RIVERS STATE UNIVERSITY
PORT HARCOURT

INTERNATIONALISING AFRICAN CUSTOMARY LAW ARBITRATION IN THE WORLD LEGAL SCENE: DISMANTLING OBSTACLES, EMBRACING PROSPECTS

AN INAUGURAL LECTURE

BY

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DEDICATION

TO THE I AM THAT I AM, THE ALPHA AND THE OMEGA

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PROTOCOL

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Academic, Administrative and Technical Staff
Great Students of Rivers State University
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Ministers of God
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Members of the Body of Senior Advocates of Nigeria
Members of the Chartered Institute of Arbitrators present here
Members of the International Chamber of Commerce Nigeria present
Members of the Lagos Regional Centre for Int'l Commercial Arbitration present
Members of the Lagos Court of Arbitrators present
Members of the Institute of Construction Industry Arbitrators, Nigeria present
Members of the Christian Lawyers Fellowship of Nigeria

present
My Family Members and Friends
Distinguished Ladies and Gentlemen

1.0 Introduction

Vice Chancellor, Sir, long ago, legal scholars and jurists blessed the world with several discoveries, theorems and theories which have become pathways through which the law and its studies have traveled and progressed. Philosophers such as Socrates, Plato[1] and so on gave birth to legal thinking in its incipient, even if primitive, stages. With time, those theorems and theories as it were graduated into the idea of law[2], governing human conduct and relationships *inter se*. Eminent legal scholars emerged, in jurisprudence for instance, with different schools of thought.[3] They held sway and shaped legal thought and were the harbingers of such theories and jurisprudence of the present day. With time such great thinkers as Lord Atkin in *Donoghue v Stevenson*[4] who asked the ever relevant question, citing the Holy Scripture in principle and for application for all times, emerged:

> **Who, then, in law is my neighbor?" and answered that it is "… persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.**

In the ever helpful issue or formulation of the liability for the

1. Plato's *The Laws, Translation and Introduction,* J. Sanders (Pengium Books, 1970)
2. Which up until today hardly has any acceptable meaning or definition. See, for instance, HLA Hart, *The Concept of Law* (Oxford, 1961); *Definition and Theory in Jurisprudence* (1954) 70 L.Q.R 37; Roscoe Pound, *Philosophy of Law* (Yale Univ. Press; 1943). This is a serious surprise to non-lawyers: that with all the certainty and precision or something of the kind which lawyers pride in, in evidence and the proof of things through hard evidence, the law itself hardly has a meaning or definition!
3. Such men as Jeremiah Bentham and John Austin of the Positivist School, Walden Holmes and Karl Lewin of the Realist School, Kal von Savigini of the Historical School, St Aquinas and J J Russaus of the Naturalist; Eugene Ehrilich and the popular Roscoe Pound of the or Sociological School.
4. (1932) A C 562, 579

occupier of land who brings and keeps upon it anything likely to do damage if it escapes is bound to prevent its escape a rule was found that he is liable for all direct consequences of its escape, even if he is not guilty of negligence: *Rylands v Fletcher*.[5] That was another great formulation of the Bench for the good of mankind. It was a great academician, Winfield who examined the words being used in the use principle and postulated that it was better to speak of "strict" liability rather than an "absolute" liability in view of the admitted exceptions to the rule; which postulation has since become the appropriate term in English law: see *Read v J. Lyons & Co.*[6]

The ever fervent Lord Denning touched the legal world stating very magisterially that you cannot put something on nothing and expect it to stand: *UAC v Macfoy.*[7] It has so long been a sing song of the judiciary across several kinds of jurisdictions. He also introduced to the world the principle of promissory estoppel in *Central London Property Trust Ltd v High Trees House Ltd*[8] and so on and so on. In the USA, great judges like Benjamin N. Cardozo and Judge Learned Hand rioterised the legal world. They both so affected the law to a level that former with his *Nature of the Judicial Process*[9] made such wonderful formulations as,

> **Deep below consciousness are other forces, the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions**

5. (1868) L.R 3 H.L. 330. In judicial activism His Lordship ably stated in *United Austrialia Ltd v Barclays Bank* (1941) AC 1, 29 that "When these ghosts of the past stand in the path of justice clanking their medieval chains the proper course for the judge is to pass through them undeterred."
6. (1945) KB 216, 226
7. (1961) 3 All ER 1160
8. (1947) KB 130
9. Delhi, Universal Law Publishing Co. Pvt. Ltd, 6th Indian Reprint 2006

and habits and convictions, which make the man, whether he be litigant or judge.

No doubt, Africa has been blessed with very erudite jurists and scholars of very eminent renown and repute. In more recent times in Nigeria, for instance, such jurists of distinction as the Hon. Justice Taslim Elias of the Nigerian Supreme Court, Hon. Justices Chukwudifu Oputa, Andrews Otutu Obaseki, Kayode Eso, Nnaemeka-Agu, Augustine Nnamani, Niki Tobi, etc. In the academia we have had such legal giants as Elias, Ben Nwabueze, Niki Tobi, Cyprain Okoknwo etc. These men have made very germane remarks and formulations in the law that ought to be celebrated and promoted, analysed and thoroughly interrogated as the academics and other judges would do for postulations in the Western world. For instance, the formulation and decision that somebody (a military government) could, not while in disobedience to the order of Court, ask the same Court for any exercise of its discretion in his favour.[10] It would amount to a flagrant disregard and contempt of the Court to do so.

As already stated, such postulations are hardly celebrated, or at least not enough, in this part of the world as for them to become definite and precise doctrines of law. They are not sufficiently thoroughly analysed, front and back as it were, from many perspectives, by the academia and by members of the scholarly judex. Proper and fitting deductions are hardly made. Seminars and workshops are hardly organized over such postulations by Universities, the Institute of Advanced Legal Studies or the Law Reform Commission. Self-doubt, traditional prejudices against oneself, an unnecessary and unfounded feeling of inadequacy of

10. The decision in *Ojukwu v Gov. Lagos State* (1986) 3 NWLR (Pt. 26) 39

things African, an attitude of insufficient thoroughness and lack of an attitude of a knack for details etc are, many times, to blame. The result is that the postulation in question is brought out and left bare; necessary enhancements of such postulations into living doctrines of law is hardly done or achieved. In some cases, with time, the postulations may even be forgotten or treated as forgotten.

In the customary law, the situation is even worse. There seems to be an unconscious but deep seated feeling that things African, in law and elsewhere, are inferior, not worthy of deep consideration, deep thought or consideration. This is often exhibited in conduct than expressed vocally. Little ink has been spent in extolling, let alone seriously and thoroughly interrogating, such beautiful formulations of the law in such cases as *Mojekwu v Ejikeme*[11]; that the inheritance of land and such properties (such as land and landed properties) in Igboland by only the male children (or that where a man dies leaving only female children or where he dies with male children and female children), only the males could inherit such properties is contrary to natural justice equity and good conscience. Niki Tobi, JCA (as he then was) stated the law emphatically by answering the question which he posed thus,

> **Is such a custom consistent with equity and fair play in an egalitarian society such as ours where the civilized sociology does not discriminate against the womenfolk in this country? They are regarded as inferior to the menfolk. Why should it be so? All human beings – male and female - are**

11. (2000) 5 NWLR (Pt. 657) 402

> **born into a free world and are expected to participate freely without any discrimination on grounds of sex, and that is constitutional. Any form of societal inhibition on grounds of sex, apart from being unconstitutional, is antithesis to society built on tenets of democracy which we have freely chosen as a people. … In my opinion it is the monopoly of God to determine the sex of a baby and not the parents. Although the scientific world disagree with this divine truth, I believe that God, the creator of human beings, is also the final authority of who should be male [or] female. Accordingly, for a custom or customary law to discriminate against a particular sex is to say the least an affront on the Almighty God himself.**
>
> **… It is not worthy of application and I declare it as being unenforceable in the judicial realm and no Court of record should countenance or take judicial notice of it. In the result, a female child does not need the performance of Nrachi ceremony on her to be entitled to inherit her deceased father's estate.**

It is, therefore, not amazing that a scholar like Hon Justice Elias, and others like him, in all his years in the academia and later on the Bench hardly has to his credit a doctrine of law. Were he to be of British descent or operation, he possibly would have had one notorious doctrine or the other to his credit, like the Cardozos, Atkins or Dennings. Definitely, Africa is blessed with eminent jurists and commentators that could put the continent on the map of first-mention commentators and discoverers.

Sometimes, when existing, even already existing, customary law doctrines and principles come before the African judge trained in Britain[12], even an African, those principles are not properly examined and there is a hurry to name it and call it the English, French or German etc equivalents which can easily be found.[13] Sometimes, this is done despite already existing judicial authorities on the same point[14]. That was how the Supreme Court of Nigeria came to the conclusion, despite prior existing authorities on the point, that for a customary law arbitration award to be final, binding and enforceable, there must be a post-award consent of the both parties to that award![15]

Thus, if an arbitrator examined the dispute between parties in the customary law and arrive at a decision that should be binding on them, such an award will not be binding on them unless after the award has been delivered the two of them come around and agree that the award is good and binding. As would often happen if such were the law, the award loser will simply sate that the award is not binding on him. Pronto! All the time and efforts spent on the arbitration would have become wasted.

Of course, that was not the law (as enunciated by the Supreme Court itself) before that judgement, nor was it the law after the judgement. As every cursory observer of the customary law in the villages can testify first hand, if there is a dispute between two parties or sides, and they are able to choose a third party of their kind to hear and determine the dispute according to that third party's understanding of the law (the law and its effects as

12. Or France etc or people who think like him who are trained in Africa, those who not critically look at the law before them or whilst they are there!
13. That can be easily be found in the English texts abroad the place or the Nigerian, nay African texts hurriedly prepared texts
14. See, for instance, *Oline v Obodo* (1958) SCNR 298
15. The unsupportable decision in *Agu v Ikewibe* (1991) 3 NWLR (Pt.180) 385

known by them) paying great attention to substance to enduring justice and fairness, the pronouncement of such a third party is final and binding. The contending parties would take the dispute as resolved and each party would go home with the matter as decided. It does not matter whether a party likes the award or not, it is final and binding. That is the law. I will return to this point *anon*.

1.1 The Journey Through and with Arbitration

My academic journey has been principally through Arbitration, its beauties and challenges in study and exegesis. Back in the days of the uncertainties and deep political crisis of 1993, I had a divine experience which exposed me to International Commercial Arbitration.[16] Little was known in Nigeria then, except in a few quarters in Lagos, about International Commercial Arbitration. Being pushed by the Almighty's hand into Arbitration and reading the Arbitration and Conciliation Act[17] like a Bible, the same hand arranged through my friend Eni Akpodiete, Esq for me to join George Etomi & Partners, Port Harcourt. The very first case or file that was assigned to me was one on Arbitration, requiring a stay of Court proceedings

16. I was praying for direction in the deep national crisis following the annulling of the 1983 general elections by the military government of Gen I. Babangida when I heard clearly that I should go into International Commercial Arbitration. I did not know what Arbitration was and I came out of the room where I was to see who said that. I went round the entirety of No. 13, Ohaeto Street, D/Line where I lived then as a youngster in the profession attached to the firm where I then practiced, Abuka, Ajegbo, Ilogu & Nwaogu, one of the then foremost law firms in the country. I did not see anybody because there was none. I consulted the dictionary and it only defined Arbitration but did not offer much help. I asked notably brilliant lawyers in Port Harcourt then what Arbitration was and, frankly, they said they did not know beyond the dictionary definition. It was not practiced in Port Harcourt, nay Nigeria, except by very few persons like Prince Bola Ajibola, SAN in Lagos. In the course of time I stumbled on the Arbitration and Conciliation Act, cap A18 LFN, 2004. The rest is now a pleasant piece of history.
17. Cap A18, Laws of the Federation, 2004. This was enacted as the Arbitration and Conciliation Decree, 1990 by the military government with Prince Bola Ajibola as the Attorney-General of the Federation.

pending Arbitration. I began drafting the application, calling into use everything I was learning in Arbitration. Partly because neither the judges (of the Federal High Court) nor counsel appearing before them understood Arbitration, the matter was transferred to Calabar jurisdiction. There, it was still difficult to understand sections 4 and 5 of the Arbitration and Conciliation Act which had contradictory provisions;[18] how they could be applied to the same Suit. This was despite our submissions on the point – borrowed knowledge!

Events in the matter led me to write a critique of the lack of understanding of those sections of the Act and the way forward: ***Stay of Court Proceedings Pending Arbitration in Nigeria Law***.[19] One event led to another and I started becoming an ardent student of the law of Arbitration. Without being in the academics, I began to write articles - all in the same journal in Switzerland until the editor reprimanded me to send my articles to other journals as well. The Chartered Institute of Arbitrators in the UK, after reading some of my articles, wrote me and sent me a membership application form. If I filled and returned that form I would be admitted without writing an entry examination! Writing and passing an entry examination is always compulsory for entry. However, based on the areas of the law of Arbitration where I had written those articles and possibly the arguments and the way forward I had pointed to, I had become qualified for

18. While section 4 required an automatic stay of Court proceedings once an application was brought by a party to a litigation in a matter having an Arbitration clause, section 5 needed the exercise of discretion to stay or not to stay Court proceedings, particularly if certain situations had already arisen in the case such as if the party applying had taken any step that manifested a lack of readiness to go to Arbitration.
19. 13 *Journal of International Arbitration* (1996) 119 – 142 (Switzerland). When I read the letter of the publishers of that journal accepting to publish the article (without modification) I thought they were talking to another person, not me. I was not in the academics yet and that was a very bold encouragement. The article is now chapter 2 in my edited book, Studies and Materials in International Commercial Arbitration(Port Harcourt, Nigeria: Lawhouse Books, 2002)

waiver of the membership entry examination. I became an Associate of the Chartered Institute of Arbitrators! That was not only an encouragement, it also gave me a sense of worth and purpose.

I began to apply to join other associations[20] and look for a practical experience of Arbitration. Today, I am a Fellow of the Chartered Institute without passing the Membership or Fellowship examinations, both of which were waived for me based on my experience in the field.[21] In 1998, the Abia State University looked at the number of articles I had done and thought it was a joke. When they confirmed it and were looking for a lecturer in Oil and Gas Law, I joined them as a Lecturer 1. Thus began my journey in the academics.

This inaugural lecture had to be on Arbitration. Everyone who knows the way I have travelled or proceeded in the academia and in legal practice generally, naturally thought it must be on Arbitration. I had a hard time deciding which part of Arbitration I should discuss. Now, an inaugural lecture is supposed to be something of

> **significance in an academic staff member's career at the University … (an) opportunity to share their achievements in research, innovation, engagement and teaching activities before an**

20. I am a member of 8 associations in Arbitration and a neutral in 7 Associations/organisations
21. A colleague who had cause to look at my curriculum vitae for assessment once retorted to me that I had written on every issue on which anyone could ever write in Arbitration, urging in each area how the law could be better. Though he expressed that view (which my former Dean at the Ebonyi State University, Prof. M C Okany shared) I do not share that kind of view. It is an overstatement. There is so much to be written about which even now I have not even thought about.

> **audience of members of the University community and the general public.**[22]

It affords

> **… professors with the opportunity to share their achievements and showcase the difference their research, innovation, engagement and teaching is making to the society.**[23]

Thinking of that, I told myself that the area in which I have made far more significant achievement in the intellectual world was when in my research I came up with the idea of the Internationalisation of African Customary Law Arbitration, an idea that had not been before I came up with it, by God's grace.

The question to my mind was whether it should be on the first challenge I encountered in Arbitration and tried to start solving through an article: the stay of Court proceedings pending Arbitration in Nigeria. The conflict between sections 4 and 5 of the Arbitration and Conciliation Act was daunting but we showed in ***Stay of Court Proceedings Pending Arbitration in Nigeria Law***[24] that since the two sections must be interpreted to retain each of them, section 4 should govern international arbitrations while section 5, which had always been part of our law, should govern domestic arbitrations. The challenge has

22. Coventry University, UK blog on Inaugural Lectures in the University to be seen at https://www.coventry.ac.uk.Last accessed 12/3/2024. See also http:s//www.collinsdictionary.com.
23. Ibid
24. Note 19 *supra.* See also **A Synergy of Opposites: Effective Commercial Justice, Rights and Liberties in African Jurisprudence, in A Chukwuemerie (ed)** ***Growing the Law and Nurturing Justice, Essays in Honour of Niki Tobi, JSC*** **(Port Harccourt: Lawhouse Books, 2005); Andrew Chukwuemerie, 'Arbitration and the ADRs as Panacea for the Ills in the Administration of Justice in the Third World'(2005) 1** ***EBSU Law Journal*** **102**

now been solved by the Arbitration and Mediation Act, 2023[25] which has removed the section 5 situation and made all stay of proceedings to be more in sync with section 4 position. Or should it be on ***International Commercial Arbitration and Third Party Interests: A Call for Urgent Reform***[26] which has, together with the efforts of others in other ways, birthed the adoption of the recognition of third party or third party proceedings as it were in Arbitration in Nigeria.[27] Should I examine one's seminal work on the ***Alternative Dispute Resolution Methods as Frameworks for the Bank Debt Recovery in the Post Consolidation Era***[28] or on ***Arbitration and Human Rights in Africa***[29] which received excellent and positive reviews and acceptance when the South African journal published it. Or should I look again at the use of alternative dispute resolution mechanisms in the resolution of political party disputes in Africa considered in ***Necessity as a Mother of Trail Blazing: Applying Alternative Dispute Resolution Mechanisms to Political Party Disputes in Africa.***[30] After the

25. Signed by the President on May 26th, 2023.
26. Hon. Justice CC Nweze (ed) *Contemporary Issues in Public International and Comparative Law: Essays in Honour of Prof. Okeke* (Florida: Vandeplas Publishing, 2011 available at www.vanderplas.com (USA). Rendered as ***Commercial Arbitration and Third Party Interests*** in chapter 3 in **New Dimensions in Commercial and Oil and Gas Laws** (Lawhouse Books, PH, 2007)
27. Sections 39 and 40 of the Arbitration and Mediation Act, 2023
28. (2006) 1(1) Justice Gazette) 45. Such bold efforts were canvassed in another manner in the law in Advancing the Rule of Law in Nigeria's Developing Political Culture through Arbitration and the ADRs in Chief M A Ajanwachukwu & H P Faga (eds) Contemporary Legal Thoughts: Essays in Honour of Chief Jossy Chibundu Eze, (Abakaliki: Izu Publishers, 2008)
29. (2007) 7 *African Human Rights Law Journal* 103 (South Africa). For some related issues see also my work in '**Problems of Jurisdiction and Modes of Human Rights Enforcement under Federal Constitutions in Developing Political Cultures: the Case of Nigeria'(2006) 1(2) *Abakaliki Bar Journal* 15; The Freedom of Information Act and the Enforcement of Human Rights** in Olanrewaju Fagbohun & Benson Oloworaran (eds), ***Readings in Contemporary Law and Policy Issues: Essays in Honour of Hon. Justice Iche Ndu***(Port Harcourt: Pearl Publishers, 2013) 1. See also '**Salient Issues in the Law and Practice of Arbitration in Nigeria'**(2006) 14(1) *African Journal of International and Comparative Law* (RADIC) 1
30. **(2009)** ***2 Journal of Politics and Law*** **122; available at** www.ccsenet.org/journal.htm **(Canada)**. See also my work, **Anatomy of Disputes, Dispute Prevention, Mapping, Mitigation & Resolution** in B. Onwuka Igwe, Esq; Chuma Nwokolo, Esq & Gerry Onwusi, Esq (eds.), ***Law &***

delivery of the motivating paper at an Independent National Electoral Commission (INEC) workshop, INEC set up a body to study this issue and advise it on its use. INEChas, reportedly, been using ADR where possible for the resolution of political and associated disputes, though not yet for the resolution of election results disputes.[31]

Or should I consider whether or not indeed foreign lawyers and arbitration practitioners (based, for instance, in Europe and the US with developed and very high skills in the law and its application) and indeed non-lawyers have a right under Nigerian law to practice Arbitration as counsel; whether the legal position is a matter of inadvertence or a national legal policy; which I had considered way back in 2004 in ***Restricted Rights of Non-lawyers and Foreigners to Practice Arbitration in Nigeria: Lawmakers' Inadvertence or National Legal Policy?***[32] The Nigerian government in a bid to assert that Nigeria had no bar against foreign lawyers seemed to have rather compounded the ugly situation by allegedly entering into the Enhanced Trade Investment Partnership (ETIP).[33] The matter has remained a very vexed question in Nigeria. I also wondered whether I should look at one's much earlier works on the enforcement and challenge of foreign arbitral awards. That work showed that Nigeria has one of the fastest means of enforcing an ICSID award in the entire world; but that there are

Justice in the Service of Humanity, Legal Discourse in Honour of Hon. Christopher Mitchell Chukwumah-Eneh, CON, Justice of Supreme Court of Nigeria(Lagos: Gwandustan Ltd, 2014) 55

31. The paper was **Applying the ADRs to Political Party Disputes** paper presented at the INEC Workshop on Resolving Political Party Disputes in a Democratic Setting: the Place of ADRs, Yar' Adua Centre Abuja on December, 15, 2008

32. **(2004) 1** ***Mediation and Dispute Resolution Law Journal*** **57.**

33. There is now a contention whether or not the pact was entered into. The government states through its Minister that it did not enter into a pact while the same Minister has stated that the government did. Whichever way, the fact is that with or without preparation of its home lawyers the government entered or is considering entering such a pact. It is also a wakeup call for lawyers – that one of these

many challenges on the way for the enforcement and challenge of awards, which one examined as long ago as 1997 in ***The Enforcement and Challenge of Foreign Arbitral Awards in Nigeria.***[34] Or should it be on the enhancement of the implementation of economic projects in the Third World through the instrumentality of Arbitration: ***Enhancing the Implementation of Economic Projects in the Third World through Arbitration***.[35]

For whatever it was worth, I also considered taking on my seminal texts books on areas in which no full textbook had been written before mine. It was ***Circumstantial Evidence in Nigerian Law***[36] which, to the best of my knowledge, as at the time of its publication was the second text on that area of the law in the globe. Mine was definitely the first text on the subject in Nigeria. The second, a seminal work also: ***The Law and Practice of Affidavit Evidence***[37] which, to the best of my knowledge, has remained the only whole texts on the subject anywhere in the world. My other texts are edited works on Arbitration and Commercial Law.[38]

days they can be taken unawares (if they have not already) as the government may just sign a pact.

34. **14** ***Journal of International Arbitration*** **3 (1997) 223(Switzerland)**
35. **(2001) 67** ***Journal of the Chartered Institute of Arbitrators*** **240 (UK)**
36. (Port Harcourt, Nigeria: Lawhouse Books, 2000) 336 pp. See also Circumstantial Evidence and Proof of Civil Cases in Nigeria in Collins Chijioke & Hon. Justice A U Kalu (eds) *Readings in Contemporary Issues in Law: Essays in Honour Hon. Justice Sunday Ndudim Imo* (Umuahia: Impact Global Publishers Ltd, 2010)
37. (Port Harcourt, Nigeria: Lawhouse Books, 2004) 760 pp. For other interventions in the Law of Evidence see **The Evidence Act, 2011: Gains and Challenges** in B. Onwuka Igwe, Esq; Chuma Nwokolo, Esq & Gerry Onwusi, Esq (eds.) ***Law & Justice in the Service of Humanity, Legal Discourse in Honour of Hon. Christopher Mitchell Chukwumah-Eneh, CON, Justice of Supreme Court of Nigeria***(Lagos: Gwandustan Ltd, 2014); **Affidavit Evidence and Electronically Generated Materials in Nigerian Courts"**(2006) 3:3 *SCRIPTed* (*online Journal of Law & Technology*), 149available at http://www.law.ed.ac.uk/ahrb/script-ed/vol13-3/affidavit.asp **(online)**
38. ***Studies and Materials in International Commercial Arbitration*** **note 19** ***supra***; ***New Dimensions in Commercial and Oil & Gas Laws,***(Port Harcourt, Nigeria: Lawhouse Books, 2007) (899 pp) and ***Growing the Law, Nurturing Justice: Essays in Honour of Niki Tobi, JSC,*** **(**Port Harcourt, Nigeria: Lawhouse Books, 2005) (558 pp)

I considered treating topics that have become quite important under the new Arbitration and Mediation Act, 2023. They include, The Challenges of Third Party Funding in Nigeria, the question whether s. 87 of the Arbitration and Mediation Act is constitutional in the light of s. 12 of the 1999 Constitution the instrument of deposit of the Singapore Convention having been done after the Act came into force, and so on.

I decided to share with this audience the impact I have made on the global intellectual community in Arbitration. Normally, a customary Court award rendered between two (literate or illiterate) persons who are subject to customary law in Abonnema can hardly be enforced in a Customary Court outside Abonnema or at most outside Rivers State or Nigeria. So also an award made between two Ikwerre or Ogoni, Igbo, Yoruba or Hausa persons if enforcement is sought outside those locations, states or the country where the award was made. For emphasis, it is extremely challenging (in fact impossible) when an award is made in Nigeria or any other African country (like Ghana, Sierra Leone, Egypt, South Africa) or other countries and continents with customary law in one form or the other like the Caribbean (such as Barbados, Dominica, Cuba, Saint Kitts and Nevis, Trinidad and Tobago) or South American countries (like Brazil) and enforcement is sought in the Customary Court of another country or continent.

There could be a dispute over the buying and selling of *odogoro* or *akpagburu* (cassava) amongst the Ikwerres, or a catch of big fishes amongst the Abonema or Degema people; or cultivation of *ziah* (yam) amongst the Ogonis. In a similar way it could be about the buying and selling *odogoro* between Nwejiowhor, an Ikwerre titled man in Isiokpo town and another Ikwerre man,

Ovunda in the UK; or between an Ogoni man, Chief Mitee in Bidere and Dr. Warine adiaspora Ogoni man resident in Germany. It could be about the trade in the Kalabari traditional male dress (Woko, Etibo or Don) between Chief Bob-manuel of Briggs Polo in Abonnema and Mr Braide of Braide Polo resident in Italy. It could also be about the buying and selling of *ewedu* or *amala* between Tunde, a Yoruba resident in Nigeria and Sola, another Yoruba resident in Benin Republic, or parts of Togo or Sierra Leone where Yoruba is spoken as a native language; or between Tunde resident in Nigeria and a diaspora Yoruba woman, Yemisi anywhere in the world about the traditional Oyo (*sokoto*) dress.

It could also be between Ikechukwu, an Igbo man in Nigeria and another Igbo, Chijioke resident in Equatorial Guinea, Caribbean Island, Cameroun or Jamaicans where Igbo is spoken as a native language about the buying and selling of *ofe egusi* or the traditional *isi agu* costume; or between an Igboman in Aba and a diaspora Igbo anywhere in the world. It could be about the buying and selling of a Hausa Bible between Musa, a Hausa man in Nigeria and another in Benin, Burkina Faso, Cameroun, Central African Republic, Chad, Congo, Eritrea, Ghana, Niger, Sudan and Togo. It could also be between Musa in Kano and a diaspora Hausa man anywhere in the world.

Can such a customary award assume an international character or foreign award character so as to be enforceable in the Courts of that other country in any of those examples? Now, can an award between two Nigerians or Ghanaians, Sierra Leoneans assume the character of an international award or a foreign award though they are both Nigerians residing in Nigeria or nationals resident in any other country that is theirs. In effect,

where two nationals conduct and arbitration and none of them is outside the country can the award to be international? Yes, it can if the country in question has an Arbitration statute modelled after the UNCITRAL Model Law on International Commercial Arbitration[39] or if he is in an OHADA country, the Uniform Act of the OHADA member states[40] applies to his country; especially if they are members of the New York Convention, 1958.[41] The situation is even more intriguing when the enforcement of an award is sought in a Court or country where customary law as it is understood in Nigeria is not known, where the Courts are English, French or Portuguese etc kinds of Courts. We will turn to this very important questions *anon*.

Before we go into this discussion, one deems it necessary to consider the fact (and sound the alarm again) that even under the local customary law applicable to a vast majority of our people, our own judges, born and bred in Africa and wearing African skin have sometimes refused to recognize the African customary Arbitration.

1.2 The Enduring Torture and Denial of the African Customary Law Arbitration by African Jurists

The unfortunate behaviour of wanting to look like the Western world while denying the African system was manifested as lately as 1988 when in *Okpuwuru v Okpokam*[42] the Court of Appeal declared so magisterially and emphatically [43] that the

39. Made by UNCITRAL (United Nations Commission on International Trade Law) in 1985
40. The Act applies directly to each country without any need for any other legislation making it directly applicable. Whither state sovereignty, one may ask.
41. Done in New York by UNCITRAL in 1958
42. (1988) 4 NWLR (Pt. 90) 554
43. Pages 570, 572 – 573 of its judgement

concept of customary arbitration is unknown to the Nigerian legal system; that elders or natives cannot constitute themselves as customary arbitrators to decide land or other disputes so as to bind disputants and that any person talking of customary arbitration law in this country simply misapplies a misunderstood concept in mistaken circumstances. As if that was not enough in *Agu v Ikewibe*[44] the Supreme Court in its majority judgement equally set out to practically strip customary arbitration law of its potency by asserting, against the weight of existing judicial authority including Supreme Court decisions, that before the award of a customary arbitration could become binding there had to be a post-award consent to its bindingness.[45] In effect, a party who sees an award as unfavourable can simply nullify it by declaring that he is not bound by it. The Honourable Court discussed customary conciliation law in some detail and tagged it arbitration.

The inescapable effect of the judgement has been to make customary arbitration law impotent and practically deny the existence of customary conciliation or to confuse it with customary mediation law. **The decision has been religiously followed ever since by the Court of Appeal and possibly many of the other lower Courts[46] and has also been cited as good authority by an academic commentator.[47] There is therefore a clear danger of the pronouncements in that judgement supplanting the well-established customary law rules on the subject.**

44. (1991) 3 NWLR (Pt.180) 385
45. 407 per Karibi-Whyte, JSC
46. See, for instance, *Nkado v Obiano* (1993) 4 NWLR (Pt. 287) 305; *Okere v Nwoke* (1991) 8 NWLR (Pt. 209) 317.
47. Amazu A. Asouzu, 'The Legal Framework for Commercial Arbitration and Conciliation in Nigeria'(1993) *ICSID Review* 214, 225.

An attempt was made after the delivery of that judgement to point out that customary law ran the risk of no longer being"a mirror of accepted usage"[48] of the people into a mirror of un-researched judicial comments.[49] This inaugural lecture is one of this lecturer's efforts to awaken the Supreme Court, and indeed all the superior Courts of the land, that a grave danger planted by that judgement still lies unmined and poses a great danger of supplanting the Nigerian customary law on the subject.

1.3 The Prior Existence or Otherwise of Customary Arbitration Law From Time Immemorial

a. Customary Law Before *Okpuwuru v Okpokam*

Long before the advent of colonialism and the modern state structure (and indeed before the English type Courts-parts of which the Court of Appeal and the Supreme Court are) were established, the various African nationalities and communities[50] already had arbitration, conciliation, mediation and negotiation in their customary laws. Those means of dispute resolution in the customary law as well as customary law litigation itself were

48. The characteristic by which that law has been known over time as enunciated by Osborne, CJ in *Lewis v Bankole* (1908) 1 NLR 81, 100 - 101

49. The article, **Andrew I. Okekeifere, 'The Recent Odyssey of Customary Law Arbitration and Conciliation in Nigeria's Apex Courts' (1998) 5 *Abia State University Law Journal 1;* repeated with permission in (2000) *Modern Law Practice Journal of Finance and Investment Law* 103** was written criticizing that judicial position and pointing the way in which the law has been and ought to proceed, calling for it to be speedily overtuned at next opportunity. The article was photocopied and distributed by hand to the members of the Supreme Court at the time, including their Lordships who delivered that judgement. Their Lordships did nothing.

50. The various countries as presently constituted comprised of the several and various nationalities which were not only independent but were strong and interacted with other neighboring and distant nationalities; which nationalities were welded by force or tricks. Nigeria, for instance, is not a nation but a state of several nations which were only welded into a political and administrative unit in 1914 for the convenience of the then colonial masters of Great Britain.

well established and in constant usage.[51] An American scholar had found out long ago and reported that,

> **The arbitral process has roots deep in history. Resolving disputes by agreeing to be bound by the decision of a third party trusted by the disputants existed long before law was established or Courts were organised or judges had formulated principles of law.[52]**

Therefore, when the present state structure was set up and Courts organised in the West African sub-region they, though presided over initially by only expatriates, had no option but to recognise the existence of customary law arbitration in the societies of the sub-region.[53] Thus before 1988, it was well established that indeed parties could agree to submit an existing or future dispute to a trusted (normally a well-respected) third party to decide, with an understanding that his verdict (award) would be binding and was sufficiently potent to be obeyed once delivered;[54] that such a third party (who would normally be a family head, a village or clan head or even a selection of friends (an arbitral tribunal!) owed the duty of fairness and impartiality;[55] that such an arbitrator could not abdicate his duty in favour of another person not so appointed or, put differently,

51. See this writer in **'Commercial and Investment Arbitration in Nigeria's Oil and Gas Sector' 4 *Journal of World Investment* 5 (2003), 828 – 866 (Switzerland) and 'The UNCITRAL Model Law under Written Federal Constitutions: Necessity Versus Constitutionality in the Nigerian Legal Framework'16 *J. Int. Arb.* 2 (1999).**
52. Kellor, 'American Arbitration: Its History, Functions and Achievements' (1948) 1 *Cambridge Law Journal* 28.
53. See *Assampong v Amuauku* (1932) 1 WACA 192; *Mbagbu v Agochukwu* (1973) 3 ECSLR 90; *Foli v Akese* 1 WACA I; *Njoku v Ekeocha* (1972) ECSLR 199; *Oline v Obodo* note 14 *supra*.
54. *Kwasi v Larbi* 13 WACA 7; *Inyang v Essien* (1957) 2 FSC 39; SCNLR 112; *Njoku v Ekeocha* (1972) ECSLR 199; *Idika v Erisi* (1988) 2 NWLR (Pt. 78) 563.
55. *Okpuwuru v Okpokam* note 42 *supra* p. 587D

could not delegate his functions to any person who was not a fellow arbitrator in the same arbitral proceeding;[56] and that his award was binding so that once it was delivered it was no longer open to a party to subsequently back out of it.[57]

It was also decided that the arbitrator could even be an expatriate once he followed the necessary rules (of customary law or the rules of the trade of the parties)[58] but that if by the relevant rules or custom only a particular person could arbitrate the matter then any award by any other person would not be binding on the parties.[59]

Upon the enactment of the 1979 Constitution it was at the earliest opportunity ruled that customary law arbitration was part of the existing law under s. 274(3) and (4)[60] and therefore remained a very important part of the Nigerian jurisprudence.

b. The Law and the Decision in *Okpuwuru v Okpokam*

At the Ikom High Court in the present Cross River State, the Plaintiffs/Respondents were granted title to land, perpetual injunction and damages when that Court accepted the bindingness of a customary law arbitration conducted by the Ofutop Council of Chiefs. The Council, made up mostly of illiterates, had used a Secretary and there was evidence that the date of the award was manipulated from 30th August 1983 to 30th August 1982 probably by the Secretary. He was found to be

56. Even the majority judgement in Okpuwuru relied on and confirmed this principle; p. 587A
57. *Obodo v Oline* note 14 *supra*; *Njoku v Ekeocha supra*; *Kobina Foli v Akese* (1930) 1WACA I; *Kwasi v Larbi* (*supra*)
58. *Oline v Obodo* note 14 *supra*
59. *Opebiyi v Noibi* (1977) NSCC (vol. 11) 464
60. Section 315(4) (b) of the 1999 Constitution of the Federal Republic of Nigeria (as amended). See *Agu v Ikewibe* (*supra*); *Okere v Nwoke* (1991) 8 NWLR (Pt. 209) 317.

an insincere person and so was disbelieved on the point whether or not he had interpreted the written award to the Council members.

Uwaifo, JCA amongst other things stated that if customary law arbitration were to be acknowledged the arbitrators would be exercising the adjudicatory powers conferred on the Courts by s. 6 of the Constitution. His Lordship felt that they could not exercise such powers. In doing this His Lordship simply fell into the error in which some English judges reveled in times past when they thought that arbitration was an affront to the powers of adjudication of the Courts.[61] Again His Lordship did not advert his mind to the fact that not all the powers of adjudication exercisable in Nigeria were specifically vested exclusively on the Courts mentioned at s. 6 of the Constitution since Customary Courts and Magistrate's Courts were not mentioned there.

Just because those Courts are not so mentioned in the Constitution, His Lordship seemed to have the view in his judgement in the case that those Courts did not have their powers of adjudication! In asserting that customary law arbitration was not obtainable in the part of the country where the Court sat (the Eastern part of Nigeria), the Court was in serious error. Only a cursory look at such cases as *Mbagbu v Agochukwu,*[62] *Njoku v. Ekeocha*[63] and *Oline v. Obodo*[64] would

61. The attitude of such judicial officers that consider arbitration, whether or not in the customary law, from the point of view of litigation, which often degenerates to mere technicalities and Court room smartness has been consistently decried. See this writer, for instance, in **'Stay of Court Proceedings Pending Arbitration in Nigerian Law' 13 J. Int Arb. 3 (1995); 'The UNCITRAL Model Law and the Problem of Delay in International Commercial Arbitration', 14 *J. Int. Arb.* 1 (1997)** etc.
62. Note 53 *supra*
63. Note 53 *supra*
64. Note 14 *supra*

have clearly shown the error to the Court.

The existence of customary law arbitration in Eastern Nigeria was, as all the other issues of customary law when they are in contention before the English type Courts, a matter of fact.[65] That fact having been proven to and pronounced upon by other Courts (especially Courts of first instance, including the Court that delivered the judgement out of which the present appeal arose) including the Supreme Court,[66] it was not open to the Court of Appeal to simply dismiss those findings with such a wave of the hand. As a Court sitting on appeal it was bound by the prior findings of fact unless there were other pieces of evidence indisputably showing that those findings were perverse or incorrect.[67] There was no such evidence before the Court.

If the Court (as represented by the majority judgement) had embarked on the least effort in research it would have clearly found that customary law arbitration not only existed in Eastern Nigeria but also flourished in stupendous prosperity as in other parts of Nigeria but even much more than in those other parts. If the Court had properly settled this point of the existence of customary law arbitration, the issue of whether or not the power of arbitrators would conflict with the adjudicatory powers of the Courts would have been easy to settle. The Court would simply have asked itself "Since the customary law arbitration existed before the 1979 Constitution, is there anything in that Constitution to show that it meant to take away in favour of the Courts the adjudicatory powers hitherto exercised by customary

65. This is rather trite and old. See, for instance, *Buraimoh v Gbmgboye* (1940) 15 NLR 139
66. *Obodo v Oline* note 14 *supra.*
67. This is equally trite but see *Chikwendu v Mbamali* (1980) 3 - 4 SC 31,48

law arbitrators?" The obvious answer would simply have been a "no". That panel of the Court of Appeal would have taken the credit of being the first panel to decide on an appeal that customary law arbitration was part of the existing law under s. 274 of the Constitution. Per *incuriam*, the panel squandered that golden opportunity.

It is abundantly clear from this discussion so far that His Lordship's pronouncements were, with due respects, incorrect. Customary law arbitration was as much a part of the Nigerian law as any other rule that the Court of Appeal was bound to apply. In his dissenting judgement, Oguntade, JCA, even without much strain of research on the point, made precious restatements of the law which are to be preferred. His Lordship posited;

> **I do not think that it is contrary to public policy and not in accordance with natural justice, equity and good conscience for the parties to a dispute to submit to the adjudication of a third party in whom the disputants have confidence both as to his impartiality and competence. The othordox arbitration which has been accepted as part of the general law also operates on such principles of voluntary submission to the adjudication of a third party... I am unable to accept that native arbitration in any way derogates from the exercise by the regular Courts of the powers vested in them under the 1979 Constitution of Nigeria. If we look**

> **around us, in so many spheres, we see endless examples of disputants giving power to adjudicate over matters in dispute to persons or bodies other than the regular Courts.**[68]

His Lordship continued in the same page,

> **It does not take a special effort to know that the whole concept of arbitration generally operates on the voluntary agreement to submit their disputes to a person of their choice for determination. The person chosen need not be skilled in the practice of the law.... I do not share the view that natives in their own communities cannot have customs which operate on the same basis of voluntary submission. The right to freely choose an arbitrator to adjudicate with binding effect is not one beyond our native communities.**

Before all these His Lordship had admirably said,

> **I find myself unable to accept the position 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 the arbitration constitutes a rival body to the**

68. Page 587D - E.

> **regular Courts. But it was soon realised that an arbitration may in fact prove the best way of settling some types of disputes. The attitude of the regular Courts to arbitration therefore gradually changed.**[69]

The fact of this change even in the received English law seems to have been lost on the majority in that august panel of the Court of Appeal. The further point that such an uneasy relationship of jealousy never existed between litigation and arbitration in the Nigerian customary laws[70] was also regrettably lost on that majority. The African disposition of communality in approach to life, being averse to selfish individualistic pursuits and maneuvers but rather each other's keeper as brothers and sisters ensured from the outset that normal traditional Africans, nay Nigerians, were not litigious. The African system has always stressed the amicable approach to the settlement of disputes a good example of which arbitration is. Therefore, instead of being the underdog oppressed by litigation as in the received English law, arbitration, conciliation, mediation and negotiation were the prime modes of dispute resolution in the customary law. The judgement under consideration was just unnecessarily attempting to reverse this antiquitous and good trend.

The error of the judgement is further demonstrated by the fact that those sweeping assertions were not even necessary for a proper resolution of the matter at hand. Based only on available

69. Page 585E - F.
70. Each of the different nations in Nigeria has its own customary law. Some principles in all the customary laws, such as the existence of arbitration, are however similar in them all.

evidence on the doubtful authenticity of the written award[71] the Court could well have reached the decision it did on the title to the land.

By questioning the existence of customary law arbitration which the Supreme Court had affirmatively pronounced on or taken for granted in a number of cases,[72] the present Court was clearly on a frolic of its own and could not have been right.

c. The Law After *Okpuwuru v. Okpokam*

In *Agu v Ikewibe*[73] the Supreme Court seriously frowned at the judgement in *Okpokam*, holding that the customary law of arbitration was not only an existing law under the Constitution but also that the powers exercised by arbitrators do not amount to exercise of judicial powers since customary arbitration is not a function undertaken by the Courts. Thereafter, the decision clearly seems to have, quite deservedly, been ignored by the Court of Appeal itself and the Supreme Court with respect to the existence or otherwise of customary law arbitration. The Courts have not only gone ahead to repeatedly affirm the existence of customary law, they have further examined its nature. Thus it has been affirmed that a customary law arbitration is based simply on the voluntary submission of disputes.[74]

This writer contends that in customary law there is nothing like compulsory arbitration which is what statutory arbitrations

71. Not because of the written nature but because of the alteration and doubt as to whether it was interpreted to the Council members before they put their hands thereto
72. See, for instance, *Idika v Erisi* (1988) 2 NWLR (Pt.78) 563; *Oline v Obodo* (*supra*); *Nwaele v Onwumere* (1985) 3 SC 101. Others were even to follow: *Awosile v Sotumbi* (1992) 5 NWLR (pt. 243) 514; *Ohiaeri v Akabueze* (1992)2 NWLR (Pt.221) 1.
73. Note 44 *supra*
74. *Okere v Nwoke* note 46 *supra*; *Ojibah v Ojibah supra*; *Nkado v Obiano supra* pp. 328-9, Oguntade, JCA.

constitute under the received English law. It is equally settled that customary law arbitrators cannot delegate their duties,[75] less so to a spiritualist[76] and that oath taking as a conclusive manner of dispute resolution is no longer cognisable as customary arbitration.

In addition, Nigeria enacted the Arbitration and Conciliation Act,[77] also in 1988, based on the UNCITRAL Model Law on International Commercial Arbitration.[78] As has been argued by this writer elsewhere,[79] customary law arbitration is envisaged under the Act and is indeed enhanced by the Act, for instance by making provisions for internationalisation of customary law awards. If in 1988 such a law was enacted it would be nothing but wrong to imagine even in the faintest form that the concept of customary law arbitration is unknown to the Nigerian legal system or that it is a misnomer to talk of a customary arbitration as having binding force of a judgement.

The effect of the decision on the very many High Courts across the country is almost impossible to determine since judgements of the High Courts have been hardly reported in the recent decades. It is reasonable to expect, however, that several High Courts, Magistrates Court and customary law arbitrators and potential users of customary law arbitration were misled by the judgement before the subsequent decisions that set the position right. It is hoped that no such vicissitude shall be visited on the Nigerian customary law arbitration any longer.

75. *Nwuka v Nwaeche* (1993) 5 NWLR (Pt. 293) 295.
76. *Onwuanumkpe v Onwuanumkpe* (1993) 8 NWLR (Pt. 130) 186, CA;
77. Cap. 19 Laws of the Federation of Nigeria 1990 (revised ed.). Formerly Arbitration and Conciliation Decree No. 11 of 1988. It has now been replaced by the Arbitration and Mediation Act, 2023 but with the same relevant provisions concerning the text of this part of the lecture.
78. UNCITRAL is the United Nations Commission on International Trade Law
79. 'International Commercial Arbitration and the UNCITRAL Model Law under Written Federal Constitutions: Necessity Versus Constitutionality in the Nigerian Legal Framework' *supra*

2.0 Bindingness of Customary Law Awards

a. The Law Before *Agu v Ikewibe*

From time immemorial, the law has been settled to the effect that a valid customary law arbitration is predicated on a voluntary submission to a third party chosen by the parties (not imposed on them or by one of them), a pre-award agreement that the award shall be binding, the conduct of an arbitration and the publication of an award to the parties. When the English type Courts were established they equally acknowledged these principles.

Thus in *Gyesiwa v Mensah*[80] the West African Court of Appeal declared that it was clear from many decisions that there must be not only a voluntary submission of the matter in dispute but also it must be shown that the decision of the arbitrators will be accepted as final and binding.

The same decision was reached in *Onwusike v Onwusike*[81] where Betuel, J based on incontrovertible evidence declared that the decisions given by the elders authorised by custom to settle such disputes parties to their jurisdiction, unless clearly wrong in principle, is binding on them. I apprehend that it would be contrary to common sense to allow persons who have voluntarily submitted their dispute to an independent the decision arrived at merely because it does not favour the interest they assert or in some other way is regarded by them as unsatisfactory. In *Njoku v Ekeocha.*[82] Ikpeazu, J (as he then was) declared,

especially Part E dealing with Cap. 19, the Model Law and Customary Law Arbitrations.

80. 1947) WACA 45.

81. (1962) 6 ENLR 10, 14. See also *Ofomata v Fabian* (1974) 4ECSLR 251, 253.

82. Note 53 *supra.*

There is another instance where the decision of a non-judicial body could have a binding effect. Where a body of men, be they chiefs or otherwise act as arbitrators over a dispute between two parties, their decision shall have a 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 thirdly that they agreed to be bound by the decision. Such decision has the same authority as the judgement of a judicial body and will be binding on the parties and thus create an estoppel.

In *Kwasi v Larbi* [83] the Privy Council even took the matter further by finding from evidence in the case before it that in a customary arbitration if after the voluntary submission one of the parties withdrew from the proceedings he would nonetheless be bound by the award as much as the other party. This was cited with approval and confirmed with specific reference to Nigeria by the Federal Supreme Court in *Oline v. Obodo*[84] This was a firm closure of the matter.

b. *Agu vIkewibe* the Facts and the Judgement

The Respondent sued in the High Court for tittle to land relying, *inter alia,* on an alleged 1970 customary law arbitration. In paragraph 8 of his Statement of Claim he had averred that in 1970,"... the Defendant trespassed into the land in dispute and

83. Note 54 *supra*
84. Note 14 *supra*

the Plaintiff summoned him before the Chief and elders of the town who gave judgement in favour of the Plaintiff and warned the Defendant not to trespass again into the said land". With respect to this the Statement of Defence only stated, "Paragraphs 8 and 9 are hereby denied". The Defendant will at the trial put the Plaintiff to the strictest proof thereof which in law did not amount to a denial. The claim was dismissed but on appeal the Court of Appeal held that an arbitration was indeed conducted and was binding and that the Respondent was therefore entitled to the land.

On this further appeal, Karibi-Whyte, JSC delivering the leading judgement to which the majority concurred, regarded as customary law arbitration a situation where parties referred their dispute 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.[85] His Lordship found as authority for this proposition the passage in Justice Ikpeazu's judgement in *Njoku v Ekeocha* already reproduced hereinbefore.[86] Of previous authorities on the point His Lordship felt they were authorities for the old Gold Coast and not Nigeria.[87]

He was in fact following in the footsteps of Akpata, JSC who after enumerating the conditions for a valid and binding customary arbitration (voluntary submission, pre award

85. 407 E-G.Emphasis is this writer's.
86. Note 53 supra and the text thereof
87. Which was not correct. Numerous cases already decided in Nigerian on the same principles before that time. *Oline v Obodo* was also cited and His Lordship had no response for it.

consent, the making of an award, publication of the award, observance of the relevant customary law rules) surprisingly said, "I will like to add a fifth ingredient and that is that the decision or award was accepted at the time it was made".[88] Though that *Ohiaeri case* was first in time it has hardly been referred to by subsequent decisions while *Ikewibe* has been the favourite of the Courts, hence our preference in this article to treat the latter case as the lead point on that road of controversy and treat it in a greater detail.

c. The Critique

It is well to start this critique by pointing out that in just a short space of time the Supreme Court overruled this decision even if tacitly, in *Ojibah v Ojibah.*[89] The Appellant, a prominent Onitsha municipal lawyer, claimed that his father had given him the piece of land in question before the father's death; that even though the Obi-in-Council of Onitsha conducted an arbitration in the matter and decided in favour of the Respondent the award was not binding on him as he had told the arbitrators that the land having been given him by his father was not the subject of a compromise. The Supreme Court affirmed the Court of Appeal that the Appellant could not resile from the award. The Court cited all the relevant authorities, *Obodo v. Oline, Kwasi v. Larbi, Njoku v. Ekeocha* and *Foli v. Akese* and affirmed the position that once there is a pre award consent the arbitral award is unflinchingly binding.

The position of Karibi-Whyte, JSC in *Agu v Ikewibe* was also well answered in every respect by the dissenting opinion of

88. *Ohiaeri v Akabueze* (1992) 2 NWLR (Pt. 221) 1, 24.
89. (1991) LPELR-2374 (SC)

Nnaemeka-Agu, JSC who, to start with, was of the opinion that the case at hand could not have been one of customary law arbitration but clearly one of customary law litigation. He stated,

> **... It was averred that the Plaintiff summoned' the Defendant before the Chief and elders of the town. Now the word summoned as used by a lawyer and the Statement of Claim was settled by counsel who is presumed to have used technical words in the technical sense - .... So, when the Respondent pleaded that he summoned the Appellant before the Chiefs and elders of the town who gave judgement in favour of the Plaintiff I clearly understand it to mean that the Appellant was bound to appear before them whether he liked it or not and whether or not he wanted them to go into the dispute between them. This is clearly antithetic to voluntary submission which is the very essence of a valid arbitration agreement.**[90]

It was His Lordship's finding that the agreement to be bound was normally pre-award, not subsequent to it. Of the existing judicial authorities His Lordship made the very valid point that though most of them were Gold Coast cases, the "trend continued also in Nigeria after the split of the West African Court of Appeal".

90. P. 420F - 421C

Justice Ikpeazu's decision is not an authority for the position taken by the Hon. Justice Karibi-Whyte. Indeed if read carefully, the passage is easily seen not to have meant that the consent should be post award. In fact, His Lordship had finished dealing with cases like what obtained in *Inyang v Essien*[91] in which the mediating third parties have no judicial power and their decision is not accepted by the parties. His Lordship ruled that even subsequently be able to resile therefrom. He then proceeded to treat the referred to. It was His Lordship of the Supreme Court that now extrapolated based on his own interpretation of the passage. In fact, *Njoku v Ekeocha* is itself an authority for the proper position of law, i.e, that the consent should be pre award and cannot be withdrawn once given having been made against his late father in the father's lifetime he could not now seek to resile from it. The passage relied on by the leading judgement of the Supreme Court in *Ikewibe* was not only read out of context but also misinterpreted.

Even if Justice Ikpeazu's statement is seen not to have been read out of context by the Supreme Court, then the further point must be acknowledged, i.e., that the statement was made obiter. It was hardly open to the Supreme Court to cite and rely on an erroneous obiter dictum when abundant evidence and authorities existed to show what the actual practice of the people has always been in the matter in issue. It was not open to either Justice Ikpeazu or Justice Karibi-Whyte to indulge in judicial legislation or radicalism on the point. Customary law is not made in the Courts, but in the daily practices and lifestyles of the indigenous people involved. Courts can only restate the law

91. 2 FSC 39.

since it must always be a mirror of the people's accepted usage, not the opinion of judicial officers. The only burden imposed on the customary law and the only way the English type Courts may play a role in its shaping is in the exercise of their power to declare it invalid if it is found to be contrary to natural justice, equity and good conscience or public policy.[92]

This writer can also confirm that indeed the practice amongst the Igbos (from amongst whom the case in hand arose and whose customary law of arbitration was in issue) and indeed the other tribes of Eastern Nigeria is that the agreement to be bound has to be pre- ward. If there is no such agreement until the award is made, the proceeding is not an arbitration even if the parties erroneously call it one. It will at most amount to a conciliation. Indeed the system described by the judgement of Karibi-Whyte, JSC was customary law conciliation. This would seem to be the position nationwide. No other judical authority (apart from *Ikewibe* i.e.) or even an academic commentary points to the contrary and no tribe in Nigeria is known to have the requirement for a post award consent for validity.

The correct position is that customary law arbitration rests only on the voluntary submission of the parties to the adjudicatory role of a third party consensually selected by them (not by only one of them as was the case in *Ikewibe*), with an express or implied agreement that his award or opinion would be binding, the arbitrator conducts the arbitration following the relevant customary law or trade rules and publishes an award.[93] In customary law conciliation the parties also voluntarily submit their dispute to a trusted third party who conducts a proceeding

92. See cases like *Laoye v Oyetunde* (1944) AC 170.
93. *Agu v Ikewibe* note 15 *supra* per Nnaemeka-Agu, JSC; *Njoku v Ekeocha supra* etc

similar to that of an arbitration (i.e. both sides present their cases and the third party considers their merits and demerits and delivers an opinion) and publishes the decision to the parties. After hearing or reading the decision each party is at liberty to accept or reject the decision. If both parties accept it, it becomes binding and none can subsequently resile from it. If any or both parties reject it, it lapses and cannot bind them unless they subsequently revive it by a joint signification of consent.

A mediation proceeding is entirely different being far more informal. Each party presents his case to the third party (which in this case is normally much more likely to be a group, not an individual) who weighs the merits and demerits purely with the aim of restoring peace and not necessarily to assert rights and liabilities, makes a proposal or a "proposed award"(which His Lordship of the Supreme Court was speaking about) to the parties on what to concede to each other and what adjustments to make to preserve peace. It may still involve the assertion of rights such as title to land and liabilities (especially where economic interests are involved) but the parties in all cases reserve the right of rejection of the suggested decision not just soon after its delivery but for all times. A party can resile from it at any time.[94] It is mediation that is always resorted to in a quarrel between relations or a couple in the African traditional society. In both conciliation and mediation if a party withdraws before delivery of the decision or suggested settlement he

94. It is arguable that in the present commercialised world a joint signification of assent to the mediator's suggestions could be binding not as a decision but as a fresh contract of the parties on the terms suggested by the mediator. Giving a definite opinion on this will require further study of the present day practice amongst the people because whatever is stated as the law must be "a mirror of accepted usage" of today, not an anticipated futuristic or outdated usage: Bairamian FJ in *Owoniyin v Omotosho* (1961) 1 All NLR 304,309; Karibi-Whyte, JSC in *Agu v Ikewibe* p. 409A-B.

cannot be bound by the decision or suggestion unlike in arbitration and litigation.

Many cases have ignored *Ojibah v Ojibah* and rather followed the error in *Ikewibe*.[95] Practically all Court of Appeal decisions have followed it. It is therefore clear that except the Courts retrace their steps or the Supreme Court (for the sake of overabundance of clarity) specifically pronounces *Ikewibe* overruled, the alien rule of post award consent that it has rule will then not be a "mirror of accepted usage" or "the prevailing "with which the present generation cannot be linked".[96] It will be a foreign, alien and alienating law, a mirror of an extravagant judicial usage.

Hardly will customary law arbitration thrive under such a rule for every loser of an award may simply disown the award and it will not bind him laughter at the customary law arbitration concept. In fact, it will then be Nigerian legal system" and that anybody talking of customary law arbitration "simply misapplies a misunderstood concept in mistaken circumstances". That way also, confusion and danger of resort to self-help especially in this age of monumental delay in all Courts - Customary Courts and the English type Courts - will have a free reign. Bad faith and treachery will acquire high premiums in such a so called customary law arbitration. Customary law arbitration and its good and honest users will be short changed. It will be a case of law and custom prostrate while unsubstantiated judicial opinion is triumphant.

95. See, for instance *Nwuka v Nwneche supra*.
96. Per Justice Karibi-Whyte himself at p. 409A B

3.0 Other Manifestations of Confusion in Courts' Decisions on Customary Arbitration

Apart from these two cases, the apex Courts have also indulged themselves in costly errors breeding confusion. For instance in *Nwuka v Nwaeche*[97] the Court of Appeal allowed itself to make contradictory statements which, combined with some other statements made in the case have the effect of further confusing the law in the area of customary arbitration unnecessarily. The Court held, rightly, that generally once parties submit to arbitration by choosing their own arbitrator to be the judge in the dispute between them, they cannot, when the award is good in its face, object to its decision, either upon the law or the facts and when matters in difference between the parties are investigated at a meeting and in accordance with customary and general usage and a decision is given, it is binding on the parties and a Court of law will enforce such decision.[98]

The Court also admirably found it as a settled principle of law that parties are bound by the decision of a customary arbitration if they really and properly submitted to the arbitration in circumstances that they cannot rebound or withdraw from its decision. It however summersaulted and borrowed from the virus of *Agu v Ikewibe* and posited that it should also be shown that the parties accepted the decision of the arbitrators as at the time it was made. In one breadth the Court restated the law on pre award consent but in another decided that there ought to be another consent at the time of delivery of the award. It would seem that a requirement of two significations of consent was being laid out; which cannot but be thoroughly erroneous

97. (1993) 5 NWLR (Pt. 293) 295.
98. At p. 308 F-G per Ndoma-Egba, JCA

considering the actual every day practice of the people and considering that all previous judicial findings on the point including Ikewibe had always stressed only one consent. This writer maintains the contention in favour of the actual practice and usage of the Nigerian village inhabitants i.e. that in customary arbitration there is only a pre award consent from which a party cannot resile.

A careful reading of page 308 of the report would show that what led the Court into holding that a post award consent was necessary was to avoid a situation where a party is bound by a decision whatever is the merit or demerit of it.[99] For this purpose, the Court stated that a right of appeal existed up to the Supreme Court for a dissatisfied party. The Courts fear is understandable since if an arbitral proceeding was conducted in contravention of the sacred principles of fair hearing or if, for instance, a customary law award is obtained by fraud, the aggrieved party is not expected to submit to (such) a decision that is clearly unjust to him.[100]

In Nigeria the right to fair hearing is a Constitutional right that even if a party is willing to waive the law and public policy deny him the chance to waive. Any proceeding conducted or decision reached in contravention of the principles of fair hearing is a complete nullity as having been done without jurisdiction,[101] However, neither in the day to day customary practice of Nigerians nor in the general received law is there any right of appeal from an arbitral award as at today. In customary law it had never existed as any discussion with the village dwellers in

99. P.308

100. P. 308E. In fact, in *Mbagbu v Agochukwu Nwokedi*, J. rejected the result of an arbitration because there was denial of fair hearing: pp. 95-96.

101. *Enigwe v Akaigwe* (1992) NWLR (Pt. 225) 505,514.

any part of the country easily and quickly discloses. It existed in the general law both under the common law and the old Arbitration Act[102] but was abolished by exclusion when the Arbitration and Conciliation Act[103] came into force. The avoidance of the danger pointed out by the Court is not at any rate a sufficient reason for such a unilateral introduction of the obnoxious principle of the right of appeal against arbitral awards in customary law arbitrations especially as the law has taken care of such situations in other very effective manners. The options available to the aggrieved party is to setting aside of the award or wait to challenge enforcement when the other Nigeria even though an aggrieved party can appeal from the ruling in a setting aside or enforcement proceeding even up to the Supreme Court.

The Court delivered one of those maltreating statements by declaring at p.308F,

> **Moreover native arbitrations were useful to the dim past when regular Courts were non-existent.**

This amounted to saying that there is presently no need for customary law arbitration. This is, with all due respects, most misconceived. It amounted to saying the same thing in different words with the lead judgement in *Okpuwuru v Okpokam* on the purported non-existence of customary law arbitration. The confusion in which the Court reveled was immediately manifested when a few paragraphs later at p.309H - 310A the same learned Justice declared,

102. Cap. 13, Laws of the Federation of Nigeria 1958.
103. Cap. 19 Laws of the Federation of Nigeria 1990 (revised ed.)

> **Arbitrations are, indeed, a short cut to early determination of cases amongst the natives with our Courts becoming increasingly congested. Customary arbitrations may stay in our accusatory system of jurisprudence but should however always operate within our rules of evidence.**[104]

That statement underscored the point that customary law arbitration is still as relevant as it was in the dim past when Courts were non-existent. It is also good to point out that regular Courts have never been non-existent in the customary law because a well organised Court system had always existed in which Obas, Obis, Ezes, Tor Tivs, Emirs etc or age grade groups, town or clan assemblies were Courts seised of sufficient coercive powers to enforce their judgements. Again, if the Courts are getting more congested as the statement attested to, then of course the situation is quite near to the dim past of absence of Courts and, even if for that reason alone, customary law arbitration will be considered as relevant as ever.

His Lordship was also in error in insisting that customary law arbitrations should however always operate within our rules of evidence unless he meant relevant customary rules of evidence. It is trite that even in arbitrations under the received English law, there is no absolute requirement that the established rules of evidence must be followed. Parties are at liberty - in exercise of the sacred principle of party autonomy - to make their own unique procedural rules (and evidence is simply a part of procedure) or even to choose the rules of procedure and

104. Emphasis mine

evidence of a completely different country to govern their arbitration even if the arbitration is taking place in Nigeria. Not only so, they reserve the right to choose the law of another country as the substantive law of the proceedings. They can also choose a foreign language, French, German or Latin for instance to be the language of the proceedings.[105]

The law reporter even created further confusion in the case by adding "or mediation" to his summaries of the Courts pronouncements on arbitration. Anyone who only reads the outlined *ratio decidendi* and does not read through the entire judgement is likely to think that the Court said that parties are bound by the decision of customary arbitration or mediation by mere submission to its jurisdiction or that parties are bound by the decision of customary arbitration or mediation if they really and properly submitted to the arbitration. These statements which appear in the reporters' summary of the *ratio decidendi* of the case are right about arbitration but would be miserably wrong about customary mediation. The reporter is probably one of the lawyers who conceive every settlement of a matter out of Court and every mediatory role played in a matter as arbitration, and who perceive arbitration and mediation and conciliation as the same thing called different names.[106]

105. For a broad consideration of these issues see this writer in **'Commercial Arbitration as the Most Effective Dispute Resolution Method: Still A Fact or Now A Myth?' 15 *J. Int. Arb.* 4 (1998)**. See *Nwuka v Nwaeche* (1993) 5 NWLR (Pt. 293) 295

106. Indeed the level of awareness of arbitration even amongst lawyers in Nigeria is shamefully poor. Lawyers assume that by their legal training they are automatically versed in arbitration where everywhere in the world arbitration has in fact become a distinct and specialist area of endeavour calling for proper training and interest. Nigeria is also not highly regarded in the international arbitration community as a vibrant arbitration centre. Efforts have however been made by some persons to put the country in her proper place by necessary discussion of her laws on the matter and by practice in the actual market place of arbitration. This writer has contributed to the discussion in the following inter alia, **'The Enforcement and Challenge of Foreign Arbitral Awards in Nigeria' 14 *J. Int. Arb.* 3 (1997); 'The UNCITRAL Model Law and the Problem of Delay in International Commercial Arbitration' 14 *J. Int. Arb.* 1 (1997); 'Public Policy and Arbitrability under the UNCITRAI Model Law' (1999) *International Arbitration Law Review***

4.0 The Way Forward on the Existence Etc of Customary Law Arbitration

The customary law is a living and self-improving system. It is in fact the people's contemporary practice and behaviour in the particular area in question. Therefore, it does not need judicial activism or judicial legislation to keep it abreast with the times. Under the general law, by the force of judicial precedent, the past rules the present and the law often requires judicial activism by way of judicial legislation to free it from the fetters of cold and lifeless orthodoxy. It is not so with the customary law since that law is not really to be found in what was yesterday's decisions or practices, but in the practices of the now. Therefore, any effort by Courts to make un-researched judicial comments about the customary law, even if in the so-called effort to grow that law, can only work injury and affliction on it.

We have tried to identify the injury inflicted or being inflicted on customary arbitration in Nigeria by the erroneous sweeping assertions of the Court of Appeal and the Supreme Court in some cases touching on customary law arbitration that they have sat on appeal over. We have demonstrated the error of the decisions. We have shown that the injury of *Okpuwuru v Okpokam* seems to have been contained while that of *Agu v Ikewibe* is spreading fast, threatening to supplant the actual existing rule of the customary law.

70 – 77; 'Appointment and Challenge of Arbitrators Under the UNCITRAL Model Law: Agenda for Improvement' (1999) ***International Arbitration Law Review*** **167 (double pages); 'Commercial Arbitration and Third Party Interests: Views for the Future' (1999)** ***Int. Arb. Law Rev.*** Nigeria's Arbitration and Conciliation Act cap. 19 LFN 1990 is based on the UNCITRAL Model Law.

It is hoped that the Supreme Court will rise to the occasion and specifically redirect the Courts to the living law by specifically declaring *Ikewibe* as overruled - an overruling that had in fact been done 1991 but which seems to be unknown or forgotten. It is also hoped that in handling cases touching on arbitration the Courts would now avail themselves of expert opinions which can now be found abundantly in the country, to avoid further confusion of the law. It is not an indictment of the learned judicial officers to say that none of them can know everything especially in such a specialist area as arbitration. Though "the law is in the bosom of the judge" times and seasons have proved that he too is a mere mortal subject to the numerous inadequacies that attend being human, one of which is the inability to exercise omniscience.

5.0 The Internationalisation Process

a. Preamble to this Part

In this part of the lecture, I will restate what I had done before several years back,that the African customary law Arbitration and its likes the world over has become international in every respect.

As would have become clear from the discussion so far, prior to the advent of colonialism and establishment of the modern African states the pre-colonial political and economic entities, which were mostly kingdoms and chiefdoms at different levels of political and economic development,[107] had their indigenous

107. While such kingdoms and empires as ancient Egypt in North Africa, Asante empire in the present Ghana, the Kanem-Bornu Empire, the Sokoto Caliphate, the Oyo and Ife kingdoms and the several Igbo egalitarian and republican societies in the present Nigeria were at advanced levels of political and economic organisation some others had less developed systems.

ways of settling economic and social disputes. They had well-established customary laws that governed their lives and businesses, providing guidance in both domestic and inter-kingdom or inter-chiefdom affairs in peace and in war. Amongst the prominently developing areas of that law were such dispute resolution mechanisms as litigation, arbitration and the ADRs such as mediation, conciliation and negotiation. Arbitration and the ADRs were certainly not called these English names and in several places may not even have had names distinguishing one from the other. Their characteristics (such as between arbitration and conciliation) were also no doubt, overlapping. That is why those trained in the British and other European or American systems have often had difficulties distinguishing between them.[108]

Those facts notwithstanding, Arbitration and the ADRs were mostly favoured and in vibrant employment by all segments of the society. They much more engendered a peaceful settlement of disputes and preservation of the pre-dispute cordial social or business relationships than litigation. The preference for peaceful or amicable settlement of disputes and restoration of pre-dispute cordiality has always been a part of African culture stemming from the deep-seated African principle of everyone being his brother's keeper.

In the colonisation process, each African kingdom or chiefdom was wholly or partly dismantled for the emerging colony to take

108. Such as the Supreme Court had in *Raphael Agu v Christian Ikewibe* note 15 *supra*. For an examination of such confusions and other maltreatments of customary law arbitration see this writer in **'The Recent Odyssey of Customary Law Arbitration and Conciliation in Nigeria's Apex Courts' (1998) 5** ***Abia State University Law Journal*** **1** and Chapter 9 of his ***Studies and Materials in International Commercial Arbitration*** **(Port Harcourt: Lawhouse Books Nigeria 2002)**.

root. As a result, the several kingdoms and chiefdoms, without any prior political or economic affinities whatsoever, got welded together into new states or countries for the administrative convenience of the conquering colonial Power.[109] With that came the replacement of the customary law by the legal system and values of the colonizing Power in general administration, state affairs and dispute settlement generally. The coloniser's imported law and legal system applied in each colony except with respect to such village/rural affairs where the personal law of the disputants was customary law and was deemed relevant under the new principles of statutory law enacted by the colonial master. In many cases states or countries stronger than the vanishing chiefdoms, kingdoms and empires emerged from the colonisation process. Each new colony began in earnest to operate as it were in the international scene through its coloniser (and, for instance, became subject to international treaties and conventions to which the coloniser was a party) but the customary law remained localised to tribes and language or cultural groups within each colony and did not develop at any international level or adopt any international character or dimension.

In this way customary law arbitration and the ADRs were localised and locked up within the small language groups within the emergent states. In consequence, though many of the emergent states later became members of the New York and ICSID Conventions,[110] those Conventions were only relevant

109. For instance, the major reason for the merger of Southern and Northern Nigeria was Britain's administrative and economic convenience. See, for instance, F K Buah, B Davidson and J F Ajayi, A History of West Africa 1000-1800 (Longman 1977).

110. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards made in New York 1958, (http://www.uncitral.org/en-index.htm) and the International Convention for the Settlement of Investment Disputes between States and Nationals of other States made at Washington in 1965.

with respect to arbitrations and awards concluded or made under the imported Western style law of arbitration and not the customary law. There were no equivalents of those Conventions for customary law arbitration and awards. Happily, however, when African states began to embrace and adopt the UNCITRAL Model Law on International Commercial Arbitration and the Uniform Act of the OHADA States (the latter of which itself derived from the OHADA Treaty of 1993)[111] as from the 1980s, customary law Arbitration has been unbound and internationalised. As each African country enacts the Model Law into that country's laws there is an automatic internationalisation of customary law arbitration and customary law awards in that country. It is also the same for any other country such as those in the Caribbean, in the South Americas etc, who have customary law Arbitration or equivalent in their jurisprudence.

This can only fail to happen if the country adopts the Model Law without its philosophy on written agreements, commercial and international arbitration. As shall be seen in this lecture, the definition of written agreements, commercial arbitration and international arbitration are such that even customary arbitration agreements (written and unwritten) and customary law arbitration processes and awards are covered and become internationalised. Once a country joins the OHADA Treaty its customary law arbitration is also internationalised.

111. OHADA is the Organisation for the Harmonisation of Business Law in Africa a forum of the former French colonies. It was established by the OHADA Treaty signed on 17 October 1993in Mauritius by Benin, Burkina Faso, Cameroun, Republic of Central Africa, Comoros, Congo (Brazzaville), Ivory Coast, Gabon, Equatorial Guinea, Mali, Niger, Senegal, Chad and Togo. It was latersigned by Guinea (Conakry) and Guinea-Bissau. It came into force on 18 September 1995 after ratification by 7 of those countries. The Uniform Arbitration Act applies to proceedings commenced in any member State after May 15, 1999. The OHADA Treaty is at http://www.ohada.con/traite.php (in French language).

We will understand from this lecture that this has happened in the African jurisdictions which have enacted the Model Law or have the OHADA Uniform Act operating in their shores. We will also understand that the same will happen in those places now contemplating the adoption of the Model Law. We argue here the internationalisation of customary law arbitration and awards is one very strong reason, amongst others, why every African country ought to give very serious thought to the soon adoption of the Model Law into her own domestic laws. We first examine the pre-colonial development of customary law arbitration. We then look at how that law fared on the Continent within the period of colonial government and after independence of the different States, up to 1988 when statutes based on the Model Law began to appear on the Continent.

Thereafter, we survey the adoption of the Model Law and the OHADA Uniform Act by African states and the consequent internationalisation of customary law arbitration and awards. We will then examine the impacts of the internationalisation process particularly in relation to such other international arbitration documents like the ICSID and New York Conventions. We will also look at the prospective impact of this new dawn on international trade and commerce and on international arbitration itself.

6.0 Pre-colonial Political and Legal Regimes

In all African states (just as in several Caribbean, Asian and Latin American States) there are in arbitration law two jurisprudences within a jurisdiction! The Western style of arbitration operates side by side with an indigenous customary law arbitration. The two streams of arbitration law may have

some things in common, the principles of fair hearing for instance, but they are clearly different systems of law.

With a few exceptions, African countries as presently constituted are creations of colonialism. The Berlin Conference of 1885 went a long way in setting the boundaries of the then emerging African colonies. The determination of the boundaries of those emergent colonies (and subsequently States) was not based on homogeneity of the peoples or their history but purely on the economic and political conveniences of the colonising Powers, particularly administrative convenience. In that manner, peoples with entirely different histories, cultures and values and even destinies were forced into unions. Thus the Igbo, Yoruba, Kalabari, Efik, Ijaw of what now constitutes Southern Nigeria were welded into the Protectorate of Lagos and Southern Nigeria. This was in 1914 merged into a single political entity (which was then named Nigeria) with the Hausa-Fulani, Kanuri of the far North and the Nupe, Tiv, Idoma, Igala of the Middle Belt. Whilstthe Yoruba kingdoms and chiefdoms had been used to an administrative system centred around the Oba (the King), the Igbos were mainly republican and had no traditional ruler or dynasty as such.

Though the Hausa-Fulani and Kanuris were organised around traditional ruling institutions, those were of an Islamic religious nature i.e. emirates. In present day Ghana the Ashantis got welded into the same entity with other groups like the Fantis and some Hausa speaking people. The Creoles and Mandigoes got welded into the present day Sierra Leone with other language groups. The Shunas and Matabeles of Zimbabwe got merged with others to form one country.
Each of these pre-colonial groups was organised as a chiefdom

or a kingdom or some other politically and administratively efficient unit. As in many other pre-capitalist societies they were also organised along principles and virtues that made each man his brother's keeper.[112] Cordiality was valued tremendously and as often as disputes arose they were settled with more emphasis on restoring cordiality and the general social bond. Far less premium was placed on the bare rights and liabilities of parties. Parties' rights and liabilities were recognised in the light of (not in spite of or against) the general social good. A deep social bond was the hallmark of early African relationships within a community or family. Even when a man's rights were infringed or trampled by another, the aggrieved was expected to pursue his rights only as far as would be consistent with the maintenance of the bond in the family, community or age-grade.[113] The social order required a continuous process of sharing one's life and the quarrelsome disposition inherent in litigation could hardly be afforded or allowed. The bond needed to be preserved not just for the interest of the living but also in deference to the dead and for the interest of those yet unborn. A scholar has identified this in the following words,

112.The doctrine of every man being his brother's keeper is the hallmark of the Christian faith and theology: Matthew 5 etc. It is also consistent with the teachings of several other religions and it would appear that earlier societies were more religiously inclined and tended to adhere more generally to that pattern of life than the present descendants of those societies. In Africa, the practice is not just a religious requirement or creed. It is a deep set inseparable part of the people's culture. It is one of the aspects of culture that spans all African societies. Every member of one's community was/is a brother to whom one owed/owes a bounden duty of being his keeper as it were. Members of other communities (even neighbouring communities) may be seen as anything good or bad depending on the cordiality or otherwise of the inter-communal relationship, but whatever pressure or strain there may be in the relationship with another member of the same community or family, there was a duty to be one another's keeper. The weal of such a bond has been affected adversely but not eroded by colonialism and the attendant market economy but it still survives.

113. Members of a community within a 10 or 20 years age bracket were organised into an age grade upon the attainment of manhood. The age grades were important administrative organs and self-help-development catalysts particularly in republican societies such as the Igbos of South-eastern Nigeria.

> **The kinship principle provided the individual with a community whose moral order emphasised shared values, a sense of belonging,security and social justice. In such social order duties preceded rights. The principle was clear to enjoy your rights you must do your duty; and duty and right have a reciprocal relationship, and structurally both were balanced. The genealogical structure, whatever its depth,solved the dialectical problem of relating the present to the past and both to the future. It is a simple transformation embedded in the lineage system. The lineage incorporates the living, the dead and the unborn. By the principle of reciprocity, the living respect the ancestors and the traditions they left; the ancestors reciprocate by maintaining the prosperity of the living community and, through re-incarnation, strengthen the living lineage. When the living die, they join their ancestors.**[114]

It did not matter how important a dispute or an infringed right was; the society was greater than all its members. In this connection with respect to the past and present, a notable African historian has also remarked:

114. VC Uchendu, Tradition and Social Order' Inaugural Lecture, University of Calabar, Calabar, Nigeria, 11 January 1990, as cited in U Oji Umozurike, The African Charter on Human and Peoples' Rights(Martinus Nijhoff Publishers, the Hague, Boston/London, 1997), p. 19 footnote 23.

> **We put less emphasis on the individual and more on the collectivity; we do not allow that the individual has any claims which may override that of the society. We assume harmony, not divergence of interests, competition and conflict; we are more inclined to think of our obligations to other members of our society rather than our claims against them.**[115]

Most naturally therefore, as already stated, these communities embraced arbitration for the settlement of their commercial, investment[116] and social disputes. It has been observed of the early Arab world (which is true of the African) that,

> **Arab and Islamic societies were characterised by the existence of a strong communal system to promote amicable settlement of disputes through negotiation/mediation as a first step that could lead ultimately at a later stage to conciliation/arbitration. According to results obtained through serious anthropological studies, the region had**

115. CAke, The African Context of Human Rights Africa Today 1st/2nd Quarters (1987), 5-12.Of course the offender is not pampered and allowed to go on with his wrong doing. His wrong doing against one member of the community is a wrong against the community and is treated as such. For more on this and on the relationship between Arbitration and Human Rights in pre-colonial and present day Africa see this writer in **'Arbitration and Human Rights in Africa' (2007) 7** ***AHRLJ*** **103**.

116. For a survey of the occurrence and settlement of commercial and investment disputes by Arbitration in the customary law see this writer in **'Commercial and Investment Arbitration in the African Customary Law: Myths or Realities?' (2007)** ***The Beacon*** **(*CLASFON, Nig. Law School*) 48 – 54.**

> **been culturally pro-conciliation even before the appearance of Judaeo-Christian and Islamic ideals of moral harmony and peaceful settlement of disputes within the community without confrontation through litigation. This characteristic survived until the mid-twentieth centurywhere 80% of all disputes used to be amicably settled out of state courts by recourse to a respected popular personality chosen for his wisdom and known integrity, either in the village rural community, within the heads of the nomadic tribe or among city merchants.**[117]

Of the general African environment it has been written,

> **The quintessence of the African jurisprudence is that in a dispute,no party is totally at fault or completely blameless. As such, a high value is placed on reconciliation and everything possible is done to avoid the severance of social relationships. Where men must live together in a communistic environment, they must be prepared for give and take relationship and the zero sum, winner-takes-all model of justice is inappropriate**

117. ASEl-Kosheri in his report to 1996 ICCA Conference, quoted in BM Cremades, 'Overcoming the Clash of Legal Cultures: The Role of Interactive Arbitration', 14 *Arbitration International* (1998) 157, 159 note 3.

in their circumstances.[118]

Writing specifically on the situation in the communities that now constitute Nigeria a learned commentator has observed,

> **Arbitration, as a method of settling disputes, is a tradition of long standing in Nigeria. Referral of a dispute to one or more laymen for decision has deep roots in the customary law of many Nigerian communities.**[119]

These observations or findings went to confirm the earlier findings of a scholar on ancient arbitration not just about Africa, Asia or Latin America but even of what now constitutes the USA. She said,

> **The arbitral process has roots deep in history. Resolving disputes by agreeing to**

118. O Adigun, The Equity in Nigerian Customary Law, in Y Osinbajo and A Kalu (eds), 'Towards a Restatement of Nigerian Customary Laws' (Federal Ministry of Justice, Lagos, Nigeria 1991) 8,11-12

119. Ezediaro, 'Guarantee and Incentive for Foreign Investment in Nigeria', 5 *Int'l Law* (1971) 770,775. See also AA Asouzu, 'The Legal Framework for Commercial Arbitration and Conciliation in Nigeria', 9 *ICSID Rev FILJ* (1994) 214, 216- 217. That a reconciliatory approach to the resolution of disputes (through arbitration and the ADRs no doubt) for the preservation of the greater social good was also the custom in East Asia was recently confirmed by Professor Yashuei Tamguchi in his report for the 1996 ICCA Conference in the following words inter alia, "a typical example is Japan, wherein under the feudal regime which lasted for more than 250 years until 1868 there was ... a strong communal system to promote amicable settlement of disputes and to suppress litigation. Litigation was condemned as a moral wrongdoing to the society and to the other party. A good judge was not supposed to give a judgment but to try to give a good conciliation. This tradition was deeply embedded in the people's mind and formed a dispute resolution culture in Japan. Radical political and economic changes taking place in the past hundred years have certainly affected this culture but it still persists in many noticeable forms. In China where this type of culture originated a strong emphasis on the conciliation was kept even under the Maoist communists regime as the means to resolve the so-called 'contra-diction within the people', Judges' primary obligation was said to be not to decide cases but to 'educate' the parties so that they become willing to cease disputing... ". See Cremades, *supra* note 11.

be bound by the decision of a third party trusted by the disputants existed long before law was established or Courts were organised or judges had formulated principles of law.[120]

Indeed in the African environments of the time, a very vibrant recourse was had to arbitration and such ADRs as mediation, conciliation and negotiation for the resolution of all kinds of disputes. In addition to the fact that every reasonable person was his brother's keeper, the communal extended family, age grade manner of living and administration of justice ensured that even in circumstances of serious quarrels and misunderstanding the African was far less litigious than his contemporaries in other societies such as Europe. He was also far less litigious than the average cosmopolitan African is today. Customary law litigation was therefore generally not resorted to except as a last resort or in the few cases where the aggrieved person was a particularly litigious or cantankerous person. Such a person was generally considered a deviant since by his action she tended against the general grain of public opinion and disposition which was the preservation of existing relationships.

As already stated, such preservation of relationships was the hallmark or the very essence of dispute settlement not necessarily the declaration of rights and liabilities. Declaration of rights and liabilities are the hallmarks of litigation in every culture and every jurisdiction in whatever age and time. It is this writer's considered view that indeed it is the position and process in the African and Asian customary systems that

120. FA Kellor, American Arbitration: Its History, Functions and Achievements (Harper, New York 1948).

correctly qualify as “dispute settlement”or “dispute resolution". The declaration of rights and liabilities, which leaves the parties still quarreling, does not "settle” or “resolve” the dispute. It grants pounds of flesh as much as possible but does not really settle the dispute. Even as of now if it is said to a normal African mind that a dispute was "settled" and yet the parties are quarrelling it would sound as a clearly preposterous antithesis to him. Even in the African customary litigation, efforts for real settlement are normally made even if not with as much commitment or result in some cases as in arbitration or ADRs.

Because of the immense respect and honour attached to their positions and their attendant high level of responsibility, traditional rulers, red cap Chiefs, elders and other trusted persons were the dispute settlers. On the one hand, the Head of the Family or clan or the Chief-in-council (i.e. Traditional ruler-in-Council) of the community, Chiefdom, Kingdom or emirate functioned as the courts of law in some places. In other places with republican and more egalitarian administrative arrangements, age groups and highly reputable social clubs were also Courts. When constituted as Courts these identified classes of people had coercive powers and anybody summoned before them[121] was bound to appear.

They could impose fines in both criminal and civil matters as

121. To summon another person before them in Igbo culture (Eastern Nigeria) for instance, an aggrieved party would normally go along with any amount of money he liked or some other property which he would deposit with the Chief, Family/Clan Head etc and give a summary of his case. He had thus instituted the case. The other party would be invited to deposit the same amount or similar property after which a date would be fixed for hearing of the case. At the hearing each party would narrate his case in detail, call witnesses if he liked and question the other party and that other party's witnesses. There were no professional lawyers and no addresses such as obtain in modern day formal Courts. The judges would retire to deliberate on the matter and come out with a judgment which could include an order for the forfeiture of the deposited money or property by the losing party. Whoever won or lost, verdict was given in such a manner as to heal the existing wounds and specific orders against further wrong doing would be handed down. The proceedings could be concluded in one day or a few days.

they deemed appropriate under the relevant customary law rules and practices. This was customary litigation and was clearly different from customary arbitration and other modes of dispute settlement such as conciliation and mediation, amongst which mediation was the most popular. The same Chiefs, Elders, Family or Clan Heads or other trusted third parties could also, and often did, function as arbitrators, conciliators or mediators. In arbitration, an aggrieved party would normally agree with the other party for their dispute to be taken to the Chief etc. The agreement could also be post dispute and, or by implication only. For instance, if a dispute arose between A and B, one of them could go to report the matter to the Chief, Family Head etc, without any deposit of money or property. The Chief etc would then invite the other party. Unlike a party in litigation, that other party had a choice not to appear[122] but if he did appear then an agreement to arbitrate was implied even if none had existed. Whether the agreement was an express or implied one, the parties would have to indicate, expressly or impliedly, that they would be bound by the decision of the Chief, Family/Clan Head etc.

The indication was implied if none of them objected to the hearing and determination of the matter by the Chief, Family/Clan Head etc. Once such an indication was given or implied, the parties would be bound by the decision of the Chief etc (i.e. the arbitrators) and none would subsequently be able to resile therefrom.[123] In mediation, the process was initiated by one of the parties or by the mediator - the Chief, Family Head, a

122. Though in the case of the Chief (traditional ruler) or Family/Clan Head non-appearance could in some cases be viewed as disrespectful.

123. See, for instance, the Nigerian Supreme Court decision in a long stream of cases such as *Obodo v Oline* note 14 *supra* and *Ojibah v Ojbah* (1996) NWLR 86. For an erroneous position taken some time by that Court, which the Court has now overruled and abandoned, see *Agu v Ikewibe supra* note 15

trusted mutual relation or friend volunteering to settle the matter. He could invite both parties and hear them in the presence of each other or he could first speak with them individually. He would give his opinion, which the parties were entitled to mutually accept or reject. If one or both rejected the opinion there was nothing anybody could do about it and the process came to an unsuccessful end.

Much as arbitration and ADRs were vigorously resorted to in those communities, there was a limitation. Arbitration was hardly international in the true sense of the word. Most, if not all, arbitral proceedings took place amongst members or residents of the same kingdom, chiefdom or emirate. Though enormous inter-kingdom, inter-chiefdom or inter-emirate trade and commerce took place amongst indigenes and residents of the different kingdoms etc and amongst those kingdoms etc themselves, inter-kingdom, inter-chiefdom or inter-emirate arbitrations between them or their indigenes or residents were very rare, if at all. Disputes between indigenes or residents of different kingdoms normally quickly developed into inter-kingdom, inter-chiefdom, inter-emirate or inter-communal disputes and were settled by war or diplomatic means.

There were also hardly any well formalised or standardised procedure by which an award could be enforced in a different kingdom, chiefdom, emirate or republican community from the Kingdom, Chiefdom etc in which it was made. For instance, a person with an award made in the Kanem-Bornu Empire[124] could not go across to even such nearby places as the Oyo

124. This was a strong empire that at its peak covered territories in the present North-Eastern and North Western Nigeria and in the Chad Republic.

Empire, Bini Kingdom[125] or Asante Empire,[126] talk less of such distant places as ancient Egypt in the present day Northern Africa and Zululand in the current Southern Africa. In fact, due to limitations in information facilities several kingdoms, chiefdoms etc probably did not know of each other's existence particularly when they were far-flung from one another.

Even if they had known of one another, constraints of distance and paucity of effective means of transportation (i.e. fast and reliable for long distances) would still have made the enforcement of awards in other kingdoms, chiefdoms etc impracticable. There would also have been grave problems with understanding one another's language since no single language was the lingua franca of more than one kingdom or emirate and proficient interpreters could not easily be found as they are found today.

An award holder could therefore only attempt its enforcement in another kingdom/chiefdom etc if that kingdom/chiefdom etc was not far from his. Even then he had to go through the King or traditional ruler of that other kingdom etc. The decision of the King, like most other decisions of that era when Kings were almost demigods not accountable to anyone,[127] was purely a matter of discretion. What is more, to gain access to a foreign King to even pray for that discretion was not one of the easiest endeavours of the age. One had to belong to the nobility of one's own kingdom etc to be able to get his own King to take up the

125. The Oyo Empire existed in some parts of the present South Western Nigeria while the Bini Kingdom was in the present Edo State in the South-south geopolitical zone of the country.
126. This is in present day Ghana.
127. For an understanding of how kings, Chiefs etc ruled then see, for instance, Buah, note 109 *supra*. It was the same in most kingdoms of the time not just African kingdoms. For the position in Europe see for instance HL Peacock, A History of Modem Europe (6th ed South East Asian Reprint, Heineman Educational Books, Hong Kong, London1980).

enforcement of an award with the other King whose discretion for enforcement was desired.

7.0 The Colonial and Post-colonial Period Before 1988

As already stated, the colonisation process involved the dismantling of the pre-colonial kingdoms, chiefdoms etc administrative structures. If the structure was not dismantled its operators (the rulers of the people) were forced into an abdication of their previous administrative sovereignty to become doers of the colonial Power's bidding.[128] Whether the colonisation process involved assimilation as done by France or indirect rule as erected by Britain, the authority of the kingdom etc was destroyed or brought under the control of the emerging colonial administration.[129] Several erstwhile kingdoms etc were merged into a country.

As the new countries were established, customary law Arbitration and ADRs were neglected and in fact de-emphasised by the new governments, though not by the people in their personal transactions. Arbitration -even western style arbitration - was more or less ignored after its initial introduction into those colonies while attention was paid only to

128. These are notorious matters but see also Buah, note 109 *supra*. The situation would have been the same under any colonising power European or African.

129. The acquisition of control was achieved mostly by treaties and covenants after a war or clearly by tricks as in the case of the treaty between Oba Dosumu (spelt Docemo by the colonial masters) and the British Empire. It is worthy of note that: "It has been seen that practice demonstrates that the European colonisation of Africa was achieved in law not by virtue of occupation of a terra nulius but by cession from local rulers. This means that such rulers were accepted as being capable in international law not only of holding title to territory, but of transferring it to Parties", M Shaw, Title to Territory in Africa (International Legal Issues, Clarendom Press, Oxford) 45.It of course clearly follows that these pre-colonial entities were in their own rights territories and States of the type that then existed in Africa - and to that extent therefore settlement of disputes between them, whether by litigation, arbitration or ADRs, was international in character whether such settlement was actually achieved.

Court litigation in the administration of justice. Even legal training administered to would-be lawyers emphasised adversarial fight-to-finish, or inquisitorial, litigation.

Each colony had laws enacted for it by which the legal system and principles of the colonising State were introduced into the colonised territory. That way, countries like Nigeria and Ghana had English law introduced into them. Upon formation of the colonial entity Nigeria in 1914, Great Britain simply enacted for it as the Arbitration Ordinance of that year a perfect reproduction of the British Arbitration Act of 1889. The English common law principles of Arbitration were also introduced intothe country as part of the received English common law under s. 45 of the Interpretation Act.[130] The same pattern was followed in other British colonies. France introduced into such colonies as Senegal, the French Code of Civil Procedure even though some parts of the Code which governed arbitration in France were not extended to those colonies.[131] Other colonising powers such as Portugal in the same way introduced their laws of arbitration into their colonies. Though America did not colonise any country, its values and systems became established in Liberia where several freed American slaves were taken to and a country established for them.

Western style arbitration in its common law and civil law varieties thus became operational in African colonies. Rightly or wrongly it was perceived by the Africans as one of the tools of the colonialists just like western style litigation. Unfortunately

130. This later became cap. 89 of the Laws of the Federation and Laos, 1958 and made applicable in Nigeria "the common law of England and the doctrines of equity, together with the statutes of general application that were in force in England on the 1st day of January, 1900".

131. See R Amossou-Guenou, 'The Evolution of Arbitration Laws in Francophone Africa' 64(1) *Arbitration* 62, 63.

again, as indigenes of the colonised states traveled over the seas to receive legal (and other kinds of) education and training in the West, the Western style arbitration and ADRs were scarcely taught them or emphasised to them. Thus all the generations of lawyers produced by those colonised states in the 19th century and most of the 20th century up to the 1970s perceived dispute settlement simply as a matter of Court litigation. Ignorance of arbitration and its principles was deep and strong. As those early generations of lawyers trained in the West went back to their countries they were concerned simply with the Courts which they eventually took over from the colonial expatriate judges at or soon after independence. After independence, the newly independent peoples of each emerging African State were able to see Western style Court litigation, as foreign but adaptable to their environments. They began to cultivate some confidence[132] in it as they saw their own nationals take over from the expatriate judges and magistrates.

132. The confidence of the African in the Western style litigation has hardly been much-even now. More than with respect to any other part of the world it would appear that DJHar's observation on why parties take on litigation as a last resort in both municipal and international law is far more true in Africa. He wrote that "the possible worsening of relations by unilateral recourse to law, the uncertainly of the outcome of legal proceedings, and the embarrassment and finality of an adverse ruling of a body beyond one's control" are factors that make it so. See G Oduntan, Africa Before the ICJ and the Permanent Court of Arbitration: The Generational Gap in International Adjudication and Arbitration, a paper presented at the colloquium on Arbitration and the African States organised in the University of London, June 4 -5, 2003 by King's College, London and the British Institute of International and Comparative Law, p. 39 note 94. In Africa it is even worsening now as congestion and delay in Courts, engendered to an embarrassing proportion by absence of facilities, have made administration of justice through the Courts rather uninspiring. More and more people are embracing arbitration-even Western style arbitration - inside those countries even if on the international scene past experiences still hinder a particularly vibrant recourse to arbitration by the African States. For more on these matters see this writer in **'Enhancing the Implementation of Economic Projects in the Third World through Arbitration' 67 *Arbitration* (2001) 240**. It must be noted even here that cases currently pending in the Western style Courts between non-customary people are probably more in number today in each African State than the number of cases being arbitrated amongst such people. The point is that with respect to new disputes the percentage being taken to arbitration is higher with each year. It is a trend that is likely to continue. It is however our view that if all cases in a country like Nigeria (i.e. customary law and non-customary law cases) were to be enumerated together, even now the number going through arbitration and the ADRs would be far more in number than those in the Courts.

In addition, the alien Western rules of law were in some areas being modified to suit the local social dynamics even as new rules were also being made.[133] It must be noted however that even as this was happening the expatriate European judicial officers struck down several otherwise commendable African customary practices that they had any difficulties reconciling with their own cultural and legal backgrounds. They declared such practices as repugnant to natural justice, equity and good conscience under the different statutory provisions put in place for such things particularly by Britain.[134] Much as the repugnancy doctrine was rightly used to strike down some obnoxious practices like the killing of twins, the invalidation or attempted invalidation of some other principles such as the *idi igi* Yoruba system of inheritance[135] was at best controversial. In the same way, those European minds, being untrained or gifted in the nuances and intricacies of the African way of life, not only

133. For instance, in view of the popular practice of communal and family ownership of land (in addition to individual ownership in several places), the imported law recognised and ingrafted onto itself the age old traditional principle that communal or family land could not be dealt in without the consent and participation of the Head and principal members of the Family. If the family or community or a member sells without the consent or knowledge of the family Head, the sale is completely void, while if the Head sells without the knowledge and consent of the principal members of the community or family the sale is voidable. See, for instance, C*hief Omoniyi Fayehun & 8 Ors v Chief R. A Fadoju & 73 Ors* (2000) FWLR (Pt. 7) 1218, SCN. Nosuch rule existed in the imported English land law where communal or family ownership was not a phenomenon.

134. In Nigeria, for instance under the High Court Laws of the different federating units (States), the English style Courts established in Nigeria can invalidate any customary law principle found to be repugnant to natural justice, equity and good conscience or public policy.

135. Under which if a man had more than one wife his estate was shared into that number of wives and the children of each wife took one portion; which was declared invalid in *Dawodu v Danmole* (1958) 3 FSC 46 by Jibowu, J. In the light of the several social dynamics surrounding polygamy and the upbringing of children of polygamous families in Yorubaland and Nigeria generally, the *idi igi* custom had several things to commend it just as it had some draw backs. A wholesale invalidation of the practice for all times and places in Yorubaland and indeed Nigeria was, to say the least, controversial. Happily, the Supreme Court and the Judicial Committee of the Privy Council overruled His Lordship.

confused certain principles[136] but even denied the very existence of some important principles and phenomena such as customary law arbitration.[137] These things, which were done in several cases by even African judges but who were trained in Europe and America[138] stemmed from an incorrect assumption that the notions of natural justice, equity and good conscience by which the African rules operating (not in Europe but Africa) to govern the lives and businesses of Africans who have fundamentally different culture and values from Europeans must in every respect accord with the European ideas of those things.[139]

In consequence of these circumstances, a deep ignorance of Western and African laws and systems of Arbitration continued,

136. Such as when the Nigerian Supreme Court even as recently as 1994, with all due respects, completely confused customary law conciliation with customary law arbitration in *Agu v Ikewibe*, note 15 *supra*, which decision was for several years followed by other decisions. For an examination of such things including the danger of the proper prevalent customary law principles in the matter being supplanted by judicial generalisations see this writer in 'The Recent Odyssey of Customary Law Arbitration and Conciliation in Nigeria's Apex' Courts', note 108 *supra*.

137. As a Nigerian Court of Appeal panel did in *Okpuwuru v Okpokam* note 42 *supra*. See The Recent Oddyssey, note 108 *supra*

138. No doubt, a man's training (in law or anything else) in a particular legal or social system colours his views and approach to things particularly things alien to his training or the environment where he trained. African lawyers (and judges) trained in the 19th century and a greater part of the 20th century all trained in Europe or America where they were not exposed to a firsthand research or training in African customary land law etc. Many were in effect "Europeans in black skin" espousing with relish the values and ideologies of their "people" in Europe while despising with great zeal (or being incapable of grasping) the African equivalents or values.

139. It is only in recent times that it is becoming generally appreciated that an African customary practice is not necessarily repugnant to natural justice, equity and good conscience just because it has no European or American equivalent; and that an otherwise unfit or repugnant practice is not necessarily to be approved simply because a similar practice exists or existed in Europe or America. For an examination of these matters see this writer in 'Commercial and Investment Arbitration in the African Customary Law: Myths or Realities' note 116 *supra* and in **'The Inheritance Rights of Women under the Nigerian Customary Law: New Developments and Unresolved Questions' (2003) 8** ***Abia State Univ. Law Journal*** **96**. It must be stated here that on a general basis certain notions and principles of justice, equity and good conscience are or should be universal. No culture - African or otherwise - should be allowed to hide under the cloak of relativity of values or principles of justice to perpetrate inhuman and unjust practices. The point here however is that in life, absolutism in law irrespective of social settings is often injurious. Relativity is an inescapable principle in several areas of law when diverse jurisdictions are under consideration.

with the result that arbitration laws in those former colonies were left behind in archaism as society moved on. For instance, even while Britain enacted for itself the Arbitration Act of 1950 the old Nigerian Arbitration Ordinance, 1914 and the Ghanaian (then Gold Coast) equivalent were left untouched. While universities in those former colonies taught law with emphasis on Evidence, Property Law etc (all preparatory for a mainly litigation practice) hardly was Arbitration taught.[140] The first review of the Nigerian Act was done only in 1988 when the Arbitration and Conciliation Act[141] was enacted. The Egyptian statutory law on the subject was also stagnant until 1994 when the Law No. 27 of that year was enacted. In South Africa, the Arbitrations Act, 1898 (no. 29 of 1898) of the Cape of Good Hope, Arbitration Act, 1898 (no.24 of 1898) of Natal, Arbitration Ordinance, 1904 (Ordinance no.24 of 1904) of the Transvaal and the Arbitration Proclamation 1926 (Proclamation no. 3 of 1926) of South-West Africa were in operation until when they were repealed and replaced by the Arbitration Act of 1965. Even the 1965 Act did not apply to blacks until the enactment of General Law Amendment Act, 1996.[142] In Francophone African countries the situation appeared to be even worse.

No legal rules existed to govern arbitration, domestic or international. Upon attainment of independence, many of the States retained that *status quo* while only very few enacted laws

140. Even as at now not many Faculties of Law, relatively speaking, teach Arbitration Law. In Nigeria the giant of Africa not many Universities, relatively speaking are known to be teaching it at any level!

141. Cap. A18 Laws of the Federation of Nigeria, 2004 presently under review. The 1914 Ordinance had later become the Arbitration Act cap 13 Laws of the Federation and Lagos 1958.

142. South Africa is presently in the process of enacting a statute to be based on the UNCITRAL Model Law and which will make the New York and ICSID Conventions operative in the country. The 1977 Act failed to operate those Conventions in the country.

at all on arbitration, which laws were purely on domestic arbitration while none existed for international arbitrations.[143] In fact, up until the coming into force of the Uniform Act of the OHADA member States[144] a few years ago, only Togo, Ivory Coast, Senegal and Mali had any specific legislation dealing with domestic or international arbitration in Francophone Africa.[145] The Portuguese Colonization of Angola and the Cape Verde Island was extremely restrictive on arbitration both customary and non-customary. The Decrees nrs. 16 473 and 16474 of February 6, 1929, the Decree nrs. 39 666 of May 20, 1954 and Decrees nrs. 43 896 and 43 897 of September 1961 were examples of such restrictions. While the Cape Verde Islands has not passed any statute whatsoever and still operates the Portuguese amended Code of Civil Procedure 1967, Angola has only recently passed a statute - *Lei de Arbitragem voluntaria*. The statute is based wholly on the Model Law.[146]

These developments produced a number of results. One, the legal infrastructure for Arbitration was far too undeveloped or non-existent in practical terms. Even if parties wanted to choose

143. Amossou-Guenou, note 131 *supra*, at p. 64

144. The Uniform Act applies directly in each of the OHADA State members without the need for any local statute making it applicable.

145. Things have changed considerably now on the continent. As already indicated, the 16 OHADA States now have the Uniform Act in operation in their shores. As at 1 June 2006 seven African Kenya, Madagascar, Nigeria, Tunisia, Uganda, Zambia and Zimbabwe-a slow but encouraging As of the same date the following States had assented to and ratified the New York Convention (the date of its coming into operation in each country is in brackets); Algeria (8/5/89), Benin Republic (13/1/63), Cote d'Ivoire (2/5/91), Djibouti (27/6/77), Egypt (7/6/59), Ghana (9/7/68),Guinea (23/4/91), Kenya (11/5/89), Lesotho (19/9/89), Madagascar (14/10/62), Mali (7/12/94).Mauritania (17/9/96), Mauritius (19/6/96), Morocco (7/6/59), Mozambique (9/9/98), Niger Uganda (12/5/92), Tanzania (12/1/65), Zambia (12/6/2002), Zimbabwe (28/12/94). See http://www.uncitral.org/en-index.htm (last visited on 1 June 2006). Several African States such as Benin, Botswana, Cameroon, Central African Republic, Congo, Cote d'Ivoire, Egypt. Ghana. Guinea, Kenya, Lesotho, Liberia, Madagascar, Malawi, Mauritania, Mauritius, Morocco, Niger, Nigeria, Rwanda, Senegal, Sierra Leone, Sudan, Swaziland, Togo, Tunisia, and Zambia are members of the ICSID Convention.

146. See generally V Lopes, Arbitration in Angola and in Cape Verde Islands, paper sent to the colloquium on Arbitration and African States, note 132 *supra*.

the laws of these countries to govern their transaction or arbitration, the law was grossly insufficient. Second, there was a serious lack of expertise on the part of African nationals in Arbitration. Thirdly, as the Courts and other infrastructure for litigation were developed no conscious efforts were made to develop facilities for the conduct of arbitral proceedings. Generally as a result of the poverty in which those countries dwelt even up to the 1970s, there was low development of arbitration infrastructure such as good world-standard hotels and hearing rooms, efficient air and land transport system, efficient telephone system etc. Fourthly, mainly as a result of the three situations already referred to above, these countries each became a poor choice as venues for arbitration or for their laws to be chosen as laws of particular arbitrations.

Most arbitrations had to take place in locations like France, Britain and America under the auspices of the ICC for example. African state parties found the arbitral process quite expensive as they not only had to travel the long distances to France, Britain and America but also had to engage foreign lawyers and pay both those lawyers and the arbitrators in foreign currency.[147] Added to these, the prejudice that characterised the North-South economic intercourse was still heavy and firm. Many of the arbitrators hardly felt any sense of obligation to ensure that any African or Third World parties got justice. A leading international practitioner of the trade has volunteered that "...in the beginning of this century, and until the 1950s, arbitrations conducted by various international tribunals or commissions

147. It is unfortunate that even now African States marginalise themselves and African practitioners in international arbitration. More African States seem to be involved in ICSID arbitrations than those of any other continent. Unlike states of other continents, however, African States still appoint almost exclusively non-African arbitrators and hire foreign lawyers for representation even when there are competent Africans. To that extent, the cry of marginalisation by those States just amounts to crocodile tears, simply answerable by the time honoured maximum volenti non fit injuria

evidenced bias against developing countries".[148]

While all these things were going on in the general body of the received European law and in policy making towards arbitration generally, customary law arbitration not only survived but thrived. Even as nationals of emergent African States were goaded along the road of litigation, they continued to vigorously embrace customary law arbitration. That system of dispute resolution was not only good, it was part of their culture. Its approach and philosophy were completely congruous with the African philosophy of life. What is more, it did not take long before the handicaps and shortcomings of litigation in the European style Courts became obvious to the people. The cost of litigating a matter was high. It involved traveling long and inconvenient distances from the villages to the few urban centres to hire the white and very few black lawyers whose fees were relatively prohibitive. There was delay.

There was a deadening rigidity and technicality and for a more or less peasant population mainly illiterate in the English, French and Portuguese languages in which Court business was conducted, depending on whether the country was a British, French or Portuguese colony. Court attendance was not a pleasant thing. In fact, the half-literate African Court messengers who doubled as interpreters took advantage of the illiterate litigants and extorted money and properties from them in disguise. Sometimes judgements were enforced before they were delivered.[149] All these things added up to make the people

148. J Paulsson, 'Third World Participation in International Investment Arbitration', 2 *ICSID Rev.* 1 (1987) 19.

maintain their loyalty to the customary ways of resolving disputes particularly arbitration and the ADRs. The people therefore resorted to litigation in Western style Courts only when by force of new legislations of the colonial government or the legislature of their newly independent country the particular dispute could only be adjudicated in Courts or was not cognisable under the customary law.[150]

Despite the attitude of some of the colonial judicial officers already alluded to above, the traditional prejudice, they could not but quickly recognise and restate the principles of customary law arbitration. In West Africa, for instance, the West African Court of Appeal held in *Chief Assampong v Amuaku*[151] that a proceeding conducted under the relevant customary law some 35 years earlier by some natives was an arbitral proceeding though "there was no arbitration in the technical English sense".[152] Similarly, in *Foli v Akese*[153] a Court of the then Gold Coast referred a dispute on the title to land held under the customary law to an expatriate judge of the then Supreme Court (High Court) who after hearing the parties on their customary law claims published an award. The WACA not only upheld the award as a customary law arbitration award but also tacitly recognised the principle that even an expatriate could be an arbitrator in acustomary law arbitration.

149. Some of these things happened even up to the middle of the 20th century. This writer narrates from stories he heard from contemporaries of his parents and grandparents who experienced those things first hand in South Eastern Nigeria even as lately as the 1960s.

150. For instance, a claim against the government or a dispute over such things as companies, mining against national governments may still generally be outside the realm of customary law arbitration. See Section on Limits of the Internationalisation Process infra.

151. (1932) 1 WACA 192,194.

152. One of the commendable recognitions of the fact that customary law arbitration, conciliation etc - did not have to conform with the European or American models to be valid.

153. (1930) 1 WACA 1. See also *Gyesiwa v Mensah* (1947) WACA 45; *Kwasi v Larbi* 13 WACA 7.

In *Inyang v Essien*[154] the Court recognised the difference between customary arbitration and mediation. The Plaintiffs/Appellants sued for title in the Native Court. At the Defendants/Respondents request, the matter was sent to an Imam Council,[155] for settlement. The Council was not a Court and had no power to make binding orders on parties. Plaintiffs/Appellants rejected the decision of the Council and instituted an Action. WACA held that since the Council was only instructed to bring the parties together and make peace between them, its decision had no binding effect and could not constitute *res judicata* as a Court decision or an arbitral award would.[156] In effect, the proceeding was merely a mediation.

Of course, customary law arbitration is still heartily patronised even by many of the African elite.[157] In fact, with respect to land in the villages[158] only the customary laws regulate ownership and customary law arbitration is often resorted to for the

154. (1957) 2 FSC 39; NSCC (vol. 1) 128.

155. A Council of Islamic scholars.

156. There have been other important cases. In *Onwusike v Onwusike* (1962) ENLR 10 a High Court of the then Eastern Region of Nigeria presided over by Betuel, P J (a European)found and declared pointedly that a decision given by elders, unless clearly wrong in principle, was binding on the parties. The Court went on to hold that it would be contrary to common sense to allow persons who have voluntarily submitted their dispute to an independent body of their own choosing to render nugatory the decision arrived at merely because it does not favour the interest they assert or in some other way is regarded by them as unsatisfactory. It goes without saying that customary law is not irrational or contrary to common sense. It has always followed the path of common sense as espoused in that and other relevant judgments. A decision of the elders would be wrong in principle if it is arrived at in violation of any of the sacred principles of fair hearing: *Enigwe v Akaigwe* (1992) 2 NWLR (Pt. 225) 505, 514.

157. Such as lawyers, engineers etc as was the case in *Ojiba v Ojibah*, *supra* note 17.

158. And, in Africa, every person is from one community or the other, which in almost all cases continue to be regarded as villages (even when they have become urbanised) for the purposes of inheritance of land, except where the operation of specific legislations (like Nigeria's Land Use Act Cap. LS Laws of the Federation of Nigeria 2004) and Statutory Instruments made thereunder have designated such lands as urban lands governed by the received/imported English, French, etc law. The customary law applies even if the elite or in fact expatriates buy or own such lands. Customary law is in such cases the lex situs and is also applicable in some areas by statute, for instance under s. 21 of the High Court Law of Northern Nigeria 1963, now applicable in all the states of Northern Nigeria. Similar legislations apply in all the 36 states of the country.

determination of any disputes touching on title to such lands. Indeed resort to customary law arbitration is a thriving endeavour and the people, particularly the rural people, have absolutely no skepticism or reservations about it.[159] In fact, presently even expatriates are expressly acceptable as arbitrators in customary law arbitration[160] though Europeans and non-Africans may not easily be acceptable any longer.[161] Expatriates of all kinds will also be unacceptable if in a particular custom the rules prescribe that only a particular person or class of persons exclusive of expatriates can be appointed.[162]

159. See, for instance, *Nwuka v Nwaeche* (1993) 5 NWLR (Pt. 293) 295. The process of colonisation could not eradicate the indigenous legal system. It was well noted by a scholar in 1960, that: "It is not surprising that after many years of British connection with and administration in Nigeria ranging in various parts from sixty to about one hundred years, English law and English legal concepts have not been received in total replacement of the customary laws of the country. History has shown that even conquerors of comparatively less advanced peoples than themselves have rarely ever succeeded in replacing the old laws of the conquered in their entirety with those of the conquerors": F A Ajayi, 'The Interaction of English Law with Customary Law in Western Nigeria', 4 *Journal of African Law* (1960) 98, 108.

160. *Obodo v Oline*, note 14 *supra*

161. Europeans may not now be easily acceptable since the difficulty or circumstance (general illiteracy amongst the natives) which in colonial times engendered, and in some cases necessitated the appointment of expatriates who neither knew the customary law nor were subject to it, no longer exists. There is no language group or community in Africa today where a well-educated person may not be found. In any event, Western education is not critically necessary for the conduct of a customary law arbitration amongst any African people. What is more, since (as will be seen shortly) lawyers do not appear before customary law arbitrators and no lawyering in the technical sense is done in the proceedings, such a European or non-African arbitrator not conversant with the customary law even if he is appointed, runs a very high risk of deciding the matter before him not in conformity with the relevant customary law rules. He may infact mete out injustice to the parties by assessing their matter in conformity with his own law or no law at all. It will be surprising if any set of parties should as of now appoint a European or other non-African as an arbitrator in preference over Africans who are likely to be conversant with the customary law. The rule allowing appointment of an expatriate is still pragmatic and relevant in some circumstances however. Parties may want to appoint an African-American who identifies with his African roots or an African who is from a different African country, as an arbitrator in a customary law arbitration. Those two classes of arbitrators would still be expatriates - brothers across the seas! The adaptation of the customary law to the use of non-Africans when it was nature. Per Osbome, CJ, in *Lewis v Bankole* (1908) 1 NLR 81, 100-101 “it appears to have been subject to motives of expediency and it shows unquestionable adaptability to altered circumstances without entirely losing its character".

162. As was the case in *Opebiyi v Noibi* (1977) NSCC (Vol. 11) 464, a dispute amongst Moslems over which, by the rules of the particular group, only an imam could function as an arbitrator.

Certain other general statements can be made about principles that have been established in customary law arbitration in most African jurisdictions. For there to be a customary law arbitration there has to be a voluntary submission of the dispute to arbitration[163] which can be by a pre-dispute or post-dispute agreement.[164] The agreement may be an express or implied one. There must be consent to be bound by any eventual award.[165] Voluntary submission (express or implied) is an implied consent to be bound by any eventual award. Other conditions are that the arbitration is conducted in accordance with the relevant rules (of customary law or the rules of the trade of the parties) and that an award is made and published to the parties. The requirement of a post award consent,[166] which some Nigerian Courts added, has been laid to rest as a comment made *per incuriam*.[167]

The commencement and conduct of customary arbitration still follows the old pattern already outlined hereinbefore. It is necessary to stress that the parties have no lawyers and therefore do not lay emphasis on astute legal arguments. There are, therefore, no arbitration practitioners as such. Nor are there professional arbitrators strictly so called. The choice of arbitrators is made based more on confidence and acquaintance

163. *Kwasi v Larbi*, note 54 *supra*; *Inyang v Essien supra*; *Njoku v Ekeocha* note 53 *supra*; *Idika v Erisi* (1988) 2 NWLR (Pt. 78) 563.

164. See, for instance, such Nigerian Supreme Court decisions as *Obodo v. Oline* note 14 *supra* and *Ojibah v Ojibah* note 89 *supra*

165. G Ezejiofor, 'The Prerequsites of Customary Arbitration' (1992-93) *JPPL* 19, 33. As stated by the learned Professor,"Usually if a party will not accept the award, whatever it be, he will hardly agree to arbitrate in the first place. And if the arbitrators know definitely that their award may not be accepted by an unsuccessful party even when there is no allegation of irregularity or misconduct, they will most probably not want to go into the matter, for they will not want to engage in a fruitless exercise."

166. Surprisingly canvassed by the Supreme Court in *Ohiaeri v Akabeze* (1992) 2 NWLR (Pt.221) 1, 24 per Akpata, JSC and *Agu v Ikewibe* note 15 *supra* per Karibi-Whyte, JSC

167. By such cases as *Ojibah v Ojibah* note 89 *supra.*

with the custom by the would-be arbitrator(s) than on eloquent experience in the technicalities of arbitration as a trade or profession. Indeed, bare technicalities and unnecessary legalese are rather despised in customary law arbitration.

In the early times, writing was alien to the customary law since even the native African Languages which formed its vehicle of communication (though very well spoken and largely very well developed) were themselves not written down. This is no longer the case. Today not only are the languages written, but, strange as it may sound, even the English, French etc languages have been integrated into the customary law as transactions of commercial and social nature are now often recorded in those languages. Writing is not only now known to it (and it has in fact been so known to it for a long time now[168]), but writing in the foreign languages also. The same are now therefore known to customary law arbitration.[169] Similarly, in the distant past non-Africans were not juristic persons under the customary law. Over the years, following wider and deeper interaction with, and involvement of, non-Africans, the customary law has granted them a juristic status enabling them to benefit from and be bound by the customary law, provided they freely consent.[170]

I am of the view that now many non-Africans are capable of being automatically bound by the customary law with respect to certain transactions, whether or not they themselves intend to submit to the customary law. Their voluntary involvement in customary law matters has reached such a level that some of

168. Per Bairamian, FJ. in *Owonyin v Omotosho* (1961) 1 All NIR 304, 309.
169. See *Rotibi v Savage* (1944) 17 NLR 77, per Waddington J.; Agbakoba, J. in *Boniface Ofomata v Anoka* (1974) 4 ECSLR 25 1. These cases revolved round the writing of customary law arbitration agreements.
170. See, for instance, *Rotibi v Savage ibid.*

them even now take traditional chieftaincy titles in the African villages and traditional institutions. What is more, some even join customary age grades, traditional social clubs and traditional (even fetish) religious groups.[171] Some European individuals and companies also now enter into many commercial relationships with respect to lands that are held in accordance with customary law tenure, for instance, which they routinely acquire for other commercial ventures.[172] Some are no longer content with just sending cash for bride price etc. to their in-laws-to-be for the girls they want to marry (an indulgence which many African families were and are ready to grant them) but now go to the remote villages and perform all the traditional marriage practices with relish and thereafter enjoy, as a traditional African would, all the customary law perquisites of the position of a traditional son-in-law from their parents-in-law.[173]

It is scarcely arguable that such non-Africans who become so freely acquainted with and take tremendous benefits from the customary practices and law should not with respect to those particular transactions bear the equivalent responsibilities under that law. It would be quite unfair to attempt to remove such transactions from the purview of the customary law just because of the non-nativity of those non-Africans when the non-nativity did not prevent them from enjoying the relevant

171. For instance, the Managing Director of Xerox HS Nig. Ltd., Chief (formerly Mr) Phil Smith. While some Nigerians reject such titles on the grounds of principle, some expatriates are falling over themselves in order to enhance the relationship of their companies with host communities. An American lady who even seems to have lost her American name is currently a priestess of one of the big shrines in Ile-Ife town in the heartland of Yorubaland.

172. The existence of such practices in their incipient forms was even recognised by the Privy Council long ago, for instance in *Oshodi v Balagun* (1936) 2 All ER 1632; and *Alade v Abori-shade* (1960) 5 FSC 167.

173. By way of some specific hospitalities, dances, etc. such as Mr Walter Carrington the ex-US Ambassador to Nigeria did. Mr Carrington's success with the masses of Nigeria in his job may not have been unconnected with thin same very free spirit of interaction.

benefits. This is particularly so in a situation where the other party is desirous and ready to have the customary law govern the transaction. Some of the transactions are not even the subject of any other law anyway. So, not even the consent of the African partner on the other side of the transaction can remove such transactions from the purview of customary law to the received European type of law.[174]

It needs to be clearly stated, however, that even when customary law is automatically applicable to a particular non-African or to a particular subject matter, there is no such thing as compulsory arbitration in the customary law. For a particular matter to go to customary law arbitration, there must be a voluntary agreement to that effect between the parties. Therefore, if an African or non-African does not consent to an arbitration none can be imposed on him however much the customary law may be applicable to the transaction.

It follows from the foregoing that a contract entered into under the purview of the customary law may not only be written (even in English, French etc), but can also have a clause requiring any disagreement or dispute arising thereunder to be submitted to a third party (a family or clan head or a group of friends, etc.) for settlement in line with customary law arbitration principles. Such a clause will qualify as an arbitration agreement cognisable under art. 7 of the UNCITRAL Model Law or any Model Law based statute applicable in the country in question.

174. Such as chieftaincy matters and village lands.

8.0 1988 and Afterwards: the Actual Internationalisation Process

The internationalisation of the African customary law arbitration came principally with the enactment of the UNCITRAL. Model Law into the domestic jurisdictions of African States and the OHADA Uniform Act. The fact that the Model Law internationalises customary law arbitration is one further reason (and a very strong one indeed) for every African country that has not adopted the Model Law to do so. Every African country has customary law arbitration in its jurisprudence and there is every need for each country to facilitate the internationalisation of that arbitration, to integrate its nationals into an emerging global and wonderful legal regime in Africa - international customary law arbitration.

The first national statute in Africa to be based on the Model Law was the then Nigeria's Arbitration and Conciliation Act.[175] The Act enacted art 7 of the Model Law on agreements as section 1, which is now section 2(1) – (4) of the new Act. At section 57 (1) it copied verbatim the definition of "commercial" as contained in a footnote to art 1 of the Model Law. Section 57(2) describes or defines international arbitration in the same words as art 1(3) of the Model Law. The second statute to be enacted in the Continent based on the Model Law was the 1994 Egyptian Law Concerning Arbitration in Civil and Commercial Matters. Thereafter came the Kenyan Arbitration Act, 1995 followed by the Zimbabwean Arbitration Act, 1996.[176] The latter made no

175. Enacted in 1990 as the first African statute based on the Model Law. It is now replaced by the Arbitration and Mediation Act, 2023. The latter Act is based not only on the Model Law 1985 but also on the amendments made in 2006 as well as other statutory instruments.

176. Others countries are, lately, Angola, Mauritius, Rwanda, South Africa, Tunisia, Sierra Leone, Uganda

amendment or modification to the Model Law and also made it applicable in both domestic and international arbitrations. Other countries that have enacted local statutes based on the Model Law include Madagascar and Zambia.[177]

In Francophone Africa the OHADA Uniform Arbitration Act came into force in 1999. It too has some liberal provisions that customary law arbitration can take advantage of. Though these two lines of statutes were not made with the customary law in mind at all, a calm perusal of some of the provisions shows that upon their coming into force in any country customary law arbitration in that country gets internationalised. We consider such provisions anon.

(a) Ambit of the African Arbitration Statutes

The OHADA Uniform Act completely internationalises arbitrations covered by it just as the Model Law is for international commercial Arbitration. In fact, the OHADA structures (the Treaty itself Title IV of which consists of 6 articles on Arbitration, the Uniform Act and the Rules of Arbitration of the Common Court of Justice and Arbitraton) make no distinction between domestic and international arbitrations. The Act applies directly in the territory of each member-State without need for any local statute to domesticate the Act. In many ways it removes an arbitration governed by it from any local rules of the country. For instance, art, 4 prescribes that the validity of the arbitration agreement is appraised according to the common will of the parties without any reference to the law of the State. The Act is by virtue of its

177. See ss. 3 and 4, the Preamble and article I of First Schedule to the Act.

Article 1 applicable to arbitration of every kind (commercial or non-commercial, international or domestic) just like the Treaty and the CCJA's Rules. It is our submission that customary law arbitration can, other things being equal, come under the OHADA jurisprudence.

On the other hand, the Model Law deals with "commercial" arbitrations. The Law defines commercial as meaning "all relationships of a commercial nature including any trade transaction for the supply, exchange of goods or services, distribution agreement, commercial representation or agency, factoring, leasing, investment, financing, banking, insurance, exploitation agreement or concession joint venture and other forms of industrial or business co-operation, carriage of goods or passengers by air, sea, rail or road".[178] This definition is adopted by the African Model Law-based statutes.[179]

No doubt, relevant customary law arbitrations fit the description. A customary law arbitration is clearly commercial in the language of the Model Law if it is over a trade transaction for the supply or exchange of goods or services. These goods could be yam, giant fish, traditional dress or staff. It could also be *ogbono* and *egwusi*[180] or some other goods scarcely known to Europeans or Americans. It would be also incorrect to think that distribution agreements, etc are unknown to the customary law. From time immemorial in Igboland of Nigeria, the farmers who produced yam in very large quantities often had merchants who bought large quantities from them at reduced (wholesale) prices and went out to sell at higher unit (retail) prices. The old cocoa

178. The definition is in a footnote to art. 1 (1) of the Law.
179. Those statutes not only reproduce the definition, one - the Egyptian Act - even elaborates it in a manner most commendable in an African environment. See note 178 and the text thereof.
180. These are types of soup derivatives or ingredients amongst the Igbos of South-eastern Nigeria.

farmers and groundnut farmers in Nigeria and Ghana probably had such arrangements. An agreement (oral, of course, in those days) over such an arrangement was certainly a distribution agreement. An agreement does not have to be made in writing between two suit-case-carrying educated Africans or an African and an expatriate or between a brewery and its "distributors" before it qualifies as a distribution agreement.

It does not matter if the parties are illiterates wearing torn dresses (or even if walking about nude), or sparkling suits or flowing native dresses, and who speak Hausa, Igbo or Swahili instead of English, French, Portuguese etc. Commercial representation or agency existed and still exists in the customs of the African people. If Ibrahim living in Rano village of Kano State, Nigeria agrees with Mantu for Mantu to raise mud walls for Ibrahim at an agreed amount; or Kofi in Ghana agrees to a similar thing with a fellow Ghanaian or with Manu a traditional Kenyan living in Ghana, it would in each case be an agreement for a construction work.

Transportation of yams, palm produce, cocoa or groundnut etc by carrying same on the head or by big cargo boats built and used in the riverine villages for conveying things from one village to another or to a city, certainly is carriage of goods by road or by "sea". Sea" as used in the Model Law must be understood even in statutory arbitration to mean "by water". The volume of things transported amongst traditional Africans in the past (or in fact even now) may not have been (and did not need to be) of equal magnitude to massive sea and air cargo transportation of today's industrialised world for them to qualify as carriage of goods by road or sea. It does not have to be carriage in a motor vehicle, on a tarred road or in a big high sea

going vessel to qualify as carriage of goods by road or sea. It will equally be shown in this lecture that the customary law may now comprehend and govern even such modern systems.

The things enumerated in the definition are not exhaustive of things commercial. The phrase “all relationships of a commercial nature” is all embracing even of things not mentioned there. This is more so as the enumeration is preceded by “including”, another all-inclusive word. At a point the definition adds “and other forms of industrial or business co-operation” which means such industrial or business co-operation in addition to the things already mentioned. Therefore, the actual import of the definition is that any relationship of a commercial nature whatsoever is covered. The definition, in order to aid understanding, only cites examples (not an exhaustive list) of such things. It further means that in addition to those specific examples “other forms of industrial or business co-operation" are to be regarded as examples. Taken on the whole then, the definition includes all human transactions involving the exchange of something for value i.e. exchange of benefits based on cash (or its equivalent i.e. including even trade by barter) or a profit motive or at least a motive of avoidance of loss and waste. Understood as such, it is easy to see that "commercial" covers everything other than transactions gratis. Since that is so, all such other things are commercial both under Western style and customary law arbitration.

The position is even clearer under art. 2. of the Egyptian Law which states that an arbitration is commercial "when the dispute arises over a legal relationship of an economic nature, whether contractual or non-contractual”. It goes on to state that the term “comprises for example such things as the supply of

commodities or services, commercial agencies, construction and engineering or technical know-how contracts, the granting of industrial, tounstic and other licenses technology transfer, investment and development contracts, banking, insurance and transport operations, and operations relating to the exploration and extraction of natural wealth, energy supply, laying of gas or oil pipelines, building of roads and tunnels, reclamation of agricultural land, protection of the environment and establishment of nuclear reactors". The use of "economic nature" to replace "commercial nature" as well as the use of "comprises for example" makes the definition all-embracing in addition to the fact that more examples relevant to a developing African economy are listed in the definition.

(b) Nature of Arbitration Agreements and Arbitrations Based Thereon

For an arbitration to come under the Model Law and the OHADA Uniform Act the arbitration agreement on which it is based must, under art. 3, be done in writing or in any other way which can be proved. Article 7(2) of the Model Law stipulates that an "arbitration agreement shall be in writing." It then states that an agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another.[181] Article 7(2)

181. For an examination of the limited practical usefulness of an arbitration agreement qualifying as a written one when alleged in a Points/Statement of Claim and not denied in the Points/Statement of Defance, see this writer in ***Salient Issues in the Law and Practice of Arbitration in Nigeria,*** **a paper presented as a Visiting Research Scholar at the colloquium on Arbitration and the African States note 132 and (2006) 14 RADIC.**

also provides that a reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract.

Clearly, an arbitration agreement in the Swahili or Hausa language would pass under this definition as much as anyone in English, French or Portuguese. What is more, as already shown in this lecture, writing in English, French etc is even now part of the African customary law.

If an arbitration is "international" under the definition in the Model Law, an award issuing therefrom can be recognised and enforced as an international award under the provisions of the Law. Such an award would be both international and foreign[182] and will easily come under the purview of the Law. A customary law arbitration or award can very easily meet the requirement and be “international” under the Model Law or any African statute based thereon. An arbitration is inter-national under art. 1(3) of the Model Law if:

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

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

(i) the place of arbitration if such place is determined in, or pursuant to the arbitration agreement,

(ii) any place where a substantial part of the obligation of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most

182. An award can be both foreign and international or domestic and international or foreign but not international. For more on that see this writer as in note 181*supra*.

closely connected:-or

(c) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.[183]

From this definition if two juristic persons based in different countries elect that the customary law of one of them should govern a commercial relationship and/or arbitration between them, the arbitration is international. The scenario is not as farfetched as it may sound. The Yoruba language group overlap across the border from Nigeria into the Benin Republic. Although resident in different countries, they have the same culture and set of customary law rules on major issues. Two of them resident in Nigeria and the Benin Republic respectively may in a large-scale trade in *ewedu* and *amala*[184] decide that Yoruba customary law should govern the transaction and that a dispute arising therefrom should be settled by arbitration under the same Iaw.

Equally, under the section, two residents of a rural riverine town in Sao Tome and Principe or any other part of the continent and who are partners in a peasant fishing business operated in the same town under the town's customary fishing practices, may decide that any dispute arising thereunder should be settled by arbitration under that town's customary law and that any such arbitration should be regarded as international. It is my contention that in each case the Model Law and any local statute

183. Article 3(2) of the 1994 Egyptian Statute adds another situation i.e. where the parties agree to resort to a permanent arbitral orgainsation or Centre with headquarters in Egypt or abroad Section 57(2)(d) equally makes an arbitration international where the parties despite the nature of the contract expressly agree that any dispute (arbitration) arising from the commercial transaction shall be treated as an international arbitration.

184. These are a traditional foofoo (food) and the soup ingredients, in Yorubaland, South-western, Nigeria.

based thereon accommodate their wish perfectly. This is because in each case the parties would have in the language of art. 1(3)(c) of the Model Law "expressly agreed that the subject-matter of the arbitration agreement relates to more than one country".

Neither the Model Law nor the OHADA Uniform Act specifies that it covers only western style arbitration. While the Uniform Act applies to all forms of arbitration domestic or international, the Model Law at art. 2(a) bestows efficacy on an arbitration once it is “any arbitration whether or not administered by a permanent arbitral institution".[185] Customary law arbitration certainly qualifies as "any arbitration" and, as already shown hereinbefore, it is also easily a commercial arbitration since customary law transactions easily fit the description of "commercial" under the Law. Taken further, this means that any customary law arbitration over a matter of a commercial nature is an arbitration contemplated by the Model Law whether or not that arbitration is "administered by a permanent arbitration institution”. It also seems quite clear even to simple thought and imagination that there is nothing that says a customary law arbitration cannot be administered by “a permanent arbitral institution" whatever that may mean in a customary setting.

In fact, despite conscientious research and inquiry on the point in the South-eastern and South-south zones of Nigeria, this writer did not learn of any rule in the customary laws of the various tribes and communities barring parties to a customary law arbitration from taking it to any forum of their choice whether or not that forum is a permanent arbitration

185. This is reproduced at section 57 (1) of the Nigerian Act for instance. Emphasis is this author's.

institution.[186] In fact, it is my considered view that parties can take such an arbitration to even permanent arbitration institutions established with Western style arbitration in mind. Such institutions in Africa are the Cairo, Lagos and Djibouti Regional Centres for International Commercial Arbitration[187] the Commercial Arbitration Centre in Harare, Zimbabwe, Kenya's Dispute Resolution Centre; the Centre for Arbitration Studies, Port Harcourt, Nigeria etc. As long as such institutions can provide arbitrators who can competently sit on customary law arbitrations they can very well administer those arbitrations.

What is more, as already indicated in this work, expatriate Africans and non-Africans can sit on customary law arbitrations.[188] If such people can sit over customary law arbitrations there is no reason why an arbitration institution in Africa may not empanel some knowledgeable Africans [whose knowledge includes that of the relevant customary law(s)] to hear and determine a dispute in customary law arbitration under its auspices. An argument to the contrary would only be lame, inspired by unnecessary fear. Surely, one day, if not yet, such a practice, which is by all means highly desirable, shall become so common amongst the people that it can no longer be doubted that it has formed part of the customary law as a mirror of accepted usage of the people. Even if it can be argued that it is not yet a common cultural practice of the people to approach

186. A detailed study of the matter in all or most cultural belts of Africa would be of immense interest.

187. These Centres are fruits of co-operation between the Asian-African Legal Consultative Organisation (AALCO) and the host countries. They are veritable tools for the promotion of the use of arbitration in Africa, and there is no apparent reason why they should not seize on the internationalisation of customary law arbitration offered by the Model Law and the OHADA Uniform Act and infact work assiduously henceforth to promote the idea and reality of international customary law arbitration and awards.

188. See notes 158 and 159 *supra* generally and the text thereof.

such institutions, it is enough to note that as yet nothing in the customary law forbids it. In the customary law it would seem that whatever is not prohibited and cannot be shown to be obnoxious to proper notions of natural justice, equity and good conscience is permissible.

The African customary law is very elastic and adaptive to necessary social dynamics partly because in such cases of non-prohibition it is unbounded in imagination. The marriage of customary law to desirable imagination and creativity makes it forever forward looking unrestricted by such often stifling principles as judicial precedent. It is a near perfect piece of law - a responsive system that is in very practical terms a vantage instrument for economic and social engineering.

Akin to the foregoing submissions, it is my view that African communities and governments should begin to explore ways and means of establishing permanent institutions even at sub-regional levels[189] for the administration of customary law arbitrations of domestic and international characters. As a start, the existing arbitration institutions may be encouraged to incorporate in their Lists and Panels Africans that are knowledgeable in customary law arbitration, for use as and when the need for the conduct of a customary law arbitration arises.

189. For instance West Africa, East Africa, Southern Africa, Central Africa, North African.

9.0 Consequences of and Responsibilities Arising From the Internationalisation

a. Internationalisation of Awards; Cross-border Enforcements Based on International Arbitration Conventions and Treaties

The most immediate consequence of the internationalisation of customary law arbitration is the birthing of international customary law awards. These awards may be international but domestic, or international and foreign and the forum of enforcement will vary accordingly. What is most important and most exciting is the possibility of cross-border enforcement of customary law award, which the development now makes possible and which shall be examined shortly.

A customary law award would be international but domestic, for instance, in the case of an arbitration between two rural dwellers resident in the same country (or even the same town) in Africa where their arbitration is international de jure though *de facto* domestic. They would, in exercise of the liberty granted them as parties to "any arbitration whether or not administered by a permanent arbitral institution" under art. 1(3)(c) of the Model Law agree "that the subject matter of the arbitration agreement relates to more than one country.[190] On the other hand, an award

190. Section 57 (2) of the Nigerian Act even has another opting out clause i.e. section 57 (2) (d) which empower the parties to, despite the nature of the contract, expressly agree that any dispute (read as arbitration) arising from the commercial transaction shall be treated as an international arbitration". Words in brackets are this author's. For an examination of this clause including why the word "dispute" should be "arbitration" see 'Salient Issues …' note 181 *supra*. It is however important to note here that in Nigeria parties to a customary law arbitration can agree (pre or post dispute note 162 *supra*) that despite the domestic or other nature of their transaction or arbitration arising therefrom, the arbitration should be regarded as an international (customary) arbitration. The award issuing therefrom would of course become international thereby though wholly domestic to Nigeria.

would be both international and foreign if the arbitration was international and enforcement of the award is sought in a country other than the African country in which it was made.

An international but domestic customary law award should be easily enforceable in the appropriate Customary Court[191] of the country in question i.e. the country wherein the award was made and enforcement of the award is also sought therein. If the award is both international and foreign it cannot be enforced in the customary Courts because of limitations in geographical jurisdiction of the Courts. However, once an award is international i.e. is cognisable in the context of the Model Law, it is enforceable under the Model Law or a local statute based thereon in the Court or other authority designated by the country in question for the performance of such functions as the enforcement of awards permitted under art. 6 of the Law. In Nigeria, Egypt and Kenya as in other African countries that have adopted the Model Law, it is the National Court-a High Court or, in the case of international arbitrations in Egypt, the Court of Appeal. Such Courts are all Courts set up for Western style litigation. In the Anglophone African States rules of customary law are not treated as law but as facts requiring proof by evidence.[192]

191. Presently Customary Courts are of dual nature in most African States. There are the purely traditional or natural Customary Courts inherent in the people's existence as a unit-the Traditional-rulers-in-Council, the Family and Community Elders fora, the age grades and town unions. There are also statutory Customary Courts created by local legislations into which mostly retired civil servants with requisite customary law knowledge are appointed. While the traditional customary Courts can only exercise jurisdiction over their immediate environments -the Community, Family, age grade etc - statutory Court covers a group of communities inclusive of all the age grades and families in those communities. Members of the traditional Customary Courts may be illiterate in English, French, Portuguese etc as the case may be unlike those of the statutory Courts. An international but domestic award is enforceable in either of these types of Customary Courts.

192. See, for instance, ss. 57 - 59 of Nigeria's Evidence Act cap E14 Laws of the Federation of Nigeria 2004.

Even then, it is my humble view that international customary law awards can be enforced directly in such Courts. They are awards, not principles of law that need to be proved. At any rate, a customary arbitral award is likeable to the judgement of a customary tribunal or Court, which qua judgement does not need proof as a fact even before the Western style Courts. In addition, even if judgements of customary tribunals and Courts were to require proof in these Courts, such a rule, being one of evidence, would be inapplicable since rules of Evidence are generally not applicable to arbitration (customary or non-customary) in those countries.[193] The point then is that just as in customary Courts, an international customary award is enforceable in those Courts both as foreign and domestic awards.

In the OHADA States the position is even simpler under the Uniform Act. Articles 31-32 of the Act provide for recognition of validity and bindingness ("exequatur") of an award (not necessarily a Western style or Western law award) once the duly authenticated original or a certified copy thereof and the original or certified copy of the agreement are presented to the national Court. In fact, under the OHADA Treaty itself, exequatur can be obtained from the Common Court of Justice and Arbitration. Once that Court so recognises an award, any award - every member State is obligated to order its enforcement through the State's own appropriate national Court. Customary law awards are enforceable in these ways and that simply means that once any customary law award is recognised by the Common Court national Courts of all OHADA States must then enforce it. What

193. For instance, s. 1(2) (a) of Nigeria's Evidence Act excludes arbitration from the application of the Act.

beauty!

It follows from the foregoing considerations that a customary law award that is both international and foreign is also enforceable under the New York Convention in every African country that is a member of that Convention.The Convention simply provides for the recognition and enforcement of foreign arbitral awards and does not require that the awards be those made in proceedings conducted under the Western (European or American) type of law. A foreign customary law award is a "foreign arbitral award" in every necessary sense.

As of now, 42 of the 54 African countries are State Parties to the Convention. That ensures a huge and easy enforcement of International or Foreign Customary Law Awards across the continent. Now, outside the Continent, out of the 193 United Nations members 172 State Parties are members of the Convention. It is the most successful Convention yet and that large membership ensures great and easy enforcement of customary awards rendered in Africa or with an African roots or involvement. Of course, when we say "African" in the context of the lecture, we have in contemplation other countries with customary law in one form or the other. Such countries include the Caribbean, South Americas etc. In fact, we are speaking of an International Customary Arbitration that has the capacity to touch or involve persons in practically every part of the globe. Let no one allow self-doubt, an inferiority feeling because we are discussing an African concept or principle or one that is global but with an African roots. Let this be one principle or concept that Africa can export with pride and dignity to the world.

b. Enhancement of Arbitral Justice and Foreign Investments

It goes without saying that the delivery of more qualitative justice within far shorter periods will follow this new dawn if Africans rise to the occasion and take ample advantage of the new dawn. Many more cases presently pending in national Courts will be channeled to customary law arbitration.

As between Africans the flow of investment is likely to be positively affected. It is a notorious fact that a sizeable portion of private investible wealth in most African countries is still in the hands of people who started off as illiterates and rural folks. Though those people are now well exposed, in many cases they still feel far more comfortable with traditional values and ethos than with the technical Western style of life particularly in dispute resolution. Assured of the reality of settling at least some sorts of investment disputes in neighbouring African States through customary law arbitration they may well feel more comfortable making investment in those neighbouring countries. It is also possible to see that in the medium and long terms even the flow of investment from English, French, Portuguese etc countries will improve.

c. Need for Permanent Customary Law Arbitral Institutions

For all of the foreseeable future the customary law, including customary law arbitration, is likely to retain its pride of place not only in the lives and affairs of the people but also in the jurisprudence of the African States. It is a testimony to the resilience of that body of law that it survived the political and

legal colonial process. It also survived the attendant wholesale aping of Western lifestyle and values which practically all educated and urbanised Africans reveled in not only during the colonial process but also in the period following political independence of the various States. Culture dies hard and customary law, as part of the African culture, is assured a place in African jurisprudence *ad infinitum*. This is despite the onslaught of mental laziness, which sometimes makes some scholars (even African scholars!) to assume without any research that the African law is necessarily evil or wrong and should be totally discarded.[194] For as long as the customary law is in use, so shall customary law arbitration be in use and in constant growth and development. There are yet likely to be other interesting developments beyond the internationalisation of customary law arbitration and awards.

In consequence of these factors, it is absolutely necessary at this point, as already stated in this work, for permanent arbitral institutes in Africa to begin to take serious interest in customary law arbitration. In addition to including in their Lists and Panels such Africans as are knowledgeable in Arbitration and in the African customary law as already suggested hereinbefore; they can follow the example of the Cairo Centre for International Commercial Arbitration[195] and create properly located branches to handle customary law arbitration. That way, greater respect

194. For such an unjustifiable position see, for instance, A. Oriola, 'Commercial Arbitration under Customary Law: What Prospects' 4 (2) *Modem Practice Journal of Finance and Investment Law* (2000) 266 where the author declared without any research whatsoever that to canvass for customary commercial arbitration of disputes is "preposterous and a mere academic exercise" and that the desirability of commercial arbitration under the customary law was hinged only on "nationalistic sentiments". For a further consideration of the matter based on field research see this writer as in footnote 9 supra. For more on why the customary law will survive and thrive into the future see Ajayi, note 159 *supra*.

195. Though having Cairo as its permanent site or seat, this has created a branch in the maritime city of Alexandria to handle purely maritime arbitration.

may be secured for customary law arbitration both in the eyes of those of the educated nationals who may have lost touch with the African essence and even in the eyes of non-Africans. That would in turn encourage many more people to embrace customary law arbitration.

The administration of customary law arbitrations by those institutions is also likely to engender more research into that law. This will in turn lead to very interesting discoveries and possibly a desirable streamlining process where necessary. It would also help free that law from the crisis of confidence which I have identified between the old ultra conservative generations and the new modern dynamic generations. The old generations sometimes mistake idol worship or animism with African culture and insist on it as the law. They thereby tie the entire society to the past religious practices of a section of the society. Such practices are normally at best the customary law of previous generations "with which the present generation cannot be linked".[196] Tying the society to the ancient past in such a manner in turn normally leads to alienation of the younger people from the purported culture, the actual culture itself and the customary law. In consequence, in many parts of Africa the current customary law on certain issues is sometimes not realised or applied.[197] Sustained research will solve all such problems.

In addition to the efforts of the different arbitral institutions in Africa, the African Union can and should set up a Pan-African Customary Law Arbitration Tribunal as part of NEPAD[198]

196. In *Agu v Ikewibe* note 15 *supra* the Hon. Justice Karibi-Whyte, quoting from Bairaman, FJ in *Owoniyin v Omotosho* (1961) I All NLR 304 described the customary law as "existing native law and customs and not ancient customs with which the present generation cannot be linked".

197. For more on these things see The Inheritance Rights of Women *supra*.

198. NEPAD is the New Partnership for Africa's Development launched in the year 2000.

initiatives. It could be given a mandate such that any customary law award with implications on more than one country could be recognised by it and once that is done the national Courts of all African States would be obliged to enforce it if enforcement is sought in their territory.

The Tribunal does not have to be an elaborate organisation, but a part of the existing African Union structures with a list of African arbitrators that would be invited when a customary law award comes from those arbitrators' part of the continent to hear and determine an application for its recognition. If an award is coming from a recognised arbitral institution anywhere in Africa the award could be accorded recognition simply by an ex-parte process of the award winner filing duly authenticated copies of the award and other necessary papers with the Tribunal.

Such a Pan-African Tribunal will be of immense benefit to the development of customary law arbitration and arbitration generally in Africa. It may well become a veritable instrument for making those African countries and Africans who still have a skepticism towards Western style International Commercial Arbitration to begin to see that Arbitration in a new light and drop their skepticism. What is more, an international customary law arbitration may well become, at least with respect to some transactions in the continent, a viable African alternative with which to correct any perceived unfair aspects of the present international arbitral process.

It is my humble view that concerning International Commercial Arbitration rather than dissipate energy and time lamenting any injustices of the past or present, Africans must wake up, join the

international arbitral process and correct any perceived wrongs from within the system, not to be crying from outside. The syndrome of self-doubt[199] must now be abandoned along with the phenomenon of "Partitioned Africans"[200] for a bold vigorous pursuit of African interests in the international arbitration market within the context of the common or communal good of the human race.

d. The Role of Arbitration Practitioners and Governments

As already stated in this lecture, it may be tempting to ignore the great potentials of international customary law arbitration, without giving it much thought. No work as Western style arbitration. In fact, certain aspects of investment disputes the realm of customary law arbitration. So also would arbitrations over oil and gas drilling and some other very complex disputes unknown as yet to the African traditional system. That is not to say however that international customary law arbitration does not have a bright future. A proper development of that concept and its practical embrace by Africans will be of immense benefit to Africans and non-Africans.

Here is therefore a call on African lawyers and arbitration practitioners in the continent to accept the inescapable reality of an International African Customary Law Arbitration and lend a hand for its full development. That system of arbitration can grow alongside the Western style Arbitration which is steadily, even if slowly, taking firm roots in Africa.[201]

199. Which may make some people want to dismiss the idea of an international customary law arbitration or an African customary law alternative/initiative in the international arbitral process.

200. See AL Asiwaju, 'Partitioned Africans ...' 1984

201. Of course, I am not by any means canvassing that the Western style Arbitration should now be abandoned or have less emphasis placed on it by Africans. Such would be a lame suggestion. As Dr. F. A. Ajayi observed long ago concerning any view for the jettisoning of English law in Nigeria, "It

e. Need for Wider Adoption of the UNCITRAL Model Law in Africa

It is obvious from the discussion so far that much of the internationalisation of the customary law arbitration in the continent is owed to the UNCITRAL Model Law. That the Model Law leads to the internationalisation of a country's customary law when it gets enacted in that country is a major additional virtue. The virtue should be a major attraction to the Law not only by African States but all other countries that have customary law arbitration or its equivalent operating side by side with Western style arbitration. That virtue is one of the diverse ways and means by which the Model Law is a greater asset than many have acknowledged.[202] In this respect, the Law should even be of greater importance or relevance to countries with not just one customary law but diverse customary laws or equivalents in their systems. It is particularly so where a common procedure for the administration of customary arbitrations and awards has not been devised, which common

would have been preposterous as it would be pointless to have started from scratch and to have attempted fashioning out a completely different customary law as to patents, copyrights, companies, and the professions, federalism and a host of other things. One cannot the like, and with the other try to shut out the English mercantile and company law in preference and legislation", note 159 *supra*, p. 110. The position is still the same today. Our view, however, is to enrich our social and legal culture by some imaginative fusion of distinctly African models of, for standard simply increases resentments that have been simmering since colonial times. We are dealing with a people who have ground for being suspicious of the purveyors 'modernization', which in their mind translates into 'westernization', a process not characterised in the past Africa: From the Age of 'Law and Modernisation' to the Era of Human Rights and Constitutionalism in B. Ajibola and D Van Zyl (eds) The Judiciary in Africa (Juta Cape Town. 1987).

202. This writer has examined the strengths and weaknesses of the Model Law in other articles projecting in each case unique features of the Law for which many more countries should enact it into their jurisprudence. See for instance, **'The UNCITRAL Model Law and the Problem of Delay in International Commercial Arbitration' 14 *J. Int. Arb.* (1997) 12; 'Public Policy and Arbitration under the UNCITRAL Model Law', *Int. Arb. Law Rev.* (1999) 70; 'Appointment and Challenge of Arbitrators under the UNCITRAL Model Law: Agenda for Improvement', *Int. Arb. Law Rev* (1999); 'International Commercial Arbitration and the UNCITRAL Model Law Under Written Federal Constitutions: Necessity versus Constitutionality in Nigeria's Legal Framework', 16 *J. Int. Arb.* (1999) 2, 49.** He has also examined the Law in operation in some other issues where national statutes are based on the Law, in Nigeria for instance,:

procedure would if it exists would make for certainty of rules and cause even more people to embrace customary law arbitration.

The Model Law will help them achieve the desired uniformity in the procedural aspects of their customary law arbitrations. It is considered obvious from the foregoing discussion that the Law will not tamper with the substantive rules of customary law, which will vary according to the customs and practices of the people. It will simply enhance uniformity in procedure and provide a framework for trans-cultural and trans-national enforcement of customary law arbitral awards.

It bears repetition here that the internationalisation process can only be achieved if the adopting State does not make radical changes to the Model Law. Fatal changes in this respect would be changes to the definition of such words or phases as "international", "commercial", "party", "arbitration". The aim of internationalisation and indeed the very need for the making of the Model Law by UNCITRAL and its recommendation by the UN General Assembly[203] would be defeated by radical changes such as those made by Iran and Lebanon.[204] Indeed,

'Enforcement and Challenge of Foreign Awards in Nigeria'14 *J. Int. Arb.* 3 (1997) 223; 'Commercial and Investment Arbitration in Nigeria's Oil and Gas Sector' 4 *Journal of World Investment* 5 (2003); 'Commercial Arbitration as the Most Effective Dispute Resolution Method: Still a Fact or Now a Myth?' 15 *J. Int. Arb* 4 (1998) 81; 'New Hopes and Responsibilities in the Maturing Process of Arbitration Law and Practice in Africa: Nigeria as a Case Study'(2004) 2 (1) *Nig. Bar Journal 55* etc.

203. The "desirability of uniformity of the law of arbitral procedures and the specific needs of the international commercial arbitration practice": UN General Assembly Resolution No. 40/72 of 11th December 1985.

204. The Iranian Law on International Commercial Arbitration, 1997 and Lebanese Arbitration Act, 1983 made such radical changes that it can easily be argued that they are not Model Law-based. See for instance, A Hamid El-Ahdab, 'The Lebanese Arbitration Act' 13 (3) *J. Int. Arb.* (1996)39.

> **The mobile and truly international arbitral process calls for a wide range of choices as regards the place of arbitration and requires ...that any legislature reviewing and revising its national arbitration law would be well advised to follow the structure and wording of the global model as closely as possible.**[205]

10.0 Limits of the Internationalisation Process

It may well be hasty to draw lines and boundaries for the internationalisation process at this incipient stage particularly in view of the virtuous flexibility and adaptability of the African customary law.[206] That notwithstanding, it can be said with a degree of certainty even now that the internationalisation may not be able to get to certain areas and issues. For instance, it is not likely to cover public law issues in the near future. It is difficult to see how ICSID arbitrations or other arbitrations between African States inter se or between an African State party and another non-African State or non-State party can become possible under the customary law. Whether or not the pre-colonial African Kingdoms, Chiefdoms and emirates etc were State entities in international law or can now be retrospectively recognised as such (for purposes of properly situating in analysis the events of that period) the present States are not creations of the customary law. They are, in fact, things completely unknown to the customary law. They are presently organised, at least in theory,[207] and run on the basis of their

205. Judge Carl-August Fleischhauer, 'UNCITRAL Model Law on International Commercial Arbitration' 41 (1) *Arbitration Journal* (1986) 17.

206. See Osbome, C. J. in *Lewis v Bankole supra.*

207. It is actually just theory when persons like the late Idi Amin of Uganda and Kamuzu Banda or military usurpers get to power and not only make nonsense of the idea of constitutionalism and the rule of law but in effect translate themselves (their wishes, caprices and bare personal interests) into

national constitutions. They are not juristic persons under the customary law.

Even if the States should become juristic persons under the customary law, a far more important problem will arise with respect to which tribe's customary law in a pluralistic country should be operative over such a national matter. I have already stated in this lecture that African States are pluralistic in language and cultural composition. Therefore, other State and non-State parties intending to go into, or that have already gone into, transactions with any African State need not be apprehensive with respect to any possibility of disputes arising from such transactions being required to go to customary law arbitration.

Even with respect to arbitrations between individual Africans and non-Africans the proposition of a customary law arbitration can only be made if in the ways already discussed herein[208] the non-African has made himself a subject of the customary law; the subject matter of the transaction is one known to customary law and both parties have voluntarily agreed not only to go to arbitration but specifically customary law arbitration. As already indicated hereinbefore, customary law arbitration is founded on the free will of the parties.[209] In no circumstance whatsoever can an unwilling party - not even a traditional African bound in every respect by the customary law - be compelled or forced into a customary law arbitration agreement.

the Constitution.

208. See notes 169 - 174 and the text thereof.

209. See note 163 and its text and the discussion after note 174; the eternally relevant principle of party autonomy, which is the same under the customary law as it is under the Western style of the law.

It becomes clear from the foregoing that a non-African need not behold the concept of International Customary Law Arbitration with any apprehensions whatsoever. It cannot affect adversely the interest of non-Africans just as it cannot so affect the interests of Africans.

11.0 Dismantling the Obstacles and Embracing the Prospects

Part 9 of this lecture, Consequences of and Responsibilities Arising From the Internationalisation, has dealt in part with the dismantling of the obstacles and embracing the prospects. More will be dealt with here in this part, up until the recommendations. Those are the prospects of this project.

Many African countries are enacting statutes based on the UNCITRAL Model Law. All the Franco-phone countries in Africa have the OHADA legislation directly applicable in them. Of the 54 African countries 42 are State Parties to the Convention. This legal infrastructure ensures a huge and easy enforcement of International or Foreign Customary Law Awards across the continent. This, in addition to the many countries outside Africa (193 United Nations members out of which 172 are State Parties of the New York Convention) ensures a large membership a great and easy enforcement of customary awards rendered in Africa or with an African roots or involvement. As is already clear form this lecture, when we say "African" here we include such other countries who have customary law in their jurisprudence in one form or the other; countries like Caribbean, South Americas etc. In fact, the concept of an International Customary Arbitration is one that

touches or involves so many places in the world where there are Africans.

12.0 Customary Law Arbitration and Human Rights

Human rights have assumed a pride of place in Africa as it has in the world legal scene. This writer has attempted to show in different ways in other works that arbitration and alternative dispute resolutions (ADRs), such as conciliation, mediation and negotiation, were firmly entrenched in the old traditional African societies and were part and parcel of the people's life, though not called by these English names.[210] Those works also showed that as of now, customary law arbitration has grown to cover disputes in even such matters as oil and gas operations as well as some aspects of international trade and investment. These issues do not bear repetition in this lecture.

Like all incipient societies, however, early African societies did not have a human right charter. Such things evolved with time in each society. Like all incipient societies, however, early African societies did not have a human right charter. Such things evolved with time in each society.[211] The effect was therefore that, in ancient African societies, most of which were organized into empires and kingdoms, little importance was attached to

210. See, eg, A I Chukwuemerie 'International Commercial Arbitration and the UNCITRAL Model Law under Written Federal Constitutions: Necessity Versus Constitutionality in the Nigerian Legal Framework' (1998) 15 *Journal of International Arbitration* 83; A I Chukwuemerie 'The recent Odyssey of Customary Law Arbitration and Conciliation in Nigeria's Apex Courts' note 49 *supra* etc

211. The exception is the USA, which itself was established on the tenets of equality of all men, and of justice. Nevertheless, even in America that had such a hard-worn beautiful national heritage and foundation, slavery continued for decades. There was also the official policy of extermination of native Indians as well as other forms of racial segregation. Even now other blacks are yet to enjoy being elected President. Even with the Magna Carta in England, social justice for the masses as different from the barons was not immediately entrenched.

the observance of human rights. It was therefore in some cases possible for human rights to be flouted, even with impunity.[212] In many societies, human rights generally depended on the social status of the person in question.[213] A slave was for all intents and purposes an object or subject of ownership (a piece of property as it were) and was not entitled to many of the rights guaranteed by law- such as access to Courts, native or customary or the imported Western type, a right to a fair hearing and a public hearing.[214]

Slaves were not entitled to go to Court (Customary or Western) and could not appoint an arbitrator. It was the practice that they could complain to a person outside the slave owner's house or state their case in any dispute with an outsider through their owner. A complaint or case against a slave would be made to or through that slave's owner. An owner would therefore pursue in his own name any arbitral or court proceeding between the slave and a freeborn. The slave owner in such proceedings occupied a higher position than a parent, guardian or friend does today in proceedings involving an infant.[215] The question of whether or not a resort to arbitration amounted to a breach of his right of access to court or of fair and public hearing therefore did not arise at all.

Generally amongst freeborns outside the monarchy, there was equality of persons before the law. Each person had a right of

212. For some of the notable abuses, see U O Umozurike, 'The African Charter on Human and Peoples' Rights' (1998) 15 - 18.

213. This was the general trend in practically all contemporary societies and indeed in all Europe 1789-1978 (1980) and V Cronin Napoleon (1982)

214. This was learnt or confirmed in interviews held with elders and custodians of the Communities. The author was informed that the position is the same amongst all the Asante of indigenous to those tribes. For a confirmation that in such matters similarity existed see T O Elias, The Nature of African Customary Law (1956)

215. *Ibid*

access to the courts just as much as he had to arbitration and alternative dispute resolution generally.[216] There were no statutory or constitutional provisions that made access to Courts a superior right over access to arbitration, or dispute resolution fora in the manner that the present provisions on access to Court seem to suggest. As a matter of fact, the traditional African environment did and does give preference to arbitration and alternative dispute over litigation. Therefore, a separate or exclusionary right of access in favour of the Courts could only be a mirage.[217]

Whether or not a public hearing and delivery of judgement were strict requirements of customary law depended on the part of Africa in question. Whilst they were strict requirements in most language groups of South Africa,[218] Igboland in Nigeria and Asante in Ghana, it was not so in the Upper Volta regions and among some of the language groups of North Africa.[219]

In modern African customary societies, this has changed a great deal. For instance, the institution of slavery has long been abolished and every person enjoys equality before the law. Concerning the right of access to Courts vis-à-vis the right or choice to arbitrate, the legal position will depend on the Courts

216. Though non-arbitration practitioners sometimes refer to arbitration as an ADR (Alternative Dispute Resolution) method, the fact is that arbitration has since assumed a distinct character of its own. It is midway between litigation and ADR. It shares some characteristics with litigation on the one hand and with ADRs on the other, but is not the same.

217. In fact, even as with respect to courts, the customary African system or procedure is itself very similar to arbitration and ADR and a practical difference hardly exists. As a South African judge has observed: 'Dispute resolution in traditional African courts gives full recognition to the idea that a public trial is only a minor phase in the progress of a dispute. The aims and procedures in these courts revolve around mediation or arbitration and reconciliation as opposed to adjudication with a win-or-lose result as in western courts.' N Mokgoro 'The Role and Place of Lay Participation, Customary and Community Courts in a Restructured Future Judiciary' in M Norton (ed) Reshaping the Structures of Justice for a Democratic South Africa (1993) 65 75.

218. As above.

219. See Elias note 30 *supra*

that are used. If it is access to customary Courts as against customary arbitration, the position is exactly as it was in pre-colonial times when Western-style Constitutions and Courts were not yet in place. If it is the right of access to Western-style Courts (set up by Constitutions) as against customary law arbitration, the situation is akin to that of Western-style Courts against Western-style arbitration which is discussed below.

If the place where a customary law arbitration award is made has legislation based on the UNCITRAL Model Law or is a member of OHADA Treaty, the customary Law award becomes internationalized under the same principles and rules as already discussed in this lecture.[220]

Conclusion and Recommendations

Conclusion

Mr. Chairman, Sir, this lecture has looked at the self-doubt and similar difficulties which have ensured that legal innovations by Africans or that have African roots do not get the needed acclaim, attention and mention of the domestic legal community. If such acclaim existed, there can now be a propagated to the international legal world scene. The lecture has also examined the related problem that even domestically some African jurists do not even pay sufficient attention to things African but would rather want to supplant and replace them with un-researched foreign ideas and principles that are

220. See Parts 8 and 9 of this lecture, notes 175 up to 205. Other issues connected with right of access to Court as against the right or choice to arbitrate, the principles of fair and public etc are not relevant for this lecture.

not similar. That is what happened in *Agu v Ikewibe* where the Supreme Court of Nigeria sought to rename customary conciliation as customary arbitration.

It has also clarified or elaborated a new reality in Africa - the internationalisation of the African customary law arbitration through the adoption of the UNCITRAL Model Law, and the Uniform Arbitration Act of the OHADA States. It remains to be seen as the years roll by how if this internationalisation process will go as far as such desirable or undesirable concepts as "a national" customary law arbitration will also emerge. It will be interesting to see if an "international (African customary) law of contract" or customary lex mercatoria will emerge or be canvassed.

As of now, what is clear is the need for Africans and indeed the international arbitration community to encourage this new phenomenon for the mutual benefit of Africa and the global community. All hands ought to be on deck on the matter while self-doubt and traditional prejudices must be abandoned. In this matter, the future is itself a very dynamic promise, and tomorrow has started today.

Recommendations

1. Vice Chancellor, Sir, may I repeat the call that I have consistently made on the Supreme Court of Nigeria to emphatically overrule *Agu v Ikewibe* and in doing so to call upon all Courts to henceforth disregard that decision. Previous cases such as *Obodo v Oline*, *Kwasi v Larbi*, *Njoku v Ekeocha* and *Foli v Akese* were all firm on the point that only a pre-award consent was necessary for the validity and bindingness of an

arbitral award. No post-award consent was ever needed in customary law arbitrations. It is in conciliation that a post-award consent is needed, which is one of the distinguishing factors between arbitration and the conciliation. If an award needed a post award consent, then there is no difference between customary law arbitration award and the end result of a conciliation. The two media of dispute resolution have never been one and the same thing. Any judgement that tries to make them the same is not correct.

The case of *Agu v Ikewibe* had in fact been over ruled in O*jibah v Ojibah,* even if tacitly. However, the Courts seem to be unduly taking cognizance of Ikewibe as if it is the present law of the land. Having been overruled, it is no longer the law of the land. Even if it is stated, may be for the sake of an argument, that it has not been over ruled, the Supreme Court should overrule it at the next opportunity and set the law of our fathers and ourselves free from the operation of judicial precedent.

2. The idea of an International Customary Law and its Award having become a reality as shown in this lecture, a Customary Law Award that is both International and Foreign enforceable under the New York Convention in every African country that is a member of that Convention in now a reality. The idea of cross-border enforcement recognition and enforcement has become a reality! It is interesting to note that a customary law award delivered to Ovunda, or Mitee or Briggs in Rivers State Nigeria can now become an international law award, enforceable in Ghana, Egypt, USA, UK, Germany, Canada, etc.

Here is a call on all arbitration practitioners of the customary law to rise up to this reality and begin to employ the legal

frameworks elucidated in this lecture to press for the recognition and enforcement of African Customary Law Awards in any country of their choice. Let self-doubt, the Achilles heel of Africans in the international legal scene debar no one. The obstacles raised of demeaning doubts from outside and the attitude of looking down on things African will be there. However, the legal obstacles (and indeed all others) have been surmounted by law and legislation, unintentionally. Let us rise and shine as it were, beyond the sky is our limit.

3. There is now room for the establishment of a Pan-African Tribunal for the enforcement of these awards, where necessary. Here is a call on the African Union to put such a Tribunal in place. The way things are now, such a Tribunal will function best if it started by governments even if it will be handed over to individual entities later.

A Pan-African institution like the ICC, ICCA, Chartered Institute of Arbitrators etc. Individuals who can dream big and clear backed by capital can also start this just as the ICC, ICCA etc were started by individuals.

Their neutrals will be constituted of Africans schooled in the art of their native trade (who need be judges wielding LL.B degrees) knowledgeable in their African art and nuances of that trade. They need only to be motivated by the deep desire to accomplish enduring justice amongst the parties and not just sometimes abstract legal principles which may not be relevant to their trade. They will examine the dispute in question and render an award which will be binding (without any post award consent) and conducive to African customary trade and business.

4. With this reality there can now be a clear study, outlining and pronouncement of the Customary Law Jurisprudence or better still, an International Customary Law Jurisprudence. This will not only serve Arbitration but will extend to all about Customary Law. It will be beyond Africa as it can cover other countries and places where customary law is presently in practice and use. Such places and Cuba, Canada, South America, the entire Caribbean etc. With time, Professorial Chairs can even be set up in this area. This is real and promising. If self-doubt allows us, there is nothing we cannot achieve in this matter. If Islamic law has now got Islamic jurisprudence Africa can do much more if proper encouragement and grit are applied.

5. If these, especially numbers 2 and 3 above, are achieved much more impetus will be added to Africans doing international business in native African things. African businesses can be done freely and promptly and if they have any dispute that they may have can be settled while enjoying the beauties and lure of arbitration. Even for non-native items, businessmen may abandon the technicalities of litigation and embrace the settlement of disputes through the customary law where customary law is applicable.

I am very grateful for your kind attention. God's grace.

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I thank the Vice Chancellor, Professor Nlerum S. Okogbule for the opportunity to deliver this Inaugural Lecture to this august audience. This lecture could have been delivered about 19 years back. It was when the VC began to give impetus to these lectures that my interest was rekindled and here am I today.

The Vice Chancellor has been very instrumental to my progress in more ways than one. I was employed in this University in 2002 when he was the Ag. Dean of the Faculty of Law. I became the Head of Department of Private and Property Law. Later in 2005, a combination of things happened and he came to my office then and appealed to me to still be a Head of Department, that nothing would happen to me. I took up the challenge just because of him, which I told him. Fortuitously, I came back in 2017 when the Faculty needed full-fledged Professors in preparation for accreditation, he was the Dean again. I can testify for all to hear that the VC is indeed a father without any trace of bias or sectionalism of any kind. A blessed man.

My gratitude goes to the DVCs Administration and Academics, Prof. Victor A. Akujuru and Prof Valentine Omubo-Pepple, who help the VC in his task. My gratitude goes to the Ag. Registrar, Mrs. I B S Harry, the University Librabrian, Prof. J. N. Igwela, the University Orator, Prof I Zeb-Opibi. I am equally grateful to all the former members of the Management Team of this University at different times including the Emeritus Professor S. Achinewhu, Prof. (Mrs) Opunebo Owei, Prof O B Owei, Prof Okoroma and the immediate former Registrar, Dr. S. Enyinday. I am grateful to all staff of this great institution because their

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I am grateful to all of you dear Senate members who have come here to hear this lecture. I am a relatively new person here, not personally known by many persons but you have come to honour me with your esteemed presence.

Today, as I deliver this Inaugural Lecture, I am thoroughly grateful to the Hon Justice Niki Tobi, who as Professor of Law and Dean of the University of Maiduguri, had an opportunity to shout me down and up but did not do so. He rather chose to embolden me by his words. An ignorant fresher in the Faculty, who did not know that he was the Dean of Law, I walked into his office and engaged him in a debate as to whether the 1966 coup was a coup or a peaceful change of government. It could be either because of the relevant facts pointing to one or the other of those conclusions. In my zeal and exuberance, I was insistent that his monograph on whether the 1966 event was a *coup d'état* or a peaceful change of government had unsupportable and faulty arguments and conclusions. He chose to tolerate me, listened patiently when it was my turn to speak, took notes and asked me to come again and again to discuss issues with him. When I learnt a few days later that he was the Dean, I thought I had done myself in. On the contrary, he saw a budding

argumentator to be encouraged. And he did.

When he left the academia and came to the old Rivers State, he rose from the ranks from the High Court to the Supreme Court. He bestrode all the steps of both the hood (the academia) and the Bench. Our association lasted all those years and he was my mentor extra ordinaire. He fanned in me a desire, a zeal to rise to the top, the zenith of both the academia and the private legal practice. May God, the faithful Rewarder of good men keep him in real perfect peace where he is in Him.

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CITATION
Profile of Prof. Andrew I. Chukwuemerie, SAN, FCIArb (UK), FICIArb, ICC, ICCA, LRCIA, LCA

Professor Andrew I. Chukwuemerie, SAN, FCIArb (UK), FICIArb is a Professor of Commercial Law at the Rivers State University, Port Harcourt. He obtained his LL.B (Hons) from the University of Maiduguri in 1988 under the then Prof Niki Tobi, who later became a Justice of the Supreme Court, now of blessed memory. He obtained his BL from the Nigeria Law School, Lagos, was called to the Bar in the same year. He later obtained his LL.M from the University of Lagos.

When he started lecturing at the Abia State University, he was the Head of two Departments and served in several Senate Committees. In the interlude between that first coming and the present, he also served in several Senate Committees and was the pioneer Head of the Post Graduate School of the Faculty of Law, Ebonyi State University. In his teaching career he worked towards achieving the feat of his mentor of becoming a Professor within a record time, which he did in 2005.

He is lecturer, a teacher of teachers. He has to his credit about (119) one hundred and nineteen publications amongst which are five (5) texts and twenty (20) chapters in other books. He became a Senior Advocate of Nigeria in 2009 and was sworn in in 2010.

His greatest area of strength is International Commercial Arbitration in which he has done extensive work and been around a little. Arbitration has helped him a lot. He is a Fellow of the Chattered Institute of Arbitrators, London, Fellow of the Institute of Construction Industry Arbitrators, Nigeria and

belongs to such other Arbitration bodies as the ICCCommission on Arbitration and ADRs (where he is a National Delegate to the global Commission on Arbitration and ADR), International Council for International Commercial Arbitration (ICCA), Lagos Court of Arbitration, Lagos. He is an Arbitrator & Mediator, World Intellectual Property Organisation (WIPO), Switzerland. He is member of Advocates International and Society for Corporate Governance, Nigeria.

His other areas of specialty and interest are in Company Law and Corporate Law. For other practice purposes he is involved in Maritime, Transnational Economic and Monetary Law, Commercial Litigation and interests in Oil and Gas Law and Evidence.

His motivation is optimum aut nihil – either the best or nothing. His SSRN Author Page: http://ssrn.com/author=346836.