

EFFECT OF CUSTOMARY ARBITRAL AWARDS ON SUBSTANTIVE LITIGATION: SETTING MATTERS STRAIGHT

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Introduction

An arbitration 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 jurisdiction¹. A person or persons to whom a reference to arbitrate is made is called an arbitrator or arbitrators, as the case may be. His or their decision is called an award². The legal effect of customary law arbitration proceeding and decisions was largely thought to be a settled feature of the Nigerian legal system. However, the decision of Uwaifo JCA (as he then was) in *Okpuruwu v Okpokam*³ has left lawyers wondering whether indeed this system of settling disputes does not run counter to Nigerian legal system.

The facts of *Okpuruwu v Okpokam* may be stated briefly. The respondents (as plaintiffs) sued appellants at the High Court claiming a declaration that they were entitled to the customary right of occupancy over the land in dispute which they call Ekpakhekpaha but which the appellants call Ofuna Nzie Asuo. Both parties testified at the trial. In addition, the plaintiffs relied on the decision of a customary arbitral proceeding conducted by Ofutop chiefs and elders in respect of the land in dispute between Ofuna Nzie Asuo of Okangha (accepted to be the present appellants) and Ofuna Ogar Nfom of Okangha (accepted to be the present respondents).

The learned trial judge held that customary arbitration exists under the Nigeria legal system and the decisions given pursuant thereto bind the parties. His Lordship accordingly held that the appellants, having accepted to be bound by the customary arbitral award, could not be held to reject that decision on the grounds that it was against them. It must be noted that neither party to the case had disagreed that customary arbitration is unknown in their particular locality. The argument of the appellants was that there were errors on the face of the record. But Uwaifo JCA held that the concept of customary arbitration was unknown to the Nigerian law and that elders or natives cannot constitute themselves as customary arbitrators to decide on title to land or other disputes with binding effect on disputants. According to his lordship⁴.

¹ *Halsbury's Laws of England* 3rd Ed Vol.2 p 2; see also Hon. Justice Adenekan Ademola "Court Decongestion: Arbitration, Conciliation, Mediation And Reconciliation" (1992) *Judicial Lectures: Continuing Education for the Judiciary*, Lagos, MIJ, 1992 p 163 (hereafter Adenekan, "Court Decongestion"); *Black's Law Dictionary* 7th Ed.; Gaius Ezejiolor: *The Law of Arbitration in Nigeria*, Lagos, Longman, 3 (hereafter Ezejiolor, *Law of Arbitration*).

² Gaius Ezejiolor, *Ibid*

³ [1988] 4 NWLR (pt 90) 554.

⁴ Above at p 571-3

To talk of customary arbitration (having a binding force as a judgment) in this country is ... somewhat a misnomer and certainly a misconception. Of course, to say that a decision by such a body creates *res judicata* is erroneous. The case of Divisional Court at Cape Coast held that the unrecorded decision of a body of persons appointed some 35 years earlier by two paramount chiefs to adjudicate upon a dispute about the ownership of the land in dispute did not create an estoppel by way of *res judicata*. The West African Court of Appeal held on appeal that such a decision though never recorded in writing and though the body of persons so appointed could not (sic) and did create estoppel by way of *res judicata* on the proof that it was pronounced as alleged and that it affected the predecessor in title of the plaintiff and the fourth defendant (in that particular litigation). I have already said that in this country that decision cannot be right in law. There cannot be an issue of estoppel *per rem judicatam* unless the judgment in question is that of a duly constituted body vested with judicial authority.

His lordship analysed some Nigerian cases especially *Inyang v Essien*⁵ and *Ozo Ezejiefor Oline & Ors. v Jacob Obodo & Ors*⁶ and came to the conclusion that Nigerian courts have always denied that a customary arbitration can be pleaded as *res judicata*. With regard to the *Ezejiefor* case, Uwaifo JCA expressed the opinion that the outcome must have been influenced by Quashie-Idun J's background as a Ghanaian! This article examines the issue of the existence or non-existence of customary law arbitration and whether, if customary arbitration does exist, it runs contrary to the Nigerian legal system. This paper also examines the significance or importance, if any, of customary arbitral awards on substantive litigation.

Does Customary Arbitration Exist in Nigerian Jurisprudence

Uwaifo JCA posits that there is nothing like settlement by customary arbitration between disputing parties in Nigeria. According to his lordship:

I do not know of any community in Nigeria which regards the settlement by arbitration between disputing parties as part of its native law and custom. It may be that in practical life when there is a dispute in any community, the parties involved may sometimes decide to refer it to a third disinterested party for settlement. That seems more of a common device for peace and good neighbourliness rather than a feature of native law and custom, unless there is any unknown to me which carries with it judicial function or authority as in Akan Laws and Customs. I do not also know how such a custom, if any, or more correctly such practice, to get a third party to intervene and decide a dispute can elevate any such decision to the status of a judgment with a binding force and fit into our judicial system. Admittedly, there can be arbitration in the loose sense of the word here in Nigeria, quite apart from that recognized under various statutes to look into parties disputes... Those Elders under Akan laws and

⁵ (1957) 2 FSC 39

⁶ (1958) 3 FSC 84

customs seem to exercise authority to have binding effect in the same status as did our old native authority courts presided over by traditional rulers and chiefs in some parts of Nigeria with appeals going to District Officers' Court and Residents' Courts. In that capacity, matters in difference by way of arbitration could be undertaken by them or referred to them to have them decided in accordance with their local customs. That to me is the nearest and most probable comparison... I also hold that there is no concept known as customary or native arbitration in our jurisprudence. Even if there had ever been such (which I do not accept), it would have had no place under the 1979 Constitution which vests the judicial powers in the judiciary under section 6.

It has been necessary to quote *in extenso* in order to highlight the argument marshaled by Uwaifo JCA in support of the position that customary arbitration awards are not *res judicata* or *ipso facto* binding. It is submitted with respect that this decision was given *per incuriam* since the Nigerian courts have for long recognized customary arbitral decision as part of its jurisprudence⁷. According to Elias,⁸ "referring 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", is a way of resolving disputes in traditional African society. It was one of the many modes of settling dispute in traditional Nigerian communities.

In pre-colonial times and before the advent of regular courts, the various communities that make up the Nigerian State had a simple and inexpensive way of adjudicating over dispute among their citizenry. An aggrieved citizen of a particular community may refer a dispute between him and another citizen to the chief, elders or a body set up for that purpose in the community⁹. Arbitrators are often selected *ad hoc* with the primary aim of restoring harmony by the elimination of grievance. They are normally men of high integrity in the society with independent mind¹⁰.

In most cases they are normally a body of elders or chiefs in the society who are conversant with the customary law of the people. In most communities in Delta State, for example, a chief representing a particular section of his community may with the consent of parties to a dispute arbitrate over same. If both parties accept the decision of the sectional chief, that settles the dispute but if either party is not satisfied, he can appeal to the traditional ruler-in-council. The traditional ruler-in-council is the highest body as far as customary law arbitration is concerned. This is a common practice in most communities in Nigeria and has over the years become strongly embedded in the Nigerian legal system that they

⁷ *Philip Njoku v Felix Ekeocha* [1958] ENLR 199; *Ekwueme v Zakari* [1972] 2 ECCLR 631; *Oline v Obodo* [1958] 5 SCNLR 298; *Inyang V Essien* [1957] F.S.C. 39

⁸ T.O. Elias: *The Nature of African Customary Law* (1956) 212

⁹ Emiola A; *The Principles of African Customary Law*; Ezejiolor, *Law of Arbitration*, 22-27; Ademola "Court Decongestion"; Andrew I. Okekeifere: "The Recent Odyssey of Customary Law Arbitration and Conciliation in Nigeria's Apex Courts" (2000) 5 (No 1) *Modern Practice Journal of Finance & Investment Law*, 130 (hereafter Okekeifere, "Recent Odyssey"); *Okpuruwu V Okpokam* (supra) at 586

¹⁰ Emiola A. *op cit*, p.39

survive today as customs. Indeed customary arbitration has been given judicial notice by the Nigeria courts¹¹. Customary law is by virtue of section 315(3) and (4)(b) of the Constitution of the Federal Republic of Nigeria an existing law being a body of rules and custom in force immediately before coming into force of the 1999 Constitution. This provision saves customary law. According to Karibi-Whyte JSC in his lead judgment in *Agu v Ikewibe*¹²:

“There seems to me some misconception about some of the provisions of the Constitution 1979, and the freedom between disputing parties to settle their difference in the manner acceptable to them. It is clearly unarguable that the judicial power of the Constitution in s.6(1) is by s.6(5) vested in the courts named in that section. Not so a customary law arbitration as an arbitration in dispute founded on the voluntary submission of the parties to the decision of the arbitrators who are either the chiefs or elders of their communities, and the agreement to be bound by such decision or freedom to resile where unfavourable. In the first place a customary arbitration is not an exercise of the judicial power of the Constitution not being a function undertaken by the courts. Secondly, customary law is by virtue of s.274(3)(4)(b) an existing law being a body of rules of law in force immediately before the coming into force of the Constitution 1979. Thus customary law which includes customary arbitration was saved by section 274(3) and 4(b) of the Constitution 1979. – See *Giwa v Inspector General of Police* – (1985) 6 NCLR 369, *Enyinnaya v Commissioner of Police* (1985) 6 NCLR 464. It is well accepted that one of the many African 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 upon the subsequent acceptance by both parties of the suggested award, which becomes binding only after such signification of its acceptance, and from which either party is free to resile at any stage of the proceedings up to that point. This is a common method of settling dispute in all indigenous Nigerian societies. It is this kind of arbitration which the court considered in *Assampaoug v Kweku & ors* – (1931) 1 WACA 192. In *Philip Njoku v Felix Ekeocha* (1972) 2 ECSLR 199 Ikpeazu J held that were a body of men, be they chiefs or other wise, act as arbitrators over a dispute between two parties their decision shall have binding effect, if it is shown firstly that both parties submitted to the arbitration. Secondly that the parties accepted the terms of the arbitration, and third, that they agreed to be bound by the decision. Such decision has the same authority as the judgment of a judicial body and will be binding on the parties and thus create an estoppel.

Section 315(3) and 4(b) of the 1999 Constitution is *ipsissima verba* of section 274(3)(4)(b) of the 1979 Constitution. In *Okpuruwn v Okpokam*¹³ dissenting on the position of Court of Appeal that there is no concept like customary arbitration under the Nigerian legal system Oguntade JCA has this to say:

¹¹ *Philip Njoku v Felix Ekeocha* [1972] ECSLR 199; *Ekwueme v Zakari* [1973] ECSLR 631; *Joseph Larb v Opanih Kwasi* (1950) 13 WACA 81; *Oline V Obodo* (1958) 5 SCNLR 298; *Inyang v Essien* (1957) 2 FSC 39.

¹² [1991] 3 NWLR (pt 180) 385 at 407; see also *Okere v Nwoke* [1991] 8 NWLR (pt 209) 317 at 344.

¹³ Per Oguntade JCA in *Okpuruwu v Okpokam* (supra) at 585

I find myself unable to accept the proposition that there is no concept known as customary or native arbitration in our jurisprudence. The regular courts in the early stages of arbitration were reluctant to accord recognition to the decisions or awards of arbitrators. This attitude flowed substantially from a reasoning that arbitration constitutes a rival body to the regular courts. But it was soon realized that an arbitration may in fact prove the best way of settling some types of dispute. The attitude of the regular courts to arbitration therefore gradually changed. It was then realized and acknowledged that if parties to a dispute voluntarily submit their dispute to third parties as arbitrators, and agree to be bound by the decision of such arbitration then the court must clothe such decision with the grab of estoppel per *rem judicatam*.

Thus, Nigerian law recognizes customary law arbitration which is distinct and different from arbitration under statute. Customary law arbitration is an arbitration founded in dispute on voluntary submission of the parties to the decision of the arbitrators who are either the chief or elders of their community and the agreement to be bound by such decision or freedom to resile where unfavorable.

Conditions for Bindingness of Customary Arbitration

Customary arbitration is valid and binding in Nigerian law if the process satisfies the following-:

- (a) The parties voluntarily submit their disputes to a non-judicial body, to wit their elders or chiefs as the case may be for determination.
- (b) The indication or the willingness of the parties to be bound or freedom to reject the decision where not satisfied;
- (c) Neither of the parties has resiled from the decision so pronounced;
- (d) The decision was in accordance with the custom of the people or of their trade or business; and
- (e) The arbitration reached a decision and published their award¹⁴

Thus it is a *sine qua non* that parties must have agreed to be bound by the decision of the non-judicial body. An attempted negotiated settlement of a dispute before a body of persons who do not ordinarily adjudicate over disputes in a particular community would not amount to customary arbitration¹⁵. For arbitration to satisfy customary law arbitration process, the arbitrators must act in accordance with the customary law and general usage of the community.

In *Ekwueme v Zakari*¹⁶ the plaintiff claimed from the defendant some amount of money which he contended was due to him under a legal oral agreement between the defendant and himself for the running of an hotel. The defendant denied the existence of such agreement and contended that the plaintiff was his employee for a trial period of three months, after which they

¹⁴ A. A. Kolajo: *Customary Law in Nigeria Through the Cases*, Ibadan, Spectrum, 2000, p 219; *Eke v Okwaranyia* [2001] F WLR (pt 51) 1974, 1998; *Ohiaeri v Akabeze* [1992] 2 NWLR (pt 221) 1; *Agu v Ikewibe* [1991] 3 NWLR (pt 180) 385

¹⁵ *Odonigi v Oyeleke* [2001] FWLR (pt 42) 172; 190-191

¹⁶ [1972] 2 ECCLR 631. See also *Awosile v Sotunbo* [1992] 5 NWLR (pt 243) 514

might commence negotiation for the plaintiff to become a partner. The sum claimed was that determined by what the plaintiff alleged to have been awarded by a panel of arbitrators, to whose jurisdiction both parties had submitted. The defendant admitted that he attendant a meeting convened by certain persons in an attempt to resolve the differences between himself and the plaintiff, but denied that there was an agreement to submit to arbitration or that he had agreed to be bound by the decision of the said persons. It was held *inter alia* that a decision of arbitrators, to be binding must be made in the exercise of judicial functions recognized by law or custom, and the parties must have agreed to be bound by such decision. In this case there was no arbitration but merely an attempted negotiated settlement.

However, in *Nzeoma v Ugocha*¹⁷ the plaintiff alleged that the defendant falsely and maliciously spoke and published certain scandalous words concerning him. The defendant denied the alleged scandalous words, whereupon the plaintiff reported the matter to the Nwadiali and body of elders who decided that since the slander involved the life of a person, the parties should swear to a juju which was accepted by them. When they took oath on the Bible, the plaintiff survived. Following his survival the defendant performed some customary rituals for the plaintiff's age grade as a sort of cleansing. The plaintiff subsequently sued the defendant in the High Court claiming damages for slander. The defendant contended that the customary ceremonies which he performed as cleansing process were sufficient compensation in the circumstances. The Court of Appeal held that the party defamed, having elected or opted for a mere native arbitration to help assuage his bruised ego and personality, cannot now resort to another mode of channeling his complaints, the remedy for which he had obtained elsewhere.

It is essential that the arbitrators reached a decision and published their award. The court will not enforce an inconclusive customary award. In *Ofomata & ors v Anoka*¹⁸ the plaintiffs claimed that a customary tribunal awarded title to land to them subject to their swearing to an oath on juju to be produced by the defendants. The parties failed to meet for the oath swearing. The defendants pleaded that the arbitration ended in fiasco, that no decision was reached. It was held *inter alia* that where a decision of an arbitration panel was dependent on a contingency of whatever nature, as in the instant case, the swearing of an oath, the decision although legal, was not final and as the swearing of an oath was part of the arbitration and not an extraneous matter, the arbitration award was not final. It is submitted that if either party to a customary arbitration proceeding is compelled to appear before a paramount ruler-in-council on pain of punishment any decision arrived thereat cannot be said to be in accordance with a valid customary arbitration. This is because the element of voluntary submission is lacking¹⁹.

¹⁷ [2001] FWLR (pt 48) 1299. see also *Odonigi v Oyeleke* above

¹⁸ [1974] 4 ECCLR 51. See also *Okere v Nwoke* above.

¹⁹ *Adeyeri v Atanda* (1995) 5 SCNJ 157.

Oath-taking as Part of Customary Arbitration Process

Oath taking is a common feature of resolving disputes in Africa. Its use was very frequent in crime detection. It was undertaken in respect of very serious crimes. Women and children were not allowed to take the more destructive forms of oath. Oath taking was also used as a last resort in settling other disputes such as title to land, adultery and defamation. In *Inwuchukwu v Anyanwu*,²⁰ Ndoma–Egba JCA opined thus:

The belief of the learned trial judge that disputes are decided by swearing juju may well be true as a matter of the past. In the this century that will be a retreat to trial by ordeal which is in thinkable any more than swearing juju as a method of proof. We cannot now reel back to superstitious fear and forswear our religious faith.

With due respect to his lordship, customary, law arbitration is valid when both parties willingly partake in swearing upon a juju if part of the arbitration process demands that. Nigerian law recognizes freedom of religion²¹. It would be wrong to condemn the practice of a particular religion as barbarous. His lordship is taken as advocating that oath taking should not be part of the process of decision making in customary arbitration since it is uncivilized.

It is submitted that the decision of the Supreme Court on this aspect of the law in the case of *Ume v Okoronkwo*²² represents the proper position. In that case, Ogundare JSC held that “oath taking was one of the methods of establishing the truth of a matter and was known to the customary law and accepted by both parties. The first defendant only resiled after the arbitrators had made their awards by refusing to produce the juju! It was not open to him to do so at that stage”²³ In *Ofomota & ors v Anoka & Ors*²⁴ Agbakoba J. held that:

Oath taking is, ... a recognized and accepted form of proof existing in certain customary judicature. Oath may be sworn extra-judicially but as a mode of judicial proof its esoteric and reverential feature, the solemnity of the choice of an oath by the disputants and imminent evil visitation to the oath breaker, if he swore falsely, are the deterrent sanctions of this form of customary judicial process which commends it alike to rural and urban indigenous courts. It is, therefore, my view that the decision to swear an oath is not illegal although it may be obnoxious to Christian ethics; Christianity, however, has not come to destroy, its mission in to edify, to correct and to reconcile.

Remedy Open to Unsatisfied Party to Customary Arbitration

²⁰ [1993] 8 NWLR (pt 311) 307, 323

²¹ See s.38 of the Constitution of the Federal Republic of Nigeria 1999

²² [1996] 12 SCNJ 404

²³ *Ume v Okoronkwo* above at 412. See also *Uzoewulu v Ezeaka* [2001] FWLR (pt 46) 932; *Nzeoma v Ugocha* [2001] FWLR (pt 48) 1299

²⁴ [1974] op cit 251; 254

Where a party is not satisfied with arbitration proceedings he is free to reject it. Customary arbitration panels are not regular courts. Their decision would only be binding if both parties indicate their willingness to abide by the arbitral award. It is, therefore, absurd to suggest that once a party has submitted to customary arbitration he cannot reject any decision arrived thereat.²⁵ A party is not expected to submit to a decision that is clearly unjust. It is however, expected that such a party act timeously if he intends to reject such a decision or else he would be taken to have consented to it. In *Uwuka v Nwaechi*²⁶ both the appellant and the respondent submitted their cases to the Okwelle Union. The Union instead of hearing the case delegated its functions to arbitrate to certain persons. The appellant objected to the jurisdiction of the nominated people. The nominated people quickly went into action and found for the respondent as being the owner in possession of the land. The appellant rejected the decision. The trial High Court held that the appellant was bound by the decision of the customary arbitration. On appeal to the Court of Appeal that court held that although parties are bound by decision of customary arbitration or mediation by mere submission to its jurisdiction, as the right of appeal is enshrined in the Constitution of the Federal Republic of Nigeria, any person or party who is aggrieved by the decision of the arbitration could seek redress and justice to the highest court of the land.

In *Mbagbu v Agochukwu*²⁷ the issue was whether a dispute taken to a local non-judicial body of elders for settlement was binding on the parties. It was held that the decision was binding if accepted at the time it was made. In this case the plaintiff reported the defendant to the Amala of Isi Eke (a body of Elders of Isi Eke) complaining of trespass by the defendant who invaded his farm and harvested certain economic crops. According to the plaintiff, the Amala with Ihegiro Amaechi as the chairman, decided that the land in dispute belonged to the plaintiff's father and therefore to him. Defendant was dissatisfied with the decision of the Amalas, and referred the dispute to one Chief Nnadi who summoned the parties to his house to settle the dispute. The dispute was so referred to Chief Nnadi by the defendant, who refused to take the oath before the Amalas, to confirm his claim to ownership of the land in dispute. Plaintiff and defendant voluntarily submitted to each of the arbitral bodies, and provided the drinks and food for the members who arbitrated. The court refused to accept any of the arbitral awards because it was clear from the evidence of both parties that they did not accept the decision of the Amalas and Chief Nnadi.

In *Philip Njoku v Felix Ekeocha & Ors*²⁸ Ikpeazu J. opined that:

The legal position seems to me to be that where such a non-judicial body has been accepted by the parties it will not be open to any of them to turn around at a later stage and reject it. In such a case the decision will be binding on him, the operative factor being the initial acceptance of the decision at the time it was given.

²⁵ Okekeifere "Recent Odyssey" 103; Ezejiolor: *Law of Arbitration*, 26-27.

²⁶ [1993] 5 NWLR (pt 293) 295

²⁷ (1973) 3 ECLSR (pt 1) 90. See also *Inyang v Essien* (1957) 2 FSC 39 where it was held that where a council of chiefs with no judicial authority decides a dispute not accepted by the parties such a decision will not have binding effect.

²⁸ (1972) 2 ECLSR 199, 205

In *Ohiaeri v Akabeze*²⁹ the Supreme Court held that it is essential, that before applying the decision of a customary arbitration panel as estoppel, the court should ensure that the parties had voluntarily submitted to the arbitration, consciously indicated their willingness to be bound by the decision and had immediately after the pronouncement of the decision unequivocally accepted the award. It is in the light of the foregoing that one would caution that the courts should not just readily accept the issue of a customary arbitral decision once it is raised in proceedings. The courts must ensure that the parties willingly accept same as at the time the arbitral award was made. This is necessary so as to ensure that a party who goes timeously to the court to challenge such arbitration award is heard on the merits of his case.

Status of a Customary Arbitral Award

The decision of a customary arbitration which is called an award must be shown to be certain, final, reasonable, legal, possible and must be shown to have disposed of all differences submitted to the arbitration. Unlike the judgment of a regular court which has the force of a law until set aside, the decision of an arbitration lacks intrinsic or inherent force until pronounced upon by a court recognized by law³⁰. If the court finds that the customary arbitration complied with the conditions herein before discussed, then the court will accord recognition to the arbitral award. However in *Okpuruwu V Okpokam*,³¹ Uwaifo JCA delivering the lead judgment held that customary arbitration settlement was not a feature of any Nigerian community since it was not part of the native law and custom of the different communities in Nigeria. Accordingly “to talk of customary arbitration (having a binding force as a judgment) in this country is ... somewhat a misnomer and certainly a misconception”

There is no gainsaying the fact that the principles of customary law arbitration first came before the courts in Ghana for judicial determination, but this is not to say that customary arbitration is unknown to the Nigerian legal system. It is submitted that his Lordship was obviously overstating the case when he opined that Nigerian courts cannot recognize customary arbitral awards and act on same. The law is that when a party to any customary arbitration had accepted such a decision neither such a party nor his successor in-title can resile therefrom.³² Spencer-Bower and Turner have defined judicial tribunal for the purpose of estoppel to include tribunals whether or not it is known by the name of a court all. According to the learned authors³³.

It is now stated to be well established that it is quite immaterial whether the tribunal which pronounced the decision relied upon as a ground of estoppel is a court of record, or not, or whether it is what has been denominated by custom, or statute, a superior court, or not, or even whether it is known by the name of a court at all ... it is enough if the

²⁹ (1992) 23 NSCC 139.

³⁰ *Ofomata v Anoka* above at 253

³¹ [1988] 4 NWLR (pt 90) 541; 571

³² *Oparaji v Ohanu* [2001] FWLR (pt 43) 385; *Oline v Obodo* [1958] 3 FSC 84 *Onwu v Nka* [1996] 7SCNJ 404; *Ume v Okoronkwo* [1996] 12 SCNJ 404; *Ojibah v Ojibah* [1991] 5 NWLR (pt 191) 396; *Nzeama v Ugoacha* [2001] F.W.L.R. pt 48 p 1299

³³ Spencer-Bower and Turner: *Estoppel* [2nd Ed] 21-22

alleged “judicial tribunal can properly be described as a person, or body of persons, exercise judicial functions by common law, statute, patent, charter, custom or otherwise in accordance with the law of England, or in the case of a foreign tribunal, the law of the particular foreign state, whether he or they, be invested with permanent jurisdiction to determine all causes of a certain class as and when submitted, or be clothed by the state or the disputants, with merely temporary authority to adjudicate on a particular dispute, or group of disputes.

Since customary arbitral awards cannot be enforced as a judgment of court, it can only be used as a shield and not a sword³⁴. It is not open to a plaintiff in his statement of claim as he would thereby be impugning the jurisdiction of the court to which he has brought his action. A successful plea of customary arbitral award as estoppel *per rem judicatam* oust the jurisdiction of the court before which it is raised.³⁵ A plaintiff may plead the previous judgment in his favor not as *res judicata* but as a relevant fact and the judgment will be conclusive of the facts which it decided.³⁶

Conclusion

Customary arbitration is not alien to the Nigerian legal system but has been existing even before the establishment of regular courts. Customary arbitration provides an alternative to early determination of cases in the Nigerian courts which are increasingly becoming congested. It is less expensive and usually provides a forum where disputes among contending parties are amicably resolved. The decision of the arbiters who are well known to the disputants are not always winner-takes-all.³⁷ In many cases blames are apportioned to both sides in the dispute: parties are reconciled in the process and this often give the two sides a sense of partial victory. However, care must be taken to examine the decisions of customary law arbitrations as “some of the arbitrators may not only have a prior knowledge of the facts of the dispute but also have their prejudices and varying interest in the matter, and are therefore sometimes judges in their own cause and are likely to prejudge the issue”³⁸

³⁴ T.O. Elias: *The Nature of African Customary Law* (supra) at 213

³⁵ *Igwego v Ezeugo* [1992] 7 SCNLJ 284 at 311; *Achiakpa v Nduka* [2002] FWLR (pt 71) 1804; *Yoge v Olubode* [1974] 1 A11 NLR (pt 2) 118

³⁶ *Igwego v Ezeugo op cit*; See also *Ukaegbu v Ugorji* [1991] 6 NWLR (pt 196) 124; *Esan v Olowu* [1974] 3 SC 125

³⁷ Akintunde Emiola: *The Principles of African Customary Law* p 40

³⁸ *Ohiari v Akabazel* at 24