appellant was *summoned* before the chiefs and elders of the town who heard the matter and gave a decision in favour of the respondent.
According to Karibi- Whyte JSC who read the lead judgment of the apex court, Nigerian law recognises arbitration at customary law if the following conditions were satisfied:

(a) If the parties *voluntarily submit* their dispute to a non-judicial body to wit, their elders or chiefs as the case may be for determination ; and
(b) The indication of willingness of the parties to be bound by the decision of the non-judicial body or *freedom to reject the decision when not satisfied*;
(c) *That neither of the parties has resiled from the decision as pronounced*.[27]

Applying the enunciated principles to the facts of the case, Justice Karibi-Whyte expresses 'no doubt' that:
(i) There is evidence of *voluntary submission* of the parties to the authority of the chiefs and elders of the community.
(ii) There is initial willingness of the parties to be bound by the decision of the chiefs and elders of the community.
(iii) The Chiefs and elders of the community exercised judicial functions according to custom.
(iv) The terms of the decision were known, final and unconditional….

Thus, his lordship concludes that 'these characteristics satisfy the requisite of estoppel' and the respondent being the party in whose favour the decision was made,' is entitled to rely on a plea of *res judicata* in subsequent litigation in respect of the subject matter or the issue'.[28] Nnaemeka-Agu JSC who dissented from the majority decision in the *Agu* case, set out the requisites of customary arbitration which must be pleaded and proved by evidence in order to raise an estoppel. These are:
(i) That, there has been a voluntary submission of the matter in dispute to an arbitration of one or more persons;
(ii) That it was agreed by the parties either expressly or by implication that the decision of the arbitrators will be accepted as final and binding;
(iii) That the said arbitration was in accordance with the custom of the parties or their trade or business; and

(iv) That the arbitrators reached a decision and published there award.[29]

The position of Justice Nnaemeka-Agu accords eloquently with the position of the pre-existing law on arbitration.[30] His lordship held that the respondent did not plead all the elements of a valid customary arbitration and thus, the decision of the arbitrators could not validly sustain an estoppel against the appellant, and much less a valid ground to reverse the judgment of the learned trial judge.

5. Compatibility or Otherwise of 'Summons' and 'Voluntary Submission'.
It is instructive to note that it is quite settled among scholars and jurists that *voluntary submission* is a fundamental common denominator to all arbitration. What appears unsettled is whether the word 'summoned' as used in the respondent's averments in paragraph 8 of his Statement of Claim is compatible with voluntary submission as known to arbitration practice. And if it is not, whether it should have swayed the Justices of the apex court to reach a different decision in the *Agu* case. Justice Nnameka-Agu faults the use of the word 'summoned' by the respondent. The word 'summon' clearly implies that the appellant was bound to appear before arbitrators. In the words of his lordship:

> The essence of a summon is to command. So when the respondent pleaded that he summoned the appellant before the chiefs and elders of the town who gave judgment in favour of the plaintiff, I clearly understood it to mean that the appellant was bound to appear before them, whether he liked it or not and whether or not he wanted them to go into the dispute between them. This is clearly antithetic to voluntary submission which is of the very essence of a valid arbitration agreement.[31]

[27] *Agu v Ikewibe supra* (n.5) p. 408, italics supplied.
[28] *Ibid.* The position of His Lordship is not consistent with the pre- existing law on arbitration with respect to rejection of the award when unfavourable or outright resile from the process.
[29] *Ibid*, pp. 418-419.
[30] See footnotes 24,25 and 26 above. See also G. Ezejiofor, 'The Prerequisites of Customary Arbitration', *Journal of Private and Property Law,* University of Lagos, April, 1993, Vol. 16, pp.19-35.
[31] *Agu v Ikewibe* supra (n.5) p. 420.

On a seemingly similar note, Professor Allot takes the view that in many cases, especially in instances where the 'arbitrator' holds and exercises political authority, he will *summon* the person complained against to answer the complaint. And so, the original bringing of the complaint to arbitration is not predicated on the agreement of both parties.[32] This is also at variance with voluntary submission which is at the core of a valid arbitration agreement. Ezejiofor however suggests that the word 'summoned' as used by the respondent in paragraph 8 of his Statement of Claim in the *Agu* case is merely contextual and should not be given its technical meaning. This is because its use in the particular context is an abuse of language even if by a lawyer, since 'it is conceivable that the chiefs and elders can 'summons' the plaintiff or any member of the community before them'. The learned Professor however opines in conclusion, that the word 'invited' should have been used instead.[33]

It seems clear, however, that the use of the word 'summoned' was quite inappropriate in the context of the *Agu* case. There is scarcely any doubt that the use thereof appears quite at variance with volition and voluntariness which are of great moment in arbitration practice. Accordingly, it would seem that the views of Justice Nnaemeka-Agu on this score are the better view. If this contention is right, then what transpired in the *Agu* case was anything but customary arbitration since submission to the chief and elders was not voluntary. This development was cogent and compelling enough to have swayed the apex court to reach a different decision. This point is reinforced by the fact that in African traditional societies, various methods of alternative dispute resolution are practiced as means of resolving disputes. They include negotiation, mediation, conciliation etc. These processes constitute an integral part of African traditional adjudication. Thus, it seems that the views expressed by Justice Karibi- Whyte in the *Agu* case *supra* tend to be more suggestive of customary conciliation or meditation than arbitration. According to a learned scholar:

> The flexibility in the system of customary adjudication often enables a typical village court with the consent of, or in sympathy with the parties to constitute itself into a conciliation or arbitration body. This flexibility plus some similarity of procedure between arbitration and adjudication have often led to misconception resulting in equating customary alternative dispute resolution methods such as conciliation and mediation with customary law arbitration…[This] was clearly shown for instance in the judgment of Karibi- Whyte JSC [in the *Agu* case] where his lordship was describing customary conciliation as arbitration.[34]

It follows from the foregoing that the word 'summons' in whatever guise or disguise has no place in arbitration proceedings properly so called.

6. Conclusion

There is no doubt that customary law arbitration is one of the means of settling dispute among natives. It is also settled that voluntary submission to arbitration, whether native or orthodox, is based on mutual agreement of the disputing parties. Where this fundamental element is lacking, then the process of dispute resolution 'submitted' to, is anything but arbitration. Arbitration *per se* will be emptied of its alluring element if summons, commands and compulsion were employed in the process. This is why the apex court could have exercised greater circumspect in the *Agu* case. If it had done so, it could have come to the conclusion that an essential element was conspicuously absent. This is certainly not technicality. And this would have persuaded it to have reached a different verdict. It is hoped that the Supreme Court as the guardian of our jurisprudence would utilize the earliest opportunity to right the wrong and give meaning to concepts in proper perspectives.

[32] A. Allot, Essays in African Law, (London: Butterwarths 1960) p. 126.

[33] G. Ezejiofor, 'The Prerequisites of Customary Arbitration' *op cit* (n. 30) p.26.

[34] Andrew I. Okekeifere, 'Stay of Court Proceedings Pending Arbitration in Nigerian Law', *Journal of International Arbitration,* 1996, Vol.13, No.3,119 at p.138.