

# FROM BOTSWANA TO NIGERIA: A COMPARATIVE ANALYSIS OF THE LEGAL STATUS OF NON-TRIBESMEN AND NON-NATIVES UNDER CUSTOMARY ARBITRATION IN BOTSWANA AND NIGERIA

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## ARTICLE

### ABSTRACT

Human existence and living is bedeviled with disputes ranging from less-serious disputes to serious disputes.<sup>1</sup> However, the existence of dispute(s) is not issue for concerns but the need to resolve same. Dispute resolution mechanisms<sup>2</sup> had been devised to solve human disputes. The challenges that litigation posits further increased the use arbitration and other alternative dispute resolution (ADR) processes. These challenges serve as major catalyst that brought about the upsurge practice of the customary arbitration globally and Africa specifically.<sup>3</sup> This paper therefore attempts to examine a comparative analysis of the legal status of non-tribesmen and non-natives under customary arbitration in Botswana and Nigeria respectively. The paper also examines the legality of customary arbitral award in Nigeria and Botswana. The paper shows that non-tribesmen and non-natives of Nigeria have capacity to enter into a valid customary arbitration in Botswana and Nigeria; respectively and same is binding and final. Finally, it submits that non-tribesmen of Botswana and non-natives of Nigeria should not and cannot be compelled into a customary arbitration in both jurisdictions.



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**Keywords:** Customary Arbitration; Non-natives; Nigeria, Botswana and ADR.

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<sup>1</sup> Bukola Oyaleke, 'An Analysis of the legal status of non-natives/foreigners under customary arbitration in Nigeria' [2013] (1)(1) *Journal of Leadership and Development*, 134

<sup>2</sup> Oyaleke ( n. 1) 135

<sup>3</sup>Oyaleke ( n. 1) 135

## 1.0 Introduction

Conflicts among human beings are as old as life itself. Conflicts may be multi-faceted. It can exist about different subject matters such as beliefs, values, material and resources, emotions, roles and responsibilities.<sup>4</sup> Conflicts may occur between friends, family members, business associates, neighbours, strangers, consumers and merchants.<sup>5</sup> It may even be between sovereign states of the world either on boundaries tussle, for example between, Japan and China,<sup>6</sup> Nigeria and Cameroun on Bakassi Peninsula on the land dispute.<sup>7</sup> It must be noted however that the existence of conflicts is not the major crux of the matter but the mean(s) of resolving the conflicts. It is also a general notion that the most effective means of resolving disputes is through litigation.<sup>8</sup> The problems associated with litigation increased the need for the use of customary arbitration in Nigeria as alternative to litigation. The question to be asked is does customary arbitration has any root under both Nigerian and Botswana jurisprudence?

## 2.0 An Overview of Arbitration in Nigeria and Botswana

### 2.1.0 Historical Background of Arbitration in Nigeria

Arbitration is ancient in nature and has been in existence for ages. This means that different people of different ages in different communities have settled or resolved dispute harmoniously using traditional method or system. It is practiced by the bushman of the Kalahari, Hawaiians Islanders, the Kpelle of Central Liberia, the Abkazian of the Caucasus Mountain, the Yoruba people of Nigeria and the people of China.<sup>9</sup> No society may lay claim to the evolution of the practice of arbitration as a dispute resolution mechanisms, although countries like China, India, Italy, and a host of others often claim to have introduced the system.<sup>10</sup> References of settlement of early international and private disputes are also found in Sumerian Inscriptions dating back to 4000BC.<sup>11</sup> Notwithstanding the fact that courts, through litigation, had been the fulcrum through which the populace had resolved their differences in the past and have become the main forum for the settlement of disputes, the fact still remain that arbitration is of early origin, which has developed with time and is still a progressive subject.<sup>12</sup>

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<sup>4</sup>Oluduro Olubayo, *Customary Arbitration and Its Development in Nigeria in Current Issues in Nigerian Jurisprudence, Essays in Honour of Chief. Adegboyega Solomon Awomolo*, (Nigeria, 2007)

<sup>5</sup> Oluduro ( n. 4)

<sup>6</sup>Kiyoshi Takenaka 'Japan warns china of deteriorating ties over East China sea dispute' (Kiyoshi Takenaka, August 8 2016) <https://www.reuters.com/article/us-japan-china-idUSKCN10K07I> accessed on 13 February 2020

<sup>7</sup>Linus Unah 'The lifelong consequences a little-known Nigeria-Cameroun land dispute' (Linus Unah, May 16 2019) <https://www.trtworld.com/magazine/the-lifelong-consequences-of-a-little-known-nigeria-cameroon-land-dispute-26701> accessed on 13 February 2020

<sup>8</sup>Paul Obo Idornigie, *Investment treaty arbitration and emerging markets: Issues, prospects and challenges*, (Nigerian Institute of Advanced Legal Studies, Nigeria, 2011)

<sup>9</sup> Lukman Ayinla, 'ADR and the Relevance of Native or Customary Arbitration in Nigeria,'[2009] 5(1) *University of Ilorin Law Journal*, 255

<sup>10</sup> Muhammed Mustapha Akanbi, *Domestic Commercial Arbitration In Nigeria: Problems and Challenges*, (Kings College London, University of London, 2005)

<sup>11</sup> Akanbi ( n. 10)

<sup>12</sup> Akanbi ( n. 10)

Globally, many disputes in international trade are not settled in court, but by arbitration because of the advantages that it posits.<sup>13</sup> First, it provides an independent venue for the resolution of any dispute between the parties by judges of their own selection. Secondly, the dispute is handled by experts and the award rendered is final and enforceable in different jurisdictions. Thirdly, arbitration is confidential and saves time.<sup>14</sup> Nigeria as a country is not also left out in the practice of Arbitration as a form of Alternative Dispute Resolution.<sup>15</sup>

Conventionally, litigation was almost the sole means of resolving disputes, whether commercial or otherwise. Historically, however, conciliation, mediation and arbitration had major roles to play in resolving disputes in Nigeria, Botswana and indeed, globally.<sup>16</sup> Alternative dispute resolution generally exists in various forms and the appropriate procedure to be used depends on the consensus of the parties thereto and the peculiar circumstance of the case. The aim of any ADR is to facilitate a simple, faster, less expensive and stress-free process of settlement of the dispute without going to the court.<sup>17</sup> When properly conducted the parties could still maintain their relationship irrespective of their dispute or differences. This means that the concept of arbitration has been, and is a known method of resolving disputes despite the fact that, often times, litigants resort to litigation than arbitration.

### **2.2.0 Nature of Customary Arbitration in Nigeria**

Arbitration generally has been recognised as an alternative disputes resolution mechanism in Nigeria and worldwide.<sup>18</sup> As such its efficacy and effectiveness cannot be over-emphasised.

Karibi Whyte JSC<sup>19</sup> (as he then was) gave a judicial definition of Customary Arbitration as:

‘It is well accepted that one of the Many African Customary models of settling disputes is to refer the disputes to the family head or an elder or elders 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...

Similarly, Elias submitted that customary arbitration is a reference of grievance for:

A compromise solution based upon subsequent acceptance by both parties of the suggested awards which becomes binding only after such signification of

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<sup>13</sup>Aiste Sklenytc, *International Arbitration: The Doctrine of Separability and Competence-Competence Principle* (The Aarhus School of Business, 2003)

<sup>14</sup> D’Arcy, Leo, Murray, Carole and Cleave, Barbara, *Scmitthoff’s Export Trade*, (London, Sweet & Maxwell, 10th ed, 2000)

<sup>15</sup>Adedoyin Rhodes V., ‘Arbitration and Alternative Dispute Resolution as Instruments for Economic Reform’ (Paper delivered at the 11th Maritime Seminar for Judges, Abuja, 2010) 2

<sup>16</sup>Paul Obo Idornigie, *Investment Treaty Arbitration And Emerging Markets: Issues, Prospects And Challenges*, (Nigerian Institute of Advanced Legal Studies, Nigeria, 2011)

<sup>17</sup> Idornigie ( n. 16)

<sup>18</sup> Gaius Ezejiolor, *The Law of Arbitration in Nigeria* (Longman, 1997)

<sup>19</sup> Bukola Oyaleke, ‘An Analysis of the legal status of non-natives/foreigners under customary arbitration in Nigeria’ [2013] 18 *The Jurist*, 272; *Agu v Ikwibe* [1991] 3 NWLR (Pt.180) 385 at 407

its acceptance from which either party is free to resile at any stage of the proceedings up to that point<sup>20</sup>

The above definition of customary arbitration was further judicially defined in the case of *Ohiari v. Akabeze*<sup>21</sup> and reiterated in *Eke v. Okwaranya*.<sup>22</sup> Judicial recognition to the concept of Customary Arbitration was given in the case of *Okereke v. Nwankwo*,<sup>23</sup> where the Supreme Court held that a customary arbitration is an arbitration in disputes founded on the voluntary submission of the parties to the decision of the arbitrators who are either the chiefs or elders of their community and the arrangement to be bound by such decision or freedom to resile where unfavourable.<sup>24</sup>

We submit that the position of the law of arbitration, in particular customary arbitration had changed as arbitration is a contract between two consenting parties which binding legal effect makes it practically impossible for either of the parties to resile from it.<sup>25</sup> The *raison d'être* is that no one should be allowed to approbate and reprobate at the same time.<sup>26</sup> Since the parties chose the arbitrator to be a judge in the disputes between them, they cannot when the award is good on its force, object to its decision, either upon the law or facts.<sup>27</sup> This position is also re-iterated by the court in *Ndah v Chianuokwu*.<sup>28</sup> The general rule is that the parties took their arbitrators for better and for worse both as to decision of facts and the decision of law. The rationale behind the binding effect of arbitration stems from the fact that parties who have the right to resort to court for adjudication of their disputes have voluntarily without any prompting opted for a decision by a quasi-judicial body such as customary arbitration, the decision of which they have held themselves to be bound by, neither of them can be allowed in law or equity to resile from the position they have willingly created as no one can be allowed to approbate and reprobate at the same time and to allow any party to resile from that decision will be repugnant to natural justice, equity and good conscience. One important features of customary arbitration is that the agreement to conduct arbitration is essentially oral, and the arbitral proceedings and the decisions are usually not in writing, and therefore, do not come within the scope of the provisions of the Act.<sup>29</sup> Unlike the arbitration under the Act which is irrevocable except when the parties to the agreement consent or through the order of a court of competent jurisdiction, customary arbitration agreement is not irrevocable. It could be revoked by the parties any time before the constitution of the tribunal and before the commencement of the arbitral proceedings. A Customary arbitral award is at par with a judgment of the court as recognized by the Supreme Court in the case of *Ras Pal Gazi Construction*

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<sup>20</sup> Taslim Olawale Eliaz, *The Nature of Customary Law*, (Manchester University Press, 1956)

<sup>21</sup> [1992] 2 NWLR (Pt.221) 1 Pt.28

<sup>22</sup> [2001] 4 SC (Pt.11) 71 Pt.89

<sup>23</sup> [2003] 9 NWLR 592 SC

<sup>24</sup> See also: *Agu v Ikewibe* [1991] 3 NWLR (Pt.180) 385 at 407

<sup>25</sup> *Oline v.Obodo* [1958] 22 SCNLR 298; *Njoku v Ekeocha* [1972] 2 ECSLR 199; *Inyang v Simeon Essien* [1957] 2 FSC 39; *Oparaji v Ohanu* [1990] 6 SC 41; *Mensah v Takyiampong & Ors* [1940] 6 WACA 118

<sup>26</sup> *Ndah v Chianuokwu* [2006] All FWLR (Pt.315) 169 at 181

<sup>27</sup> Bukola Oyaleke, 'An Analysis of the Legal Status of non-natives/foreigners under Customary Arbitration in Nigeria' [2013] (1)(1) *Journal of Leadership and Development*, 7

<sup>28</sup> [2006] ALL FWLR p.315 at 181

<sup>29</sup> Arbitration and Conciliation Act. Cap. A 18,LFN, 2004

*Company Ltd v. FCDA*.<sup>30</sup> Award granted at the end of arbitration process is as valid as the court judgement.<sup>31</sup> A decision or an award of a customary arbitration, though binding on the parties and their privies, is not a judgement of a court of law, and but the decision can be equated with those of courts of law capable of creating judicial precedent; a full arbitral proceedings inclusive.<sup>32</sup> Customary arbitration lacks intrinsic or inherent force, and cannot be enforced like the judgments of regular courts until it is pronounced upon by a court of competent judicial authority. Before such an award can create estoppel per rem judicata or issue estoppel, it must have been pleaded and proved by proceedings before the court.<sup>33</sup> Also, the ingredients of a valid customary arbitration must be proved and pleaded.<sup>34</sup>

### **3.0 Historical Background of Arbitration in Botswana**

Botswana's arbitral proceedings are governed by the Botswana Arbitration Act.<sup>35</sup> As a principle of law, arbitration clause contained in a contract between party states that in the event of a dispute, it will be resolved by arbitration and not through the courts of Botswana.<sup>36</sup> Section 2 of the Act states that an arbitration agreement is described in the Act as a written agreement, by the parties, to submit present or future disputes to arbitration. Such an agreement remains valid whether or not an arbitrator has been appointed.

Courts of law in Botswana play an important role in arbitral matters. For instance, where arbitration proceedings are conducted in a manner inconsistent with the provisions of the Act, the arbitral award obtained therefrom could be set aside and the courts can intervene in such instances.<sup>37</sup>

Section 10(1) of the Act states the limitations of the parties to select arbitrators to the effect that:

Where an arbitration agreement submits that the reference shall be to three, each party is to appoint an arbitrator each and the third one is appointed by the two elected arbitrators.<sup>38</sup>

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<sup>30</sup> *Ras Pal Gazi Construction Company Ltd vs. FCDA* [2001] 5 SCNJ, 234

<sup>31</sup> Adedoyin Rhodes-V, 'Arbitration and alternative dispute resolution as Instruments for economic reform' (Paper delivered at the 11th Maritime Seminar for Judges, Abuja, 2010).

<sup>32</sup> Jean Timsit 'Mediation: An alternative to judgment, not an alternative judgment [2003] 69(3) *International Journal of Arbitration*, 159.

<sup>33</sup> *Ofomata & Ors v Anoka & Ors* [1974] ECSLR 251; *Okereke v Nwankwo* [2003] 9 NWLR (Pt.828)592; *Odinigi v Oyeleke* [2003] 6 NWLR (Pt.708) 12; *Ohiaeri v Akabeze* [1992] 2 NWLR (Pt.221) 1; *Agu v Ikewibe* [1991] 3 NWLR (Pt.180) 385 at 407; *Oparaji v Ohanu* [1999] 9 NWLR (Pt.618) 290

<sup>34</sup> *Ehoche v Ijegwa* [2003] 7 NWLR (Pt.818)139; See also: *Nwannewuihe v Nwannewuihe* [2007] NWLR (Pt. 1059) 1 at 16 - 17

<sup>35</sup> Arbitration Act (Cap 06:1)

<sup>36</sup> Edward William Fashole-Luke II and Queen Letshabo, *The European, Middle Eastern and African Arbitration Review 2016* (Edward William Fashole-Luke II and Queen Letshabo, October 19, 2015) <https://globalarbitrationreview.com/insight/the-european-middle-eastern-and-african-arbitration-review2016/1036941/b> accessed 13 October 2020

<sup>37</sup> Botswana Arbitration Act, 1959

<sup>38</sup> Botswana Arbitration Act, 1959

In the event that the parties fail to appoint the third arbitrator for one reason or the other, a court of law can appoint an arbitrator for the parties.

The court can also intervene in the appointment of arbitrators as provided in section 11 of the Act. The section states instances where the court can invoke its inherent powers to appoint an arbitrator or umpire such as:

- (a) Where the parties or two arbitrators are at liberty to appoint an umpire or third arbitrator and do not do so or where two arbitrators are required to appoint an umpire and do not appoint the arbitrator; or
- (b) If an appointed arbitrator refuses to act, is incapable of acting or dies, and the submission does not show that it was intended that the vacancy should not be supplied and the parties do not supply the vacancy;
- (c) Where a submission provides that the reference shall be to a single arbitrator and all the parties do not, after differences have arisen, occur in the appointment of an arbitrator;
- (d) Where an appointed umpire or third arbitrator refuses to act, is incapable of acting or dies, and the submission does not show that it was intended that the vacancy should not be supplied and the parties or arbitrators do not supply the vacancy, any party may serve the other parties or the arbitrators, as the case maybe, with a written Notice to appoint or, as the case may be, concur in appointing an arbitrator, umpire or third arbitrator, and if the appointment is not made within seven clear days after the service of the notice, the Court or a judge thereof may, on application by the party who gave the notice, appoint an arbitrator, umpire or third arbitrator who shall have similar powers to act in the case and make an award as if he had been appointed by consent of all parties.<sup>39</sup>

Parties are allowed under the Act to choose an arbitral procedure of their choice. Virtually all matters are arbitrable except criminal cases, matrimonial causes, matters relating to status and matters involving minors or other persons that are under legal disability.<sup>40</sup> An arbitral award may be set aside on the grounds that the arbitrator or umpire misconducted the proceeding or same was improperly obtained.<sup>41</sup> It must be noted however that the Act is archaic and long due for a reform. For instance, the Act does not contain any specific provision that gives the arbitrator power to decide on his own jurisdiction on the one hand, and the arbitrator has no statutory powers to grant interim measures, order security for costs or call witnesses *suo motu*.<sup>42</sup> Furthermore, the Act fails to provide for the doctrine of competence-competence and doctrine of separability of the arbitration clause to mention but a few. This lacuna in the Act makes the arbitral tribunal to rely heavily on the courts and causes unnecessary interference by the courts.<sup>43</sup>

It is worthy of mention that the New York Convention on Recognition of Foreign Arbitral Awards is applicable in Nigeria as a party to the arbitration can bring an action for the enforcement of a foreign award validly given.<sup>44</sup>

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<sup>39</sup> Customary Law Act, 1969

<sup>40</sup> See generally s. 7 of Customary Law Act, 1969

<sup>41</sup> See s. 13(2) of Customary Law Act, 1969

<sup>42</sup> Butler David, 'The State of International Commercial Arbitration in Southern Africa: Tangible yet Tantalising Progress' [2004] 21(2) *Journal of International Arbitration*, 209

<sup>43</sup> Baboki Dambe, 'The Doctrine of Competence-Competence and the Botswana Arbitration Act of 1959: The Need for Reform' [2014] *University of Botswana Law Journal*, June-December, 88

<sup>44</sup> See s. 3 of Customary Law Act 1969

### **3.1.0 Nature of Customary Arbitration in Botswana**

Before the advent of colonization in Botswana, there were already in existence traditional beliefs, norms, values, habits and idiosyncrasies which helped to maintain law and order in the society. These bodies of norms, beliefs, values, and usages constitute the customary law of the people of Botswana; regulating their lives and transactions.<sup>45</sup> This form of customary law had been in use for centuries and is being transmitted orally from generation to generations.<sup>46</sup> The enforcement and compliance of these customary laws was usually done by male elders at various levels of authority ranging from family heads, ward heads, and section heads; who are all accountable to the chief.<sup>47</sup> The decisions given by the heads are binding on their subject and thereafter referred to as customary arbitration. Customary arbitration is the voluntary submission of a dispute to an elder or group of elders with an indication that the decision therefrom in the form of an award shall be binding and final. This practice has been in use in Botswana for a long period of time.<sup>48</sup>

### **4.0.0: The Legal Status of Non-Natives/Foreigners under Customary Arbitration in Nigeria**

Arbitration has been argued to be a contract<sup>49</sup> between the parties to it and as a general principle of law all persons have legal capacity to contract with legal limitations or qualifications. This by implication means that both natives and non-natives have capacity to enter into a valid customary arbitration. However, under this heading, an examination of the legal status of natives and non-natives under customary arbitration would be examined with a view to knowing the applicable law in matters between natives on one hand and between natives and non-natives on the other hand.

A “native” includes a native of Nigeria and a native foreigner; ‘native of Nigeria’ means any person whose parents were members of any tribe or tribes indigenous to Nigeria and the descendants of such persons; and includes any person one of whose parents was a member of such tribe; ‘native foreigner’ means any person (not being a native of Nigeria) whose parents were members of a tribe or tribes indigenous to some part of Africa and the descendants of such persons; and includes any person one of whose parents was a member of such a tribe.<sup>50</sup>

This above provision is in tandem with the definition of persons that are citizens of Nigeria by birth in Section 25(1) of the 1999 Constitution of the Federal Republic of Nigeria. Section 25(1) of the Constitution provides thus:

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<sup>45</sup> In the Botswana case of *Sekale v. Ministry of Health* [2006] 1 BLR 438 (HC) para 20

<sup>46</sup>Lubabalo Booi, UPDATE: Botswana’s legal system and legal research (Lubabalo Booi, October, 2015) [www.nyulawglobal.org/globalex/Botswana1.html](http://www.nyulawglobal.org/globalex/Botswana1.html) accessed 13 October 2020

<sup>47</sup>Lubabalo ( n. 44)

<sup>48</sup> Lubabalo ( n. 44)

<sup>49</sup>Frances Kellor, *Arbitration in Action: A Code for Civil, Commercial and Industrial Arbitrations* (Mishawaka, U.S.A, 1941)

<sup>50</sup> High Court Laws of Northern Nigeria, s 34

- (a) Every person born in Nigeria before the date of independence, either of whose parents or any of whose grandparents belongs or belonged to a community indigenous to Nigeria:

Provided that a person shall not become a citizen of Nigeria by virtue of this section if neither of his parents nor any of his grandparents was born in Nigeria;

- (b) Every person born in Nigeria after the date of independence, either of whose parents or any of whose parents or any of whose grandparents is a citizen of Nigeria;  
and
- (c) Every person born outside Nigeria either of whose parents is a citizen of Nigeria.

It is therefore safe to submit that a 'native of Nigeria' is a citizen of Nigeria by birth. In this paper, the definition of native as it relates to native of Nigeria means citizen of Nigeria by birth and same would be adopted. This, by implication, means that the non-natives/foreigners referred to in this paper means, persons who are not citizens of Nigeria by birth according to Section 25(1) of the Constitution.<sup>51</sup>

It is trite that customary law will usually apply to regulate a transaction in the following instances:

- (a) where the parties are natives and or the transaction is subject to customary law,<sup>52</sup>
- (b) where the transaction involves a native and non-native, but substantial injustice will be occasioned to either party if customary law is not applied,<sup>53</sup> and
- (c) where a statute provides that customary law should apply.<sup>54</sup>

Customary law will not apply if:

- (a) The parties expressly contract that customary law should not apply,
- (b) if from the nature of the transaction, the parties could not have intended that customary law should apply; and
- (c) where the transaction is not governed by customary law.<sup>55</sup>

From the above, all cases of transactions between natives, and the disputes that emanate from them, they are generally governed by customary law and usually referred to customary arbitration for proper settlement. The legality or otherwise of non-natives to submit their disputes to customary arbitration is predicated on the general principle of law of contract that every person has the capacity to enter into a valid contract and in the absence of vitiating factors such contract is valid.<sup>56</sup> This argument flows naturally from the fact that an arbitration clause contained in a contract is purely contractual<sup>57</sup> and which according to the concept of *pacta sunt servanda*<sup>58</sup> the *consensus ad idem* of

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<sup>51</sup> 1999 Constitution of the Federal Republic of Nigeria, 2011 ( As Amended)

<sup>52</sup> Lewis v Bankole [1908] 1 NLR 81

<sup>53</sup> Nelson v Nelson [1951] 13 WACA 248

<sup>54</sup> Agidigbi v Agidigbi [1992] 2 NWLR Pt. 221

<sup>55</sup> Lewis v Bankole [1908] 1 NLR 81

<sup>56</sup> Orient Bank Nigeria Plc v Bilante International Ltd [1997] 8 NWLR (Pt. 515) at 36 p.76

<sup>57</sup> Kellor (n. 49)



the parties serves as the legal basis for its binding nature.<sup>59</sup> This by implication is in tandem with the legal capacity of parties to a valid customary arbitration and whether they are natives or non-natives is immaterial. The legal basis for its binding nature is the voluntary submission of the parties.

Therefore, the legality or otherwise of non-natives/foreigners under customary arbitration in Nigeria is a question of law and which has already been settled by the principle of law of contract, in particular, the capacity to contracts that, all persons generally have legal capacity to enter in to a valid contract and in the absence of vitiating factors such a contract would be binding and final. Therefore in relation to customary arbitration, where two parties to a dispute voluntarily submit the issue in controversy between them to an arbitration according to customary law and agree expressly or by implication that the decision of such arbitration would be accepted as final and binding, once the arbitrators reach a decision, it would no longer be opened to either party to subsequently back out or resile from the decision so pronounced.<sup>60</sup> The poser therefore is that in a contract between a native and a non-native, and or non-natives and non-natives, can the parties make provision for the referral of their disputes to a non-judicial body such as customary arbitration. If the answer is in the affirmative, what is the legal status of the non-native under the arbitration and the legal status of the award of such arbitration? If no, can the disputes be resolved under the Act and what is the legal effect of the award of such arbitration?

Another question to be asked is whether an alien could be compelled to submit to a customary arbitration by virtue that the other party is a native? If yes, can such arbitration be binding on him and if No, what is the law.

This would therefore lead us to the next issue which is the status of the outcome of the arbitral process. As a general rule, a transaction between a non-native and a native are not to be governed by the customary law.<sup>61</sup> The law however provides for an exception. Thus, customary law may still be applied to a transaction where it appears to the court that substantial justice would be done to either party by a strict adherence to the rules of any other law than customary law.<sup>62</sup> Where a non-native voluntarily submits to the jurisdiction of customary arbitration for the settlement of their disputes, such arbitration is binding on him and it attains the status of *estoppel per rem judicatum*.<sup>63</sup> This is predicated on the fact that voluntary submission is the fulcrum that carries the binding nature of a valid customary arbitration and he cannot resile from the decision thereof on the basis of the law that in all cases, disputes between a native and a non-native should not ordinarily be settled by

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<sup>58</sup> “*Pacta sunt servanda*” represents the idea that agreements should be observed as recognized under International Law.

<sup>59</sup> Bukola Oyaleke, *A Critical Analysis of Customary Arbitration in Nigeria* (LL.B Thesis, University of Ilorin, Nigeria, 2013) 94; Hong-lin Yu, ‘A Theoretical Overview of the Foundations of International Commercial Arbitration’ [2008] 1(2) *Contemporary Asia Arbitration Journal*, 266;

<sup>60</sup> *Oline v Obodo* [1958] 22 SCNLR 298; *Njoku v Ekeocha* [1972] 2 ECSR 199, *Inyang v Simeon Essien* [1957] 2 FSC 39; *Oparaji v Ohanu* [1990] 6 SC 41

<sup>61</sup> *Koney v Union Trading Co* [1934] 2 WACA, 188

<sup>62</sup> *Nelson v Nelson* [1951] 13 WACA, 248

<sup>63</sup> *Okonkwo & Ors v Okeke & Ors* [2002] 11 NWLR (Pt.777) 1 at 26-27; *Adone v Ikebudu* [2001] 14 NWLR (Pt.733) 385.

customary law.<sup>64</sup> It must be noted also that customary arbitration is purely customary in nature and is not accommodated under the Act.

Therefore, if the parties want to settle their disputes under the Act, they are free to do same and the provisions of the Act as to a valid statutory arbitration must be followed and upon such compliance, the award of the arbitration would be binding on them. In law, consent is the basis of a valid contract and such consent must be voluntary and devoid of duress, manipulation, and coercion. Therefore, a non-native cannot and should not be compelled to submit to the operation of a law. If allowed, it negates the principle of law that *consensus ad idem* of the parties is the legal basis for the binding nature of a contract which arbitration is deemed to be.

### **5.0 The Legal Status of Non-Tribesmen under Customary Arbitration in Botswana.**

Botswana practices dual legal system of common law and customary law. As a general rule and except as otherwise provided under the Customary Law Act, <sup>65</sup>customary law of Botswana shall apply where the parties are tribesmen unless:

- (a) it shall appear either from express agreement or from all relevant circumstances, that each intended or may reasonably be deemed to have intended the matter to be regulated according to the common law;
- (b) the transaction out of which the case or proceedings arose is one unknown to customary law; or
- (c) the parties express to the court their consent to the common law being applicable; and any consent referred to in this paragraph shall be recorded in writing and attached to the court record of the case and shall be irrevocable.

Section 2 of the Act defines a 'tribesman' to mean 'member of a tribe or tribal community of Botswana or member of a tribe or similar group of any other country in Africa prescribed by the Minister by notice published in the Gazette for the purposes of the Customary Courts Act, and includes the legal personal representative of such member while 'tribal community' means any community is living outside a tribal territory but is organized in a tribal manner.

Section 5 of the Act provides that subject to any written law and in any cases or proceedings between tribesmen and non-tribesmen:

- (a) it shall appear either from express agreement; or from all relevant circumstances, that each intended or may reasonably be deemed to have intended the matter to be regulated according to the customary law;
- (b) the parties express to the court their consent to any customary law being applicable,
- (c) that law shall be applied accordingly, and any consent referred to in paragraph (b) shall be recorded in writing and attached to the court record of the case and shall be irrevocable.

The combined reading of the above cited statutory provisions shows that in all cases of transactions between tribesmen of Botswana, and the disputes that emanate therefrom, they are generally

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<sup>64</sup> *Oline v Obodo* [1958] 22 SCNLR 298; *Njoku v Ekeocha* [1972] 2 ECCLR 199, *Inyang v Simeon Essien* [1957] 2 FSC 39; *Oparaji v Ohanu* [1990] 6 SC 41

<sup>65</sup> Botswana Customary Law Act 1969, s 4

governed by customary law and usually referred to customary arbitration for proper settlement. A Non-Tribesman could therefore be defined as a person who is not a member of a tribe or tribal community of Botswana or member of a tribe or similar group of any other country in Africa prescribed by the Minister by notice published in the Gazette for the purposes of the Customary Courts Act, and includes the legal personal representative of such member.

The legality or otherwise of non-tribesmen to submit their disputes to customary arbitration is predicated on the general principle of law of contract that every person has the capacity to enter into a valid contract and in the absence of vitiating factors such contract is valid. This argument flows naturally from the fact that an arbitration clause contained in a contract is purely contractual<sup>66</sup> and which according to the concept of *pacta sunt servanda*,<sup>67</sup> the *consensus ad idem* of the parties serves as the legal basis for its binding nature.<sup>68</sup> This by implication is in tandem with the legal capacity of parties to a valid customary arbitration and whether they are tribesmen or not is immaterial. The legal basis for its binding nature is the *consensus ad idem* of the parties.

Therefore, the legality or otherwise of non-tribesmen under customary arbitration in Botswana is a question of law and which has already been settled by the principle of law of contract, in particular, capacity to contracts that, all persons generally have a legal capacity to enter into a valid contract and in the absence of vitiating factors, such a contract would be binding and final.

## **6.0 Conclusion**

From the above, it is clear that customary arbitration is known and recognized under the Nigerian and Botswana jurisprudence as an effective means of resolving disputes. Also, it could be submitted that non-tribesmen of Botswana/foreigners can voluntarily submit to a valid customary arbitration and in the concurrency of all the ingredients for its validity, the arbitral award would be binding. Also, it is submitted that non-natives of Nigeria/foreigners should not and cannot be compelled to a customary arbitration arbitrarily without their consent and if compelled at all, the outcome of the arbitration may be invalidated on the ground of absence of consent. Same applies to non-tribesmen of Botswana.

## **7.0 Recommendations**

Customary arbitration has been recognised as a means of settling disputes under Nigerian and Botswana Jurisprudence and this has not been the issue of concern or debate. It is however necessary that in order to ensure effective practice of customary arbitration, the followings are recommended:

1. The Botswana Arbitration Act should be amended as same is overdue for a reform. It contains notable lacuna that needed to be filled as stated in this work. It should be amended and or repealed to meet up with the current economic and legal realities.
2. The traditional rulers, chiefs and elders of the communities in Nigeria that engage in customary arbitration should be independent and allowed to perform their duties without fear or favour or external manipulative influences.

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<sup>66</sup> Kellor (n. 47)

<sup>67</sup> “Pacta sunt servanda” represents the idea that agreements should be observed as recognized under International Law.

<sup>68</sup> Oyaleke (n. 56)

3. There is a need to ensure that the people that participate in traditional customary arbitration in both jurisdictions are well versed and knowledgeable in the native law and customs of their people so that they would be able to meet up with the demands of their duties as arbitrators.
4. The Botswana Arbitration Act should be based on the UNCITRAL Model Law.