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REVIEW OF THE INGREDIENTS OF CUSTOMARY ARBITRATION IN NIGERIA

PROF. M.N UMENWEKE*

1.0 Abstract

Customary arbitration has existed in Nigeria even before the coming of the colonial masters. Indigenous people then had disputes and they had their indigenous and peculiar ways of settling such disputes. The coming of the English adversarial justice system somehow affected the operations and evolution of customary arbitration. Ingredients of customary arbitration are the elements and particulars that must be present in any customary arbitration proceedings for its arbitral award to be considered valid and binding on the disputing parties. This article exposes the courts' inability to have a uniform standard as regards the ingredients of a valid customary arbitration and its arbitral award. The Court of Appeal and Supreme Court have over the years in many cases given conflicting judicial decisions. Jurists and proponents of customary arbitration have opined that this confusion has limited the scope and growth of customary arbitration in Nigeria. Many authors have done their own researches and given their own recommendations on how to remedy the situation. We shall see the three (3) compulsory tests every custom must undergo before it is judicially noticed. We finally distilled about Seven (7) ingredients from decided cases and explain their stance on customary arbitration of disputes and recommended that the courts need to give consistent judgments as regards the ingredients of a valid customary arbitration and that traditional rulers should be involved in the judicial process of the customary courts itself.

2.0 Introduction

Before the coming of the British colonial masters and the English adversarial judicial system, communities in the region later known as Nigeria settled their disputes in accordance with the prevalent indigenous custom and tradition of that community. Customary arbitration refers to dispute settlement in accordance with the customs or traditions of a particular people. The rules of court or evidence have little to no influence over such arbitration process. Everything that relates to the way of life and practice of a people is what governs the settlement of disputes in this setting. Community or family leaders and elders are a huge part of customary arbitration in Nigeria; their contribution cannot be over emphasized. The traditions, customs and cultural practices of a people determine the direction of settling dispute. Even though of some these traditions, customs and cultural practices are repugnant to natural justice, equity and good conscience, they cannot be ignored or set aside (except by the order of court.) This form of arbitration is of course very informal and at the grassroots level.

Disputes such as personal disagreements, religious crises, political rivalry, marital disputes, chieftaincy matters, land disputes, commercial disputes and boundary disputes are usually resolved by the elders or chiefs of the various Nigerian communities through an organised traditional dispute resolution mechanism called customary arbitration.[1] The main objective of customary arbitration was to promote communal welfare by reconciling divergence interests of people. Hence, customary arbitration is premised on the principle of accommodation, compromise and genuine reconciliation, as opposed to the principle of winner-takes-all characteristics of court system.[2] Therefore, arbitration was not conceived in the modern era and it is indeed not new to the system of dispute settlement in Nigerian indigenous societies. This paper seeks to assess the ingredients of customary arbitration in Nigeria.

3.0 Customary Law

Section 258 (1) of the Evidence Act 2011 defines custom as "a rule which, in a particular district, has from long usage, obtained the force of law."

* **Prof. Meshach Nnama Umenweke,** *PhD, FICMC, ACTI, BL*, Professor of Law and Former Dean, Faculty of Law, Nnamdi Azikiwe University, Awka, Anambra State. E-mail: mn.umenweke@unizik.edu.ng Tel: 08037090048

[1] A A Daibu, 2012. 'An Examination of the Rules of Natural Justice and Equal Treatment of Parties in Arbitration,' LL.M Thesis, Faculty of Law, University of Ilorin, 2012, 101-102.

[2] E J Alagoa. 1998. 'Conflict Management, Traditional Models from Pre-Colonial Times to the Present in the South-South Zone'. Paper presented at the South-South Zonal Conference on Peaceful Co-existence in Nigeria. Organised by the Centre for Peace Research and Conflict Resolution, National War College, Abuja, September, 1993, 3; J. F. Rapu. 2012. Alternative Dispute Resolution of Indigenous African Dispute: An Irrelevant Myth Catalyst for Modern Global Relations in Azinge, E and Awah, A. (Eds). Legal Pluralism in Africa: A Compendium of African Customary Law, (Lagos: Nigeria Institute of Advanced Legal Studies, 2012), pp. 268-269.

The Supreme Court case of ***Oyewumi v. Ogunesan***[3] defined customary law as:

> *"The organic or living law of the indigenous people of Nigeria, regulating their lives and transactions. It is organic in that it is not static. It is regulatory in that it controls the lives and transactions of the community subject to it. It is said that custom is a mirror of the culture of the people…."*

Customary law has also been defined as "The law of the indigenous people of Nigeria, which varies from one locality to the other. It is a body of rules and regulations that governs conducts and activities of the people as opposed to the laws promulgated by the House of Parliament [that is, the National Assembly or a State House of Assembly] in Nigeria."[4]

See also the case of ***Olabode v. Lawal***[5], where the Court defined custom or customary law as a set of rules of conduct applying to persons and things in a particular locality.

It is worthy to note that before a customary law can be said to be as valid as a law passed by the legislature, such a custom would have to pass through the Repugnancy test, Incompatibility test and the Public policy test. Once the said custom has passed those 3 tests, the regular courts are duty-bound to recognise and enforce such customary law.

i. **Repugnancy Test:** is a doctrine that prescribes that courts shall not enforce any customary law if it is contrary to public policy or repugnant to natural justice, equity and good conscience. Natural justice refers to the principle of fair hearing and equity refers to the doctrine of equity. Good conscience is a bit difficult to determine because what is against good conscience to one person might not be seen as being against good conscience in another.[6] In ***Mojekwu v. Mojekwu***,[7] the Court of Appeal stated that a custom which prevented a female child from inheriting her late father's property was repugnant to natural justice, equity and good conscience.
ii. **Incompatibility Test:** this test provides that a customary law must not be incompatible with any written law or with any law in force. This means that any customary law is inapplicable if it contradicts local enactments whether expressly or impliedly.[8] In the case of *Re* ***Adadevoh***[9], the court held that the incompatibility test extends to common law and the doctrines of equity. Whereas, the Supreme Court in ***Adesubokan v. Yinusa***[10] held that the incompatibility test includes incompatibility with English statutes of general application. Section 36(12) of the Constitution of the Federal Republic of Nigeria 1999 has the effect of preventing the application of customary law in criminal cases.
iii. **Public Policy Test:** looks at what is best for the society at large but this is left at the discretion of the judges. The customary law must not be against public interest or safety and must not undermine any moral values or cause any harm. While the decision of making customary law inapplicable on the basis of public policy may be abused by a judge, it is an important tool in the hands of judges who care about the sustenance of society.[11]

4.0 Arbitration

Prof. (Dr.) J Olakunle Orojo CON and Prof. M. Ayodele Ajomo defined arbitration in the following manner:

> "Arbitration is a procedure for the settlement of disputes, under which the parties agree to be bound by the decision of an arbitrator whose decision is, in general, final and legally binding on both parties."[12]

In the case of ***Agala*** *v.* ***Okusin***,[13] the Supreme Court defined arbitration thus:

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[3] (1990) 3 NWLR (pt. 182) 20

[4]Adekanle, A & Agbator, A, "Towards the Enforcement of Women's Right to Inheritance and Abolition of Cultural Discrimination against Women in Nigeria,"(2010), Vol. 2, EJOB, 145

[5] (2008) 17 NWLR (pt. 1115) 8.

[6] https://www.learnnigerianlaw.com/learn/legal-system/customarylaw

[7] [1997] 7 NWLR 283

[8] https://www.learnnigerianlaw.com/learn/legal-system/customarylaw

[9] (1951) 13 W.A.C.A. 304

[10] (1971) NNLR 77

[11] https://www.learnnigerianlaw.com/learn/legal-system/customarylaw

[12] Orojo Olakunle J and Ajomo Ayodele M. (1999): Law and Practice of Arbitration and Conciliation in Nigeria, Lagos: Mbeyi & Associates (Nig.) Ltd.

[13] (2010)10 NWLR (pt. 1202) 412 at 448 para G

> *"An arbitration is a reference to the decision of one or more persons either with or without an umpire of a particular matter in difference between the parties."*

Arbitration, known as "arbitrament" in customary law, is the reference of a dispute or difference between not less than two parties for determination, after hearing both sides in a judicial manner, by a person or persons, other than a court of competent jurisdiction.[14]

4.1 Customary Arbitration

Customary arbitration has been defined as 'arbitration of dispute founded on the voluntary submission of the parties to the decision of the arbitrators who are either the chiefs or elders of their communities, and the agreement to be bound by such decision.[15] Whereas the western type arbitration is attractive because of its private nature, customary arbitration is not private but it is organised to socialise the whole society, therefore, the community is present. Another distinction is that the process is gender sensitive; hence, women were excluded from male driven communal dispute resolution. Parties could arise from the whole process and maintain their relationship and where one party got an award the whole society was witness and saw to it that it was enforced.[16]

The Supreme Court lent its voice to the definition of customary arbitration in the celebrated case of ***Agu v. Ikewibe***[17] 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.'*

In the case of ***Ufomba v Ahucahoagu***[18] at the Supreme Court of Nigeria, customary arbitration was described as:

> *"A customary arbitration is essentially a native arrangement by selected elders of the community who is vast in the customary law of the people and takes decision, which are mainly designed or aimed at bringing some amicable settlement, stability and social equilibrium to the people and their immediate society or environment."*

T.O. Elias in his book[19] stated the following about customary arbitration:

> *"It is well accepted that one of the many African customary modes of settling disputes is to refer the dispute to the family head or an elder or elders of the community for a compromise solution based on 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."*

Justice Karibi-Whyte JSC (as he then was) of blessed memory while describing the nature of customary arbitration said inter alia:

> *"Customary arbitration is a dispute resolution mechanism 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'.*[20]

In the case of ***Agu v. Ikewibe***[21] the Nigerian Supreme Court held inter alia that customary law included customary arbitration and was saved as an 'existing law' by virtue of section 274 (3) (4) (b) of the 1999 Constitution (as amended). Therefore, we can say that customary arbitration system or process for settling disputes conducted in accordance with the customs and traditions of an indigenous people.

Furthermore, we can deduce from above that customary arbitration involves: voluntary submission of disputing parties, the absence of any written agreement to arbitration, the arbitral panel consisting usually of chiefs, elders and/or

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[14] Halbury's Law of England, 4th Edition, Vol. 2, p.256.

[15] C G Nwakoby 1995 'Enforcement of Customary Law Arbitration Awards in Nigeria Civil Litigation', International Legal Practitioner, vol. 20, p. 142;

[16] FAGBEMI: Scope and Relevance of Customary Arbitration as Mechanism for Settlement of Dispute in the 21st Century

[17] (1991) 3 Nigerian Weekly Law Report (NWLR) part 180 at 385

[18] (2003) 4 SC part II 65 at 90

[19] Elias Olawale Taslim (1956): The Nature of African Customary Law, England: Manchester University Press, p. 212

[20] A Oriola. 2000. 'Commercial Arbitration under Customary Law: What Prospect?' *MPJFIL* Vol. 4, No. 2: 272- 273.

[21] *Supra*

traditional rulers who have deep knowledge of the customary laws and traditions in order to resolve the disputes between the parties.

Decisions emanating from customary arbitration are enforceable by the courts. In the case of ***Asampong*** *v.* ***Kweku Amuaka***[22] Dean C.J. asserted that:

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

Ingredients of a Valid Customary Arbitration

Akanbi *et al*[23] opined that the legal status of customary arbitration as a dispute resolution mechanism had gone through a tortuous journey in the Nigerian courts–from its initial acceptance to its denial to a reconfirmation of its validity as an authentic dispute resolution mechanism under Nigerian jurisprudence.

The ingredients/attributes/requirements of customary arbitration are elements that must be present in a customary dispute resolution in order to make customary arbitral award valid, binding and enforceable.

The Nigerian courts have over the years not been consistent in stating the essential ingredients of a valid customary arbitration. Various decisions emanating from courts of superior records on these criteria have presented ambiguous, disconcerting and confusing situations. What is surprising is that members of the same panel in these cases have not agreed to a consensus on these specifications or ingredients. This has unfortunately affected the practice and evolution of customary arbitration in Nigeria in many several ways.

For example: In the case of ***Awonusi*** *v.* ***Awonusi***,[24] Okoro JCA (as he then was) after reviewing previous cases stated that:

Four ingredients usually accepted as constituting the essential characteristics of a binding arbitration are:

i. Voluntary submission of the dispute to the arbitration of the individual or body
ii. Agreement by the parties either expressly or by implication that the decision of the arbitrators will be accepted and binding
iii. That the arbitration was in accordance with the custom of the parties; and
iv. That the arbitrators reached a decision and published their award

The court did not consider the acceptance of the decision by the parties after the award has been made as part of the criteria. However, in ***Achor*** *v.* ***Adejoh***[25] the same Court of Appeal (Abuja judicial Division) per Aboki JCA (as he then was) held that a valid arbitration must consist of the following:

a. Submission of both parties to the arbitration
b. The arbitration must be recognized by both parties; and
c. The parties must agree to be bound by the decision.[26]

Similarly, in ***Okoye*** *v* ***Obiaso***[27] the Supreme Court stated that a party can prove the existence of customary arbitration by pleading and establishing the following:

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

[22] (2003) 4 SC part II 65 at 90
[23] M M Akanbi, L A Abdulrauf and A A Daibu. 2015. Customary Arbitration in Nigeria: A Review of Extant Judicial Parameters and the Need for Paradigm Shift Afe Babalola University: J. of Sust. Dev. Law & Policy, vol. 6: No. 1, 209
[24] (2007) All FWLR 1642 at 1662
[25] *Supra* at page 590.
[26] Customary Arbitration in Nigeria: A Review of Extant Judicial Parameters and the Need For Paradigm Shift: Afe Babalola University: Journal of Sustainable Development Law & Policy Vol. 6: 1: 2015
[27] 2010) 8 NWLR Part 1195 page 145 at 171.

In ***Egbesimba v Onuzuike***[28], the justices of the Supreme Court started the ingredients which must be present to give customary arbitration validity. Ayoola JSC (as he then was) declared that:

> *"The four ingredients usually accepted as constituting the essential characteristics of a binding arbitration are:*
> 1. *Voluntary submission of the dispute to the arbitration of the individual or body*
> 2. *Agreement by the parties either expressly or by implication that the decision of the arbitrators will be accepted and binding*
> 3. *That the arbitration was in accordance with the custom of the parties*
> 4. *That the arbitrators reached a decision and published their award."*

His Lordship Ogundare JSC (as he then was)[29] aligned himself as follows:

> *"For a customary arbitration to be valid, it must be shown:*
> - *That parties voluntarily submit their disputes to their elders or chiefs as the case may be for determination;*
> - *That there is an indication of the willingness of the parties to be bound by the decision of non-judicial body or freedom to reject the decision where not satisfied;*
> - *That neither of the parties has resiled from the decision so pronounced."*

In addition, Niki Tobi JSC (as he then was)[30] enumerated the following ingredients:

1) That there has been a voluntary submission of the subject-matter in dispute to an arbitration of one or more persons;
2) That it is agreed by the parties, either expressly or by implication, that the decision of the arbitrators will be accepted as final and binding;
3) That the said arbitration was in accordance with the action of the parties or their trade or business;
4) That the arbitrators reached a decision and published their award;
5) That the decision or award was accepted at the time it was made

The above cases capture clearly the inconsistency of the courts concerning the criteria for the validity of a customary arbitration. If we review the various judicial decisions right from before independence to the decisions of the Supreme Court in the 21st century shows the prevalence of seven criteria to customary arbitration. These criteria are:

1. Acceptance of the award by the parties;
2. Voluntary submission by the parties to arbitration,
3. Submission to bodies or persons recognized as having judicial authority under the custom of the parties,
4. Agreement by the parties beforehand to be bound by the decision of the arbitral tribunal,
5. Conduct of the arbitral proceedings in accordance with the custom of the parties;
6. Non-withdrawal of any party before publication of the award by the arbitral tribunal and,
7. Publication of the award.

From the above, it is obvious that the appellate courts are at war as to the precise ingredients that would constitute a valid customary arbitration.

The million dollar question is: must all these criteria be present at a particular time before a customary arbitration award is upheld as valid by the court? In other words, do these criteria operate concurrently or alternatively? Since the superior courts have not agreed on a consensus concerning the ingredients, it is a rebuttable assumption that these criteria do not operate simultaneously.

However, it is submitted that all the criteria laid down in a particular decision must all exist, for that award to be upheld. This means that the criteria laid down in a particular decision must all exist concurrently.[31] In ***Duruaku Eke & Ors*** *v.*

[28] (2002) 15 NWLR [Pt. 791] p. 466
[29] *Ibid*
[30] *Ibid*
[31] *Supra*

Udeozor Okwaranyiai & Ors,[32] the Supreme Court per Uwaifo JSC (as he then was), after laying down the judicial parameters went ahead to state:

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

The use of the word "must" in most of the decisions laying down these criteria is a vindication of the above position.[33] This lack of consensus has caused much disruption to the smooth operation and practice of customary arbitration as a suitable dispute resolution mechanism in Nigeria especially at the local level which will aid in decongesting the courts of disputes that otherwise would have been settled by customary ADR.

We will now discuss these ingredients in detail.

i. Prior Agreement by Parties to Accept the Arbitral Award

Before the customary arbitration proceeding is begun, the parties must either expressly or by implication agree that the decision of the arbitrators will be accepted and binding on them. This criterion is very fundamental in order for the arbitral award to be enforced by the court. When the court in the course of its findings discovered that the parties have earlier agreed to be bound by the outcome of the proceedings, neither of them will be allowed to resile from it. It can be argued that if the parties will not accept the decision of the customary arbitrators, then there is no need for the entire proceedings to even begin, as it will be a waste of time and intellectual resources. The entire proceeding will be a joke and parties will have no faith in the customary justice system will has been in establishment before the coming of the English arbitral system. This criteria and voluntary submission of parties are indelibly connected or intertwined.

ii. Voluntary Submission of Dispute By Parties

The voluntariness of all parties to settle dispute is said to be the bedrock and cornerstone of arbitration itself in all jurisdictions and legal systems. Regardless, most authors like Akanbi have opined that while this might be true for the western type arbitration it is doubtful if the same can be said for customary arbitration as customary arbitration is not founded on the basis of contract or commerce but rather it evolved as a social device for the maintenance of a stable and harmonious society.[34]

The Black's Law Dictionary[35] defined the word "voluntary", as something "done by design or intention. Online resources on the Google search engine defined voluntary as: an adjective that describes something you do because you want to without being influenced or forced into it.[36] It is an action done without compulsion or obligation or with intention.[37] It implies freedom and spontaneity of choice or action without external compulsion.[38] We can therefore imply that voluntary submission is when a party enter into the arbitration process and agreement based on their own free will and volition without any external influence or compulsion whatsoever.

The position of voluntary submission under customary arbitration is a bit dicey and that is why some scholars argue that customary arbitration has more of the features of litigation than arbitration properly so called. A typical customary arbitral process in most Nigerian societies starts with a complaint by an aggrieved party to the appropriate authority after which the other party is summoned or invited.[39] Of course, this raises the question: how is such a submission voluntary if it was done by means of a summons?

If there is evidence that any of the parties was coerced to submit to arbitration or even refused to so submit, the entire proceedings would be voided at the instance of such an aggrieved party. In the case of ***Raphael v. Ezi***,[40] the court held that since evidence which was led showed that the plaintiff/respondent had informed the Ogieneni of Uzairue that he

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[32] (2001) LPELR 1074

[33] See *Agala v. Okusin* (2010) 10 NWLR (Pt 1202) 412 at 448 where Ogbuagu JSC used the word "must" for each of the criterion.

[34] Akanbi M M Domestic Commercial Arbitration in Nigeria: Problems and Challenges (Lambert Academic Publishing: Germany, 2012) 151.

[35] (8th Edition) 1605

[36] https://www.vocabulary.com/dictionary/voluntary

[37] https://www.dictionary.com/browse/voluntary

[38] https://www.merriam-webster.com/dictionary/voluntary

[39] Emiola A, The Principles of African Customary Law (Emiola Pub, Nigeria 1997) pp. 37, 38.

[40] (2015) 12 NWLR (pt.1472) 39 at 60-61 paras H-B

would not submit to an arbitration presided over by the traditional ruler, the entire arbitral proceedings carried out without such voluntary submission by one of the parties was void and its outcome cannot therefore debar the plaintiff/respondent from reinstituting the matter in the regular court. However, where parties voluntarily submit their dispute to customary arbitration, they have elected to be bound by their decision.

iii. Submission to Recognized Customary Judicial Authorities

These customary arbitrator(s) must be recognised person(s) under the customary law of the parties involved in the dispute and they must be capable of settling disputes by arbitration. Such persons are usually the family heads, chiefs and elders of the said community who by virtue of their positions are assumed to be knowledgeable in their customs in order to perform judicial functions and settle the disputes that arises between the members of the community.

This requirement was brought to limelight in the case of ***Inyang v. Essien***.[41] For a customary arbitral award to be upheld by the court, the tribunal must be a body of persons having judicial authority. The question then is what group of body could be said to have such "judicial authority"? This requirement seems to be very vague and open to various interpretations or misinterpretations and this could be the reason why it is has not been contained in many of the recent decisions on the ingredients of customary arbitration. Despite this ambiguity, the courts in some other cases have continued to pronounce that submission to elders or chiefs is a requirement for the validity of customary arbitration. In the case of *Folic v. Larbi*[42], the arbitration was not conducted by an elder, chief or members of the indigenous society in the traditional judicial process but by a judge, the award was consequently rejected as customary arbitration.

It recommended that this requirement be upheld by the courts as it will cause the parties in dispute to have more faith in the proceedings especially if it being administered by elders and chiefs that are respected in the community and know the customs and traditions that govern the local populace.

iv. Customary Proceedings done in accordance with the Customs of the Parties

It will be an aberration for a customary proceeding to reference customs or traditions that are not known or practiced in locality. The customary arbitration proceeding must of course be in accordance with the customs and tradition of the particular society in question. Any attempt to import any foreign custom not known or accepted in that community will be fatal to the practice of customary arbitration in Nigeria. The court of law frowns at any adjudication that was based on extraneous customs that is not applicable to the parties in dispute.

v. Decision Making and Publication of the Arbitral Award

Moreover, it is further required that the customary arbitrators reach a definite decision on the dispute between the parties and thereafter publish their award.[43] Where no decision was reached and the award published after the hearing and determination of the dispute, it cannot be said that the customary arbitration dispute proceeding has been concluded satisfactorily.

When we talk about the publication of an award as one of ingredients for the validity of a customary arbitration award, two things are brought to the surface: the first is that the award must be declared publicly. However, this is antithetical to the spirit of customary arbitration as one of the main reasons parties resort to arbitration for the settlement of their disputes is to ensure privacy and confidentiality. Indeed, confidentiality has been identified as one of the major potentials of an ADR process. The number 2 thing that surfaces is that the award must be in a written form. This condition seems impracticable especially because of the largely unwritten and unsophisticated nature of customary law. The requirement of publication of customary arbitral award means the act of conveying an arbitration award to the parties.[44]

vi. Acceptance of Award by Parties

Acceptance of the award at the time it was made indicates that none of the parties must have withdrawn from the arbitration proceedings before the award was made. Justice Akpata JSC (as he then was), stated that it must also be shown that the parties accepted, either expressly or impliedly, the decision or award of the customary arbitrators as soon as they made the award.[45] Therefore, a party is free to reject an arbitral award he finds unfavourable by this parameter. This criterion appears to be the most controversial and unsettled among all the criteria. Many authors are of the view,

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[41] (1977) NSCC p. 464.

[42] (1930) I WACA I

[43] *Okoye v. Obiaso* (2010) 186 LRCN 181.

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

[45] *Ohiaeri v. Akabueze* (1992) 2 NWLR (pt.221) 1.

that the requirement that parties must accept the award or decision of the arbitrators, before it becomes binding, should be expunged. This requirement was introduced in the case of ***Agu v. Ikewibe***[46] by Justice Elias JSC (as he then was):

> *"...Referring a dispute to the family head or an elder of the community for a compromise solution based upon subsequent acceptance by both parties of the suggested award, which becomes binding only after such signification of its acceptance and from which either party is free to resile at any stage of the proceedings up to that point."*

By the above decision, parties to arbitration have an unfettered right to reject an unfavourable award. The decision has generated heated controversy among jurists and scholars alike. Some opine that the decision is not in tandem with previous decisions on the subject matter, as allowing a party to freely resile out of a valid arbitral award for which he has previously agreed to be bound is contrary to good sense and equity.[47] The author Ezejiofor criticized the decision and submitted that this particular condition and the other conditions listed by the Supreme Court may not be consistent with customary practices of a particular community.[48]

In the case of ***Awonusi v Awonusi***,[49] a dispute relating to a family land, the appellants initiated customary arbitral proceedings before the Ewusi-in council, a traditional customary arbitrator where the dispute was heard and determined. The appellant as defendants at the lower court thereafter sort to resile by refusing to abide by the decision of the council. The respondent as plaintiff before the lower court instituted an action at the High Court. The High Court granted all his claims. The appellant subsequently appealed to the court of appeal. Dismissing the appeal, Fabiyi JCA (as he then was) held that:

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

It is also submitted that the courts are just attempting to lay down general parameters for the validity of customary arbitration and that will do no good to the practice of customary arbitration. The fact that parties may be allowed to resile in one community does not necessarily mean the parties could do so in another community. For instance, a party cannot back out of arbitration under Islamic law, which is largely adopted by communities in northern Nigeria.[50] This is may not be applicable in the eastern or western part of Nigeria.

I hereby align myself with the above authors and the court's reasoning; the courts should strike out or remove this liberty given to parties to customary arbitration to either accept or reject the outcome of the arbitration. Such a removal would make the customary arbitration more effective and at par with the English legal system kind of arbitration where parties commit themselves, well in advance of the arbitral decision, to be bound by the decision and are unable to resile from same, except by appealing to a higher court.[51]

It should be noted that, once the above conditions or requirements are satisfied, the decision reached or award made at a customary arbitration becomes binding on the parties thereto and same can be used as a defence of res judicata in a subsequent court action on the same or similar facts, subject matter and parties. In other words, once customary arbitration proceedings satisfies the above itemised requirements, its decision or award shall have binding effect and have the same authority as the judgment of a judicial body and thus create estoppel.[52]
In the case of ***Achor v. Adejoh***[53], Aboki, JCA stated:

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[46] *Supra*
[47] A L Okekeifere "The recent odyssey of customary law arbitration and conciliation in Nigeria's apex court" (2002) 4/1 Modern Practice Journal of Finance and Investment Law 113-117
[48] Ezejiofor, G "The Pre-requisites of customary arbitration" (1992-93) 16-18. Journal of Private and Property Law 1
[49] *Supra*
[50] Sahcht J, An Introduction to Islamic Law (Clarendon Paperbacks, Oxford 1996) 10.
[51] Oamen & Aigbokhan. Customary Law Arbitration In Nigeria: An Appraisal Of Contentious Legal Issues
[52] *Egesimba v. Onuzuruike* (2002) 15 NWLR (pt. 791) 466
[53] (2010) 6 NWLR (pt. 1191) 537 at 569 paras D-E.

> *"….Where parties agree to submit themselves to the arbitration of a traditional authority, they should be bound by whatever decision reached by the traditional authority. I am of the opinion that such decision will act as estoppels to future relitigation on the same matter by the same parties or their privies."*[54]

Conclusion and Recommendation

The ingredients of customary arbitration are what differentiate it from the English system of arbitration. We see that despite the hard work and desperate efforts of the Nigerian Courts to make customary arbitration effective, that customary arbitration is still in need of an evolution. The Courts needs to understand that customs and traditions differ from state to state, region to region, language to language, ethnic group to ethnic group, local government to local government, village to village and even kindred to kindred. Therefore, a holistic approach to solve the issues inherent in customary arbitration might prove to be a herculean task. Instead the court should use peculiar systems and approaches that will resonate with the local people who are more open to their local way of resolving disputes than the regular courts of law. I recommend that the Customary Courts in Nigeria should be properly funded and the panel members properly educated and trained on the customs of the people; and to synergise with traditional rulers in order to get more cooperation from the people. The judges of the regular should be allowed to refer cases they think have elements of customary law disputes to the customary courts or traditional judicial authority. The superior courts of record need to once and for all give a decision on which of the ingredients of customary arbitration must be present in a customary arbitration proceeding for its arbitral award to be valid and upheld. The President of the Customary Courts of Appeal of the states need to update the rules of court to allow traditional rulers and family heads to have a seat at the adjudication table when matters are filed in the customary courts. This will aid with the speedy dispensation of the case as these elders are learned in the area of custom and traditional law.

[54] See also *Nka & Ors. v. Onwu & Ors* (1996) 40/41, LRCN 1303 at 1322