

PAVING THE UNEVEN LANDSCAPE OF THE JURISPRUDENCE OF BINDING CUSTOMARY ARBITRATION IN NIGERIA

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Abstract

It is several decades now since the law on customary arbitration has remained seemingly unsettled on the question of when a customary settlement of dispute becomes binding. Two parallel streams of decisions, each reaching up to the Supreme Court, have remained without the apex court making it clear as to which stream represents the law. Although several writers have commented on the issue, the point seemed to be missed that one of the roots of the confusion is the misuse of law language. The other is that even the Supreme Court has not adverted its mind to clear the confusion with an express overrule of one stream. This paper, adopting doctrinal research methodology, wades into the issue and concludes that the confusion would not have persisted if the courts properly applied the relevant tools of legal language and the well-settled principles of evidence law. This paper recommended that proper use of legal language and application of the principles and rules of law in customary dispute settlement sufficiently brings clarity on when customary settlements amount to customary arbitration and thereby become binding. It also applied the principles for prioritizing conflicting judgments of the Supreme Court to posit that the Supreme Court has settled for one of the streams. This paper further recommended statutory reform of the law of customary arbitration to further entrench clarity of the law as to when a customary settlement becomes binding.

Keywords: Customary Arbitration, Jurisprudence, Judicial Precedent.

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1. INTRODUCTION

Arbitration constitutes an important feature of the legal system of a state. Its value and in some measures, advantage over acrimonious court litigation, especially under the adversarial dispute settlement model, is unquestionable. Arbitration is a fast-track method, founded on the freedom of the parties to a dispute to choose between themselves, the mode of the resolution of their dispute.

A species of arbitration under the Nigerian legal system is customary arbitration. Customary arbitration is speedy and cost effective, compared with the statutory variant. Under various Nigerian customary laws, people frequently resort to it, till date, to settle disputes before approaching the courts. Nigerian courts recognize that customary dispute settlement could be binding under certain circumstances.

An excursion into the decisions of the courts show that there are confusing pronouncements by the courts- including the Supreme Court – as to when a customary arbitral decision becomes binding. The decisions demonstrate lack of clarity of principles and improper legalese relating to customary arbitration. These are the root cause of the confusing landscape of customary law arbitration in Nigeria.

A lot of ink has been spilled on this legal problem but the confusion still lingers because the Supreme Court has not clearly resolved it. This uncertainty has an obvious negative effect on the Nigerian legal system. Existing literature has not adequately considered some legal principles and tools of jurisprudence that would assist in making the law clear.

This work adopted doctrinal research approach and traversed five sections, spanning this introduction; an examination of the concept of customary arbitration; theoretical justification and foundations for arbitration; highlight of the confusion in the decisions of the courts; suggested resolution of the problem by applying the principles relating to customary arbitration in Nigeria, and a section of conclusion and recommendations, to show the way to resolve the confusing law on binding customary arbitration in Nigeria.

2. CUSTOMARY ARBITRATION

The words arbitration and customary are thrown up for consideration in this paper. A clarification of the meaning to assign to the usage will help to resolve the confusion that has arisen on binding customary law arbitration in Nigeria.

An arbitration is the method of settling disputes between persons whereby the disputants agree on how the dispute settler should be appointed or appoint the dispute settler or submit to the dispute settler and thereafter present their dispute to the settler who hears the dispute and makes a binding determination or decision on the dispute. It has also been defined as “a process whereby the parties to a dispute agree to have it settled by an independent third party and to be bound by the decision he makes.”¹ The World Intellectual Property Organization defined arbitration as “a procedure in which a dispute is submitted, by agreement of the parties, to one or more arbitrators who make a binding decision on the dispute.”² It is “Generally, a private form of final and binding dispute resolution by an appointed arbitral tribunal

¹ SO Akindipe and Abiola Sanni, ‘Facts Finding and Dispute Resolution’ in Abiola Sanni(ed), *Introduction to Legal Method* (Ile-Ife: Obafemi Awolowo University Press Ltd 2006) 155

² WIPO< <http://www.wipo.int/amc/en/arbitration/wha-is-arb.html>>accessed 7 April, 2026

acting in a quasi-judicial manner.”³ “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.”⁴ It is a contract-based form of binding dispute resolution.”⁵

Arbitration may be domestic or international, *ad hoc* or institutional and so on. The sources of the law in Nigeria are the received common law of England and principles of equity; statutory Law and customary Law. It is differentiated from other dispute resolution methods such as mediation, conciliation and litigation. The distinguishing feature of arbitration is that it is binding in contradistinction with other forms of Alternative Dispute Resolution (ADR) methods. Here however is where the pronouncement of courts in Nigeria has brought in one of the confusions by stating that customary arbitration may not be binding.

Customary arbitration is a feature of the different customary practices of African peoples in settling disputes that arise between persons or communities of different kinds. In the context of customary ‘arbitration,’ according to the usage in Nigerian jurisprudence, there may or may not be an agreement to be bound by the decision of the arbitrator. This problem of language use is one of the focuses of this paper.

Nigerian societies have always had their systems of customary arbitration before the incursion of western and Arab cum Christian and

³ LexisNexis, *Arbitration*<<https://www.lexisnexis.co.uk/legal/glossary/arbitration>>accessed 7 April, 2026

⁴ Bryan Garner (ed.), *Black’s Law Dictionary* (9th edn., St. Paul: West Publishing company 2009) 119

⁵ Stewart Law com<stewartlawslaw.com/expertise/international-arbitration/arbitration-process/#:~:text=Arbitration%20>accessed 7 April 2026

Islamic culture and jurisprudence. The general⁶ picture of customary arbitration is that when a dispute arises between two persons or more or even between a family or kindred or community and another family or kindred or community, disputing parties often – may be even predominantly – refer the dispute to their elders or kinsmen or other third party to assist them to settle the dispute. The disputing parties would be invited by the arbitrator(s) to appear before the arbitrator(s) with their witnesses. After hearing the parties and their witnesses, the arbitrator(s) resolve(s) the dispute by publishing a decision orally or in writing.⁷ Customary arbitration may also be entirely or partially based on oath taking⁸ or oracle enquiry or some other customary way of taking a decision. The opinion to the contrary that arbitration cannot involve a third party to turn in a verdict founded on oath taking⁹ is not the position of the law¹⁰ provided that the parties agree to have the arbitrator refer the matter to the third party. The record and decision in an arbitration could be oral¹¹ and in recent times has been in writing.

While statutory provisions require arbitral awards to be in writing and be binding, there is confusion as to if and when customary arbitral awards could be said to be binding. This is the issue that this paper

⁶ There are different systems of customary law in Nigeria. Thus, before customs are applied, they are required to be proved or judicially noticed. See s 16 Evidence Act 2011(Act No 18 of 2011) amended by Evidence (Amendment) Act 2023. It is thus simplistic to pontificate to uphold a common rule of customary law applicable everywhere in Nigeria.

⁷ Writing became possible when western education entered. A good number of decisions are presently rendered in writing but oral decisions are still tenable.

⁸ *Onyenge v Ebere* (2004) 13 NWLR (Pt. 889) 20(SC); (2004) All FWLR (Pt. 219) 981(SC); *Uzoewulu v Ezeaka* (2001) FWLR (Pt. 48) 932 (CA)

⁹ *Achiakpa v Nduka* (2001) 14 NWLR (Pt. 734) 623(SC)

¹⁰ See A I Chukwuemerie, 'The Recent Odyssey of Customary Law Arbitration and Conciliation in Nigeria's Apex Courts' in *Studies and Materials in International Commercial Arbitration* (Law House Books, Port Harcourt, 2002) 210,212; *Onyenge* (n 8)

¹¹ See *Nruamah v Ebuzuome* (2013) NWLR (Pt. 1372) 474(SC) [499B-D]

seeks to tackle. Alongside, it should be borne in mind that not all ADR at customary law amount to arbitration.¹² In situations where the ADR is mediation or conciliation, a person making a resolution does not act judicially.¹³

No doubt customary arbitration arguably packs all the advantages of dispute settlements by statutory arbitration and even goes beyond. It is not however without its own defects, but that is not in the scope of this paper. It is, unlike statutory arbitration, cheap. It is a means of speedy dispensation of justice in an adversarial legal and judicial system dogged by justice delays,¹⁴ acrimonious judicial settlement, uncaring technical rules on evidence and procedure and judicial resolutions shorn of restoration of good relationship between disputing parties. Importantly, decisions in customary arbitration sound in native jurisprudence that is not strange to the disputing parties, rather than the esoteric *legalese* of the adopted English judicial system. Customary arbitral decisions may be used as a shield,¹⁵ not a sword, since its efficacy lies in applying it as estoppel.¹⁶

3. THEORETICAL FOUNDATIONS OF CUSTOMARY ARBITRATION

Customary arbitration has some obvious theoretical links and jurisprudential justifications some of which may be considered as follows:

¹² AI Chukwueme (n 10) 211

¹³ See *Agu v Ikewibe* (1991) 3 NWL (Pt. 180) 385(CA) [419 D] (Nnaemeka Agu, JCA) where he referred to arbitrators exercising non judicial powers and recommended the exercise as mere “settlement.” See also *Inyang v Essien* (1957) 7 FSC 39(FSC); *Assampong v Amoaku* (1932) 1 WACA 192(WACA)

¹⁴ *Nwuka v Nwaeche* (1993) 5 NWLR (Pt. 293) 295(CA) [309H]-[310A] (Egba, JCA)

¹⁵ *Yaga v Olubode* (1974) All NLR (Pt. 2) 118(SC)

¹⁶ *Nruamah* (n 11)

3.1 Natural Law

Natural law is hinged on the law of nature, applicable to all peoples wherever they may be found on the globe. The Greeks propounded it in known history. Thinkers from elsewhere also advanced their thought on natural law and developed the idea. According, it has been identified to be in accord with the nature of man and right reason¹⁷ upheld by all men¹⁸ by reason of their humanity; and in accord with what is fair, just and right.

If a dispute arises, it is certainly just, fair, right and good that the person(s) chosen by the disputing parties to decide on the dispute, in preference to, another method of resolution determined by positive law, be allowed to make an enforceable decision. Natural law strives against the primacy of legislation. By extension, the rules of customary law arbitration have valid natural law credentials. Customary arbitration is a mirror of the freedom of the individual to enter into contractual agreement to settle his private dispute in a way acceptable to him. This is reflected in the Universal Declaration of Human Rights, 1948¹⁹ which states that “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood”²⁰ The rights to freedom of conscience and to own property also reflect the freedom to contract and to decide to take one’s dispute to arbitration, albeit remotely.

¹⁷ Aristotle; *Nichomachean Ethics* (Book VI, 114b) in O Okpara, ‘History and Concept of Natural Law (I)’ in O Okpara (Ed), *Human Rights Law and Practice in Nigeria Vol. 1* (Enugu: Chenglo Ltd 2005) 7

¹⁸ *Ibid*, 4

¹⁹ UNGA Res 217A(III) of 10 Dec 1948

²⁰ Art. 2

3.2 Sociological Jurisprudence

Customary law has been said to be a mirror of acceptable usage²¹ prevalent in a society. Invariably, customary arbitration grew from societal practice. Society grown rules of law are hardly harsh or strange unlike positive law which may or may not be acceptable to the people. Erlich identifies the “living law” as the law which is effective among the people.²² Customary arbitration is thus acceptable and suitable to Nigerian societies, hinging on the wisdom of sociological jurisprudence. Some had thought that without formal legal codes, courts, policemen and prisons, customs such as are associated with traditional African societies could not crystallize into law.²³ This view is a discredit of African customary arbitration. But that is far from the reality. Customary arbitrators act judicially²⁴ though informally. African traditional societies had their methods of customary policing²⁵ which ensured that arbitral decisions were enforced.

The principles of customary arbitration could still be polished, in accordance with the rules of natural justice, to improve on it. This may be achieved through social adaptation and change of rules by the people or legislation or even judicial interpretation.

4. THE QUESTION OF BINDING CUSTOMARY ARBITRATION AS CONCEIVED IN NIGERIAN COURTS

Three streams of judicial decisions on high authority exist in Nigeria on whether and when customary arbitration is binding. One has been

²¹ See *Onwonyin v Omotosho* ((1961) All NLR 304(FSC) [309] (Bairamian, F.J)

²² Ehrlich, *Fundamental Principles of the Sociology of Law* (Trans. W. L Moll, 1937) in MDA Freeman, *Lloyd's Introduction to Jurisprudence* (7th Ed., London: Sweet and Maxwell 2001) 147

²³ MDA Freeman (n 22) 910

²⁴ See *Assampong v Amoaku* (1932) 1 WACA 192(WACA)

²⁵ E C Onyeozili, ‘Obstacles to Effective Policing in Nigeria’ [2025] 1 African Journal of Criminology and Justice Studies 32, 33

shut down, nevertheless it is worthy of consideration as a position that may be valid in a certain situation.

4.1 The Decision that Customary Law Arbitration is not Binding

Okpuwuru v Okpokam,²⁶ emanated from a dispute over land in Cross River State before the High Court of Ikom. The majority of the Justices that sat in the Court of Appeal held that the concept of customary arbitration was not part of jurisprudence “in the eastern part of the country.”

4.2 The Decisions that Customary Law Arbitration is not Binding if any of the Parties Refutes the Award

The second stream is depicted in the decisions of the courts in *Eke v Okwaranya*²⁷ and other cases.²⁸ The outlined principles for a valid customary arbitration are:

- i. Voluntary submission of the matter in dispute to an arbitration of one or more persons.
- ii. Express or implied agreement by the parties that the decision of the arbitrator(s) would be accepted as final and binding.
- iii. The existence of an arbitration in accordance with the custom of the parties or their trade or business.
- iv. The arbitrator(s) reached a decision and published their award.
- v. The decision or award was accepted at the time it was made.

By this school of judicial thought, apart from the proof that parties agreed to be bound by the arbitral decision, they must also have accepted the decision after it was rendered, before a customary

²⁶ (1988) 4 NWLR (Pt. 90) 554(CA)

²⁷ (2001) FWRL (Pt. 51) 1974(SC) [1998 E-H]

²⁸ *Ehoche v Ijegwa* (2003) 7 NWLR (Pt. 818) 139(CA); *Agu* (n 13); *Ohiaeri v Akabeze* (1992) 2 NWLR (Pt. 221) 1(SC); *Odonigi v Oyeleke* (2001) FWLR (Pt. 42) 172(SC); *Okereke v Nwankwo* (2003) 9 NWLR (Pt. 826) 592(SC); *Okoye v Obiaso* (2010) 8 NWLR (1195) 145(SC), etc.

arbitration can be binding and enforced. Accordingly, if the parties or a party, after hearing the award rejects from it, the arbitration will not be binding. This point was emphasized by the Supreme Court in *Eke v Okwaranya*,²⁹ *per* Uwaifo, JSC adopting the *dictum* of Karibi-Whyte, JSC in *Agu v Ikewibe*:³⁰

*It is well accepted that one of the many African customary modes of settling disputes is to refer the dispute the family held 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*³¹

4.3 The Decisions that Customary Law Arbitration is Binding Once an Award is Made

The second stream of judicial thought is reflected in the decision in *Nzeoma v Ugocha*³² and other cases.³³ The conditions stated for a valid and binding customary arbitration are as follows:

- i. Voluntary submission of the dispute by the disputing parties to an arbitrator.
- ii. Agreement of the parties to be bound by the decision of the arbitrator.
- iii. Decision of the arbitrator in accordance with the custom of the people or their trades or their business.
- iv. Publication of the decision and award of the arbitrator³⁴

²⁹ *Eke* (n 27)

³⁰ *Agu* (n 13)

³¹ *Ibid* [1999 E-F]

³² (2001) FWLR (Pt. 48) 1299(CA)

³³ *Ojibah v Ojibah* (1991) 5 NWLR (Pt. 191) 296(SC); *Osuigwe v Nwihim* (1995) 3 NWLR (Pt. 386) 752(CA); *Awosile v Sotunbo* (1992) 5 NWLR (Pt. 243) 514(SC); *Igwego v Ezeugo* (1992) 6 NWLR (Pt. 249) 561(SC); *Ume v Okoronkwo* (1996) 10 NWLR (Pt. 477) 133(SC); *Ike v Ugboaja* (1993) 6 NWLR (Pt. 301) 539(SC); *Oparaji v Ohanu* (1999) 9 NWLR (Pt. 618) 290(SC); Onyenge (n 8); *Agala v Okusin* 2010 LPELR-221 (SC) *etc.*

The emphasis in the third stream of decisions is that after the disputing parties have been granted an award or decision, they can no longer resile from it. This was stated by the Supreme Court in *Amadi v Wokem*³⁵ thus:

The general rule is that parties to customary arbitration choose their own arbitrator to be the judge in the dispute between them, they cannot, when it is good on its face, object to the decision reached either upon the law or on the facts.

The Supreme Court in *Ume v Okoronkwo*³⁶ further made a statement in the case worthy of critical consideration in relation to proof of customary arbitration. Ogwegbu, JSC said:

One of the many ways of settling disputes under the customary law is to refer the dispute to a family head ... These is as a rule an agreement that the decision of the arbitrators would be accepted as final and binding.

The court here seems to be creating a rule of presumption in favor of binding arbitration where the question arises as to whether or not the parties agreed to be bound by the decision of the arbitrator.

5. RESOLVING THE CONFLICT BETWEEN LIBERAL AND CONSERVATIVE JURISPRUDENCE ON WHEN CUSTOMARY ARBITRATION IS BINDING

It is important to resolve the confusion as to when a customary arbitration becomes binding. The confusion creates a difficulty for the

³⁴ Eke (n. 27) 1306

³⁵ (2026) 4NWLR (Pt. 2034) 235(SC) [261 GH]. See also *Ume* (n 33) [144C-D] (Ogwuegbu, JSC) “...the 2nd only resiled after the arbitrators had made their awards. It was not open to him to do so at that stage.”

³⁶ *Umeh* (n 33); See also *Amadi* (n 35)[261G-H]

courts and lawyers on how to respond to the issue. Taking any convenient view in a particular litigation, ignoring the question and sitting on the fence of the controversy³⁷ are some of the results of the uncertainty. Where the facts are reasonably clear that a customary arbitration exists on a dispute, litigants will save judicial time as other issues bothering on the dispute may be given lesser prominence while litigation relating to setting aside customary arbitration will become more prominent. The paucity of cases on setting aside customary arbitration in Nigeria is a pointer that binding customary arbitration has not gained much ascent in Nigeria. This is indicative that customary arbitration is hardly treated as stand-alone final decision at first instance in a dispute. This robs the judicial system of the value of arbitral method of resolution of disputes under customary jurisprudence.

From the point of view of enhancing the status of customary arbitration in Nigeria, the conservative view is the one that allows a party to the dispute to resile from an arbitral decision. The liberal view is the stream of decisions which disallow parties to an arbitration to resile from an arbitral decision which they voluntarily submitted to with an express or tacit consent to abide by the award of the arbitrator. The confusion as to when a customary arbitration is binding could be resolved by sticking to the proper tools of legal analysis and to the basic principles for applying the law.

5.1 The Doctrine of Judicial Precedent

Application of the doctrine of judicial precedent does not point to a settled position as to which of the streams-liberal or conservative- is upheld by the courts. Nwauche is of the view that the liberal stream

³⁷ See C J Ubanyionwu, *Origin and Nature of Customary and Common Law Arbitrations*<<http://www.journals.ezenwaohaetoc.Org/index.php/AAJLHR/article/viewFile/2722/2847>, 39, 40>accessed 7 April, 2026

appears to depict the law in Nigeria.³⁸ It is at the Supreme Court that the position of the law ought to be settled. A judgment of the Supreme Court is binding on it and will only be departed from in exceptional circumstances,³⁹ including when the previous decision was made *per incuriam*⁴⁰ or when it will be unjust not to do so.⁴¹ In applying judicial precedent, only decisions which could be identified as *ratio decidendi* can be relied upon, although it has been held that Supreme Court statements that are *obiter* may be authoritative under certain circumstances.⁴²

The Supreme Court decisions on the two streams are parallel and this does not make good room for the issue to be resolved under the doctrine of judicial precedent. In *Egesimba v Onuzurike*,⁴³ various Justices of the Supreme Court cited either the conservative or liberal condition for a valid arbitration without meaning to expressly overrule the other. A similar thing happened in *Agu v Ikewibe*⁴⁴ in which Karibi-Whyte, JSC who read the lead judgment stated the conservative principle while Nnameka-Agu, JSC stated the liberal principle. It appears that in none of the decisions did the Supreme Court expressly overrule itself. In such a situation, the courts under the hierarchy would follow the last one.⁴⁵ The problem however is that where decisions of the Supreme Court are parallel, without resolving that the

³⁸ E S Nwauche, 'State Response to Outcomes of Traditional Justice Resolution Mechanisms in Commonwealth Africa: Customary Arbitration in Nigeria and Ghana,' [2022] 4 Journal of Commonwealth Law 43, 73

³⁹ *SCC(Nig) Ltd v Joseph* (2026) 1 NWLR (Pt. 2025) 227(SC)

⁴⁰ *Johnson v Lawanson* (1971) 7 NSCC 82(SC)

⁴¹ *McLean v Inlaks Ltd* (1980) 8-11 SC 1(SC)

⁴² *Otun v Otun* (2004) 14 NWLR (Pt.893) 381(SC)

⁴³ (2002) 15 NWLR (Pt. 791) 466(SC)

⁴⁴ *Agu* (n 13)

⁴⁵ *Osakue v Federal College of Educational (Technical) Asaba* (2002) 10 NWLR (Pt 1201) 1(SC)

other version is overruled, it is doubtful whether the later one is deemed to have overruled the previous conflicting decision.

Nevertheless, the last decision of the Supreme Court on the issue was, as it appears, in *Amadi v Wokem*,⁴⁶ which was delivered on 31 January, 2025; in which the court held that parties to an arbitration to which they submitted and agreed to be bound cannot resile from an award after the award is published. However, the statement of the court made by Abiru, JSC and to which the other justices agreed was *obiter* since the issue did not directly arise in the case, on the facts. The facts show that both parties presented different versions of customary arbitration awards which they seek to be upheld. The trial court and the Court of Appeal preferred to treat the arbitral decision presented by the respondents as authentic. Issues were not raised as to whether or not any party resiled from the award.

If *Amadi v Wokem*⁴⁷ is overlooked on the basis of being *obiter*, we may then zero in on *Okoye v Obiano*⁴⁸ decided in line with the conservative stream on 5 March, 2010 and *Agala v Okusin*⁴⁹ decided in line with the liberal stream on 23 April, 2010. The latter would then be the prevailing position.⁵⁰ Nevertheless, in none of these cases were the conflict of principles pointedly addressed.

5.2 Avoidance of the Misuse of Terms

Legal language ought to be accorded a reasonable measure of uniform universal usage such that the same words ought to mean the same thing wherever we use them on the globe. It is a reality that the same

⁴⁶ *Amadi* (n 35)

⁴⁷ *ibid*

⁴⁸ *Okoye* (n 28)

⁴⁹ *Agala* (n 33)

⁵⁰ In *Katagum v Umar* (2026) 8 NWLR (Pt. 2046) 457(SC), it was held that where there are conflicting decisions of the Supreme Court, the last in time will prevail

word may not mean the same thing in all jurisdictions, particularly because the doctrine of sovereignty upholds the independence of domestic legislatures and their power to define and redefine words. However, in the context of customary arbitration, no issue arises to justify the misuse of the word “arbitration” by Nigerian courts. One of the errors that has contributed to the confusion on when customary arbitration is binding is reference to conciliation and mediation as arbitration. There is customary law mediation and conciliation as different from customary arbitration. The single identifying feature of arbitration, customary or otherwise, is that it is binding on the basis that parties to it enter into it with the tacit or express agreement that they will be bound by the award. Any form of alternative dispute resolution that is not customarily or legally binding, is not and should not be referred to as an arbitration. Unfortunately, the courts and even researchers who comment on this problem seem to have failed to discern this problem. However, Nnaemeka-Agu, JSC adverted his mind to this in *Agu v Ikewibe*,⁵¹ when he said that where there is a right to resile, the arbitration should be treated as a “settlement.” Much more, there is no arbitration where the right to resile is possible as well as permissible under the law. The courts have also distinguished between arbitration by arbitrators exercising judicial powers and arbitrators exercising non judicial powers, as a means of denoting binding and non-binding customary arbitration.⁵² While this distinction is proper, a non-judicial arbitration could be a mediation or conciliation or any other method of settling disputes but not an arbitration, properly so called.

⁵¹ *Agu* (n 13) 418 B-C. See also Nnaemeka-Agu, JSC in *Awosile* (n 33) [532 B]

⁵² See *Assampong* (n 13); *Inyang* (n 13)

5.3 Sticking to the Principles of Proof and Validity of Customary Law Rules

Customary arbitration is an incident of customary law. Its rules are not founded on any statutory provision for their formulation. They grow from the people. The rules of customary law may be attenuated under the provisions of statute to validate its application by the courts.⁵³ The validity or otherwise of a rule of customary arbitration is founded on whether or not there is proof or judicial notice of it⁵⁴ and on passing the repugnance and public policy and compatibility tests.⁵⁵ It should not be asserted on the basis of “un-researched” pronouncement.⁵⁶

Applying the rules; when an issue of validity of customary arbitration arises in court, the relevant questions to consider to approach the issue properly would be: Was there an arbitration? Was there proof or is there judicial notice of the rules under custom? Is the arbitral custom valid? Is the arbitral decision valid? A consideration of these questions may yield a result similar to any of the three streams of decisions earlier considered or maybe something quite different. In other words, it may yield a finding that customary arbitration is strange under the particular custom in view or that customary arbitration is binding and may, or on the other hand, may not, be resiled from, and so on.

The mistake of the court in *Okpuwuru v Okpokam*⁵⁷ was to make the unverified conclusion that customary arbitration is unknown in the “eastern part of the country.” A proper finding on the facts in evidence in a case before a court may be that customary arbitration is unknown under a particular system of customary law. Such a finding would be

⁵³ See Evidence Act 2011 (n 6) s. 18

⁵⁴ Evidence Act 2011(n 6) s 16

⁵⁵ See Evidence Act 2011(n 6) s. 18(3)

⁵⁶ See AI Chukwuemerie (n 10) 211

⁵⁷*Okpuwuru* (n 26)

unimpeachable. In that event, it would be untenable to criticize the court when such pronouncement is made in any court today on the basis of proof before the court or on the basis that there is no proof of the existence of customary arbitration under the particular system of customary law being considered by the court. For example, if what could be gathered from the evidence proves the existence of conciliation or mediation but not arbitration, the pronouncement similar in *Okpuwuru v Okpokam*⁵⁸ would be valid in respect of the particular system of customary law being considered.

Similarly, the finding of facts in consonance of the conditions listed in the second and third streams of judicial decisions should depend on proof or judicial notice. The evidence before a court may as well force a re-formulation of the conditions listed in the streams. In *Nruamah v Ebuzoeme*⁵⁹ the Supreme Court said, quoting Oputa, J, as he then was in *Akomah v Eke*.⁶⁰

Any party relying on arbitration under customary law should clearly plead and convincingly prove that those who sat over the dispute were, under the customary law alleged, competent to adjudicate over the class of cases-in other words that they constituted a judicial tribunal under the law

Thus, given that customary law differs from place to place in Nigeria, the adoption of a liberal or conservative approach ought to depend on the customary law proved or taken judicial notice of by the courts.⁶¹ Where, however, rules of customary law permit a party to resile after the decision is published, the application of the supervening principles of equity and good conscience ought to be applied to nullify such resiliation. The principles of equity were clearly and rightly applied in

⁵⁸ *ibid*

⁵⁹ *Nruamah* (n 11)

⁶⁰ (1966-178) OLR 1[11]

⁶¹ See Evidence Act 2011 (n 6) ss 16 & 18

*Oparaji v Ohanu*⁶² in which the Supreme Court held that where a pronouncement is made after parties went to an arbitration in which they agreed expressly or impliedly to be bound, it would be repugnant to good sense and equity to allow the losing party to reject or resile from the decision of the arbitrators. It was rightly earlier emphasized in *Kwasi v Larbi*⁶³ that an agreement to be bound will prevail even if a party later withdraws from proceedings. This is akin to the futility of a party refusing to appear in court to continue in the proceedings on sensing that the matter would go against him.

The conservative line of cases may have unduly ignored the advantages of a robust system of customary arbitration and its advantages of quick dispensation of justice; its simplicity; its low expense; first-instance dispute settlement and other advantages of upholding customary arbitration, once the parties had agreed to be bound by the decision of the arbitrator, expressly or impliedly. In *Ohiaeri v Akabeze*⁶⁴ the Supreme Court opined that prior knowledge of arbitrators, prejudice, being a judge in one's cause and various (selfish) interests are problems associated with customary arbitrations in close knit communities.⁶⁵ This conclusion appears very subjective and flimsy. These same problems could be associated with any tribunal or court including the Supreme Court. A party that senses that the arbitrators are biased or likely to be biased should opt out of the customary arbitration before the commencement or at any other permissible stage. Leveling accusations against customary law arbitrators as done by the Supreme Court in the case is improper. Mere learning of an adjudicator does not guarantee his fairness.

⁶² *Oparaji* (n 33) [389G]

⁶³ 13 WACA 7(WACA)

⁶⁴ *Ohiaeri* (n 13) [24B-C]

⁶⁵ This prejudice against customary arbitrators was adopted in *Eke* (n 28) [1999 A-C] (Uwaifo, JSC)

With clarity of the principles and application of the liberal approach, it would become glaring that a case can be won solely on the pleading and giving evidence of binding customary arbitration. Parties against whom binding customary arbitration is decided would need to apply to set aside the arbitral decision on relevant grounds.⁶⁶ Statutory provision could also be applied to improve on the Nigerian system of customary arbitration by legislating against resiling from arbitral decisions and awards after they are published. With the level of learning in the country, written arbitral proceedings should be made mandatory by legislation. Ghana's Alternative Dispute Resolution Act, 2010⁶⁷ is instructive in statutory intervention to streamline customary arbitration formalities.

A related issue that arose from the comment of the Supreme Court in *Ume v Okoronkwo*⁶⁸ is whether there is as a rule, an agreement to be bound in customary arbitration. This statement was adopted in *Amadi v Wokem*.⁶⁹ If the courts used the term “arbitration” properly, the statement would not raise any problem. An arbitration cannot exist if there is no agreement to be bound. But in a situation where other kinds of ADRs are also (wrongly) referred to as arbitration, the comments meant that there is a presumption that parties are presumed to be bound whenever parties go into them. The consequence is that if it is successfully disproved that there was no agreement to be bound, only then will a resolution be found to be non-arbitral.

Respectfully, there seems to be no basis to introduce such a presumption. Customary law rules ought to be proved or judicially

⁶⁶ See *Amadi* (n 35)

⁶⁷ Act no 798 of 2010

⁶⁸ *Umeh* (n 33)

⁶⁹ *Amadi* (n 35)

taken notice of. If in any particular case there is an agreement to be bound-which is tantamount to entering into an arbitration- it is a matter of evidence in accordance with section 16 of the Evidence Act, 2011, but not such as could be presumed.

6. CONCLUSION AND RECOMMENDATIONS

Customary arbitration is one of the means of resolving disputes in Nigerian communities under the different systems of customary law. Its advantage as a fast-track, cheap and homely means of settling disputes is not in doubt.

In conceiving customary arbitration in our courts, the courts have not clearly distinguished between customary arbitration and other ADR methods. This has created the confusion as to whether or not customary arbitration may be binding whereas in universal use of language, an arbitration is binding. The second confusion in Nigeria has to do with the failure of the Supreme Court to be specific on whether a party is, after agreeing to be bound by an arbitral decision, entitled to resile from it. This conflict has created the liberal stream and the conservative stream of decisions. On the basis of the application of the doctrine of judicial precedent and the legal principles for the validity of rules of customary law, customary arbitration cannot be resiled from.

It is suggested that the Supreme Court ought to use the next available opportunity to make the law clear by upholding the liberal stream of its decisions on the issue and expressly shut down the conservative stream. Like the situation in Ghana, the various legislatures may need to wade in with laws on the issue and other formalities for customary arbitration, although the courts could easily apply the available legal tools to clarify the law on when customary arbitration is binding.