

## OBSERVANCE OF THE PRINCIPLE IN 'SCOTT V AVERY CLAUSE' IN CUSTOMARY ARBITRATION: A CONTEXTUAL OVERVIEW\*

### Abstract

*When colonial history claimed that a certain Mungo Park, a Scottish explorer, discovered the River Niger, it was quite startling. This is because African ancestors had for centuries known, explored and exploited the River Niger for their communal benefit. In like manner, observance of the principle of 'condition precedent' apparently more popularised in the classical case of Scott v Avery as the 'Scott v Avery clause' has become a hallowed creed in formal written arbitration. However, same observance has, mutatis mutandis, also been known and practised for centuries under native arbitration procedures. In the context of customary arbitration, dispute settlement procedures are systemic and ex fortiori, circumscribe and subsumed within the customary law usages and procedures of a given community. In this wise, such arbitration dispute settlement procedures commence at the lower units of a dispute settlement strata and proceed to higher levels in such a way that without the lower level intervention, there cannot be an upper level intervention in that regard. Such lower level arbitral intervention is a condition precedent which must be observed before the 'jurisdiction' of a higher level arbitration body could be invoked. Thus, will a disputant who harbours misgivings against his or her family head and family elders be compelled to take his or her dispute to a potentially hostile body to arbitrate? Or could compliance with this condition precedent in such circumstance be dispensed with to avert a miscarriage of justice? If a disputant is compelled in this regard, would the process still remain arbitration or something else? These questions will guide our discourse in this paper, using the doctrinal methodology of research. The paper posits that the whole essence of any veritable dispute resolution mechanism is to do justice to the disputants. Any derogation therefrom, will not only destroy confidence in the system but will approximate to a big minus from efforts to achieve a more peaceful and harmonious co-existence in African indigenous communities.*

**Keywords:** Observance, Principle, Scott v Avery Clause, Customary Arbitration, Contextual Overview

### 1. Introduction

Dispute is a material reality in human interaction. Manifestation of disputes is a recurrent decimal in the affairs of man. Thus, the dialectics of disputes and disputes resolution has continued to be an existential commitment of man in society, in quest for a better place for human habitation. There is scarcely any doubt therefore, why the teachings of our Lord Jesus Christ attaches great importance to peace and harmonious co-existence among men. He enjoins all '...to have peace one with another'.<sup>1</sup> In His popular Sermon on the Mount, Christ teaches that 'blessed are the peacemakers for they shall be called the children of God'.<sup>2</sup> Ultimately, man is enjoined to seek peace and pursue it<sup>3</sup> with unwavering dedication.

Historical documentation shows that the pursuit of peace and harmony has remained as lingering as disputes have persisted in human society. Thus, in primitive times, an era where life for man was replete with conflicts and strife. The mighty suppressed and expropriated the weak with impunity. It was an era of quest and conquest, of kill or be killed, of man a wolf to his fellow man.<sup>4</sup> This scenario was captured by Thomas Hobbes as the 'state of nature' where life was 'solitary, poor, nasty, brutish and short'. In order to realise peace and get over this worthless style of living, men resolved to enter into a social contract whereby each gave up his right of self defence to a sovereign ruler, the Leviathan, for a more orderly society where no man as it were, will be oppressed by another man and thus, guaranteed peace

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<sup>1</sup> The Holy Bible (King James Version) Mark chapter 9, verse 50.

<sup>2</sup> *Ibid*, Matthew chapter 5, verse 9.

<sup>3</sup> *Ibid*, Psalms 34, verse 14.

<sup>4</sup> Chukwudifu Oputa, JSC, 'The Independence of the Judiciary in a Democratic Society – Its Need, Its Positive and Negative Aspects,' (1990) *JUS*, Vol. 1, No. 3, 18.

and greater security to each than he might otherwise have had while significantly retaining individual's entitlement to self-preservation.<sup>5</sup> To address recurrent issues of disputes and ensure that peace and harmonious co-existence reigned in primordial human society long before formal courts were put in place, man resorted *inter alia* to arbitration as one of the earliest means of resolving these disputes.<sup>6</sup>

## **2. Customary Arbitration**

Arbitration generally, could be described as a private adjudicatory process of dispute settlement based on the parties' voluntary agreement. The parties must consent to the arbitration such that without this requisite consent or agreement, there can be no arbitration between them. It involves the reference of a dispute to a private person or persons who act in a judicial manner to settle the dispute.<sup>7</sup>

Customary arbitration specifically, is based on customary law which is in turn founded on native customs and usages of different people and communities subject to their sway. As a process of dispute resolution, customary arbitration has no fixed pattern or procedure which is common to all people at all times. Its application tends to vary *mutatis mutandis* with the peculiarities of the people of various communities. What is significant is that customary arbitration is essentially oral in nature. Although with modern development, proceedings and decisions reached thereat are more often written and sometimes committed to print in a permanent form. This recent practice does not however, bring customary arbitration within the purview of the extant arbitration law<sup>8</sup> which is concerned with written agreements to arbitrate.

Perhaps of great concern is the quantum of what is to be pleaded to establish customary arbitration. The law prior to the majority decision in *Raphael Agu v Christian Ikewibe*<sup>9</sup> is that where matters in dispute are by mutual consent arbitrated in accordance with native customary law and a decision is given, it binds the parties, and the court shall enforce it. Besides, in submitting to arbitration, the general rule is that as the parties chose their arbitrator to be the judge in their dispute, they cannot when the award is good on its face object to it.<sup>10</sup> Thus, the foregoing encapsulates the basic ingredients of customary arbitration to wit: voluntary submission of the parties to the arbitration; express or implied agreement to accept the decision of the arbitrators as final and binding conduct of the arbitration in accordance with the custom of the parties; and the fact that arbitrators reached a decision and published their award.<sup>11</sup> It will be recalled that in the *Agu case*, Karibi-Whyte, JSC who read the lead judgment in which majority of the panel of the apex court concurred, while recognising customary arbitration, set the conditions to be satisfied to include: voluntary submission of the parties' dispute to their elders or chiefs for determination; indication of willingness to be bound by the decision of the arbitrators or

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<sup>5</sup> R.W.M. Dias, *Jurisprudence*, (5th edn, London: LexisNexis & Co Publishers Ltd, 2014) 79-80.

<sup>6</sup> F. Kellor, 'American Arbitration, Its History, Functions and Achievements' (1948) cited in Henry P. De Vires, 'International Commercial Arbitration: A Contractual Substitute for National Courts', *Tulane Law Review*, (1982) Vol. 57, 43.

<sup>7</sup> J. Fulton Maxwell, *Commercial Alternative Dispute Resolution*, (Sydney: The Law Book Co Ltd, 1989) 55.

<sup>8</sup> Arbitration and Mediation Act, 2023, section 2. See also C.U. Agbo, 'Customary Law Arbitration and the Challenge of Party Autonomy: A Contextual Overview', (2022) 4 (1) *International Journal of Comparative Law and Legal Philosophy*, 156-158.

<sup>9</sup> (1991) 3 NWLR (pt.180) 385, Nnaemeka-Agu, JSC dissented.

<sup>10</sup> See *Kweku Assampong v Kwaku Amuaku & Ors* (1932) 1 WACA 192 at 201; *Ozo Ezejiofor Oline & Ors v Jacob Obodo & Ors* (1958) 3 FSC 84; *Kobina Foli v Obong Akese* (1930) 1 WACA 1.

<sup>11</sup> See the dissenting judgment of Nnaemeka-Agu, JSC in *Agu v Ikewibe* (n.9) 418-419. See also *Ojibah v Ojibah* (1991) 5 NWLR (pt. 191) 296 at 304; *Igwego & Ors v Ezeugo & Anor* (1992) 6 NWLR (pt. 249) 561 at 576; *Vincent Awosile v FOD Sotumbo* (1992) 5 NWLR (pt. 243) 514 at 532. In *Ohiaeri v Akabueze* (1992) 2 NWLR (pt. 221) 1 at 24, Akpata, JSC while adopting Justice Nnaemeka-Agu's position in the *Agu case*, added a fifth ingredient – that the decision or award was accepted at the time it was made. In other words, if the decision or award is not so accepted, then it does not approximate to customary arbitration. See generally, G. Ezejiofor, 'The Pre-requisites of Customary Arbitration', *Journal of Private and Property Law*, University of Lagos, April, 1993, Vol. 16, 29.

freedom to reject the decision when not satisfied; and neither party has resiled from the decision as pronounced.<sup>12</sup>

The seeming vacillatory attitude of the court apparently influenced Hon. Justice G.C. Nnamani to take the view that 'customary arbitration, since it is fluid in nature, can be a potpourri of the troika of customary arbitration, mediation and conciliation... no matter the form it takes, it is characterisable as customary arbitration.'<sup>13</sup> This seeming lack of distinct conceptualisation and compartmentalisation of the dispute resolution procedures into their respective spheres appears to introduce and re-enforce misconceptions into the customary arbitration procedure. In this wise, Prof Chukwuemerie took a swipe on the views expressed by Hon. Justice Karibi-Whyte in the *Agu* case, stating that such views tend to be more suggestive of customary conciliation or mediation than arbitration. According to the learned scholar:

the flexibility in the system of customary adjudication often enables a typical village court with the consent of, or in sympathy with the parties to constitute itself into a conciliation or arbitration body. This flexibility plus some similarity of procedure between arbitration and adjudication have often led to misconceptions resulting in equating customary alternative dispute resolution methods such as conciliation and mediation with customary law arbitration... was clearly shown for instance in the judgment of Karibi-Whyte JSC where his Lordship was describing customary conciliation as arbitration.<sup>14</sup>

For Justice G.C. Nnamani, 'what is important is that the matter between the parties is settled or resolved amicably and they are satisfied with the outcome.'<sup>15</sup> Customary arbitration has nonetheless remained a popular means of dispute resolution in African traditional communities in line with their customary norms, usages and procedure.

### 3. The *Scott v Avery Clause* in Arbitration Practice

Sometimes, parties to an arbitration agreement may stipulate that in the event of any dispute or disagreement between the parties in respect of any matter or matters in relation to or connection with the subject matter of their contract, such dispute or disagreement shall be subject to arbitration before any resort to an action at law. Such an agreement does not oust the jurisdiction of the courts, since to do so will be contrary to public policy and thus, illegal. This point is re-enforced by the fact that the judicial powers of the Federal Republic of Nigeria and the Constituent States are vested in the courts to determine justiciable causes and matter by the Constitution of the Federal Republic of Nigeria 1999 (as amended).<sup>16</sup>

Such an arbitration agreement merely postpones the institution of any action in court until the arbitration is held and an award handed down. It makes the arbitration and award a condition precedent to any right of action at law.<sup>17</sup> A condition precedent is simply the condition that must be fulfilled before an action can be instituted. It is a requirement which must be met or complied with before a right to bring an action matures. Put differently, a condition precedent means 'the condition which delays the vesting of a right until the happening of an event.'<sup>18</sup> In formal parlance, it seems that non-compliance with a condition precedent to bringing an action to a court of law, deprives the court of the requisite jurisdiction to entertain, hear and determine such a case.<sup>19</sup>

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<sup>12</sup> *Agu v Ikewibe* (n.9) 408.

<sup>13</sup> G.C. Nnamani, 'Dispute Resolution Mechanisms in the Administration of Justice: Customary Law Perspective', (2019) 1 *Journal of Contemporary Customary & Sharia Law Issues in Nigeria*, 23.

<sup>14</sup> Andrew I. Okekeifere (now Chukwuemerie) 'Stay of Court Proceedings Pending Arbitration in Nigerian Law', *Journal of International Arbitration*, (1996), Vol. 13, No. 3, 119 at 138.

<sup>15</sup> G.C. Nnamani, (n.13) 23.

<sup>16</sup> Henceforth, 'the Constitution', section 6.

<sup>17</sup> *Scott v Avery* (1856) 5 HLC 811.

<sup>18</sup> *Atolagbe v Awani* (1997) 9 NWLR (pt. 522) 536 at 666.

<sup>19</sup> *Madukolu v Nkemdilim* (1962) 2 SCNLR 341.

This practice of observance of conditions precedent obtains in the procedure of customary arbitration under native custom, particularly at the ‘appellate’ stages. Thus, a party to a dispute must initiate, customary arbitration at the family level. Such a party, can only lodge an appeal at higher levels in the social strata of dispute resolution if he or she is dissatisfied with the decision of the customary arbitrators. Any dispute initiated at a higher level such as the *Igwe-in-Council* before the intervention at the family level will not be entertained for hearing and determination. In this regard, some questions could agitate the mind of a disputant. What for instance, will happen, if the disputant is in a state of enmity with the family head and, or family elders? Will he or she be compelled to still take his or her case before such a potentially hostile body? Could compliance with the requirement of condition precedent in such a circumstance be dispensed with in order to avert a miscarriage of justice?<sup>20</sup> The whole essence of any method of dispute resolution is to do justice and *a fortiori* avoid a miscarriage thereof. On the other hand, to compel a disputant to take his or her dispute to a family panel of potentially hostile arbitrators is to take the procedure outside the purview of arbitration. This is because arbitration is anchored on voluntary submission. If the arbitration process is emptied of voluntariness, it becomes transformed into anything else but arbitration.<sup>21</sup>

In the well known case of *Scott v Avery*,<sup>22</sup> the popularly known *Scott v Avery Clause* was entrenched. In the case, the purport of an insurance policy of a mutual insurance company was in issue. One of the written conditions in the policy was that any member who suffered any loss or detriment would be indemnified by payment to him or her an amount of money determined by a committee. If the affected member refused to accept the amount so determined, the matter will be submitted to arbitrators. It also contains a proviso that such a member would not be entitled to maintain an action on the policy unless and until the matter has been decided by the arbitrators. Accordingly, the arbitrators decision was expressly declared condition precedent to the maintenance of an action. The House of Lords affirmed this decision. Lord Campbell held that it would approximate to a most inexpedient encroachment on the liberty of the contracting parties not to allow them to enter into such a contract.<sup>23</sup>

The *Scott v Avery Clause* introduced the principle that parties to a contract containing the clause, covenant that no right of action accrues until arbitrators have first looked into and decided on any dispute, difference or discord arising between the parties. Non-compliance with the condition precedent could be a ground for either staying the proceedings pursuant to statutory provisions<sup>24</sup> or the arbitration clause.<sup>25</sup> The *Scott v Avery Clause* imports essentially two things: first, it creates an obligation to arbitrate and second, it creates a condition precedent to a party’s right of action in a court of law.

It is important to state however, that the *Scott v Avery Clause* is not a magic wand that automatically applies to swallow up any remedies available to a party who has, out of the frustrating and non-challant attitude of the other party been left with no option but to resort to court for redress. If such a frustrated party resorts to court for redress, then upon a challenge of the court’s jurisdiction by the non-challant party, the court may exercise its discretion to stay proceedings of the suit and refer the parties to arbitration unless the agreement is void, inoperative or incapable of being performed, but not to strike out the suit for want of jurisdiction. Besides, under subsection (3) of section 5 of the A&M Act, the court may in addition, and for the purpose of preserving the rights of the parties, make an interim or supplementary order as may be necessary. Furthermore, the court can appoint an arbitrator for a recalcitrant party pursuant to section 7 of the A&M Act.

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<sup>20</sup> See *Amadi v NNPC* (2000) 2 SC (pt. 1) 66 at 96.

<sup>21</sup>C.U. Agbo, ‘Summons and Voluntary Submission in Arbitration Proceedings: A Contextual Overview at Customary Arbitration’, *African Journal of Criminal Law and Jurisprudence*, Vol. 7, (2022), 120-124.

<sup>22</sup>(n.17).

<sup>23</sup>*Ibid*, at 1138.

<sup>24</sup>Arbitration and Mediation Act, 2023, hereinafter, ‘the A & M Act’, section 5.

<sup>25</sup>*Oyedule v New India Assurance Co Ltd* (1969) 3 ALR Comm. 200; *Jebara v Mercury Assurance Co Ltd* (1971) 1 ALR Comm. 1; *Cipriani v Burnett* (1933) AC 83. See generally, G. Ezejiolor, *The Law of Arbitration in Nigeria*, (Ikeja: Longman Nig Plc, 1997) 43-45.

Thus, the assertion that the court has to terminate an action commenced by the plaintiff once the *Scott v Avery clause* is pleaded, is qualified<sup>26</sup>. Accordingly, the defendant will be disentitled to rely on the clause if he or she has by conduct waived the it<sup>27</sup>. Similarly, if a defendant has by his or her neglect or default frustrated the conduct of arbitration and the handing down of an award despite the fact that the other party took all proper steps to give effect to the arbitration to no avail, before a resort to the court, such a recalcitrant party will not be allowed to invoke the clause.

In *Panamena Europea Navicacion (Companie Limitada) v Frederick Leyland & Co Ltd*,<sup>28</sup> the defendant shipowners, the plaintiffs shiprepairers and a government Ministry entered into a ship repair contract under which the Ministry was to charter the ship after repairs. The defendants were to pay for the repairs based on certificates issued by their surveyor on satisfactory repairs done and upon receipt of the said certificate by the Ministry. The certificates will be accepted by the parties as final and binding without question. Although the contract did not contain an arbitration clause, the surveyor was an arbitrator and his certificate, a condition precedent to any claim for payment. The surveyor was not only an employee of the defendants but also its president. This compromised position made him to frustrate the issuance of certificates, a condition precedent for payment. In an action by the plaintiffs to recover money due and payable to them, the House of Lords held that the plaintiffs were entitled to the claim thereby dispensing with the necessity of obtaining the surveyor's certificate<sup>29</sup>.

An application for stay of proceedings pending arbitration is not granted as a matter of course. An applicant must therefore, show evidence of readiness to resort to arbitration and steps taken in that regard in an affidavit. In *United Bank for Africa Plc v Trident Consulting Limited*<sup>30</sup>, it was held that stay of proceedings under section 5 of the A&M Act may be granted pending arbitration, but the applicant must demonstrate unequivocally by documentary evidence and or other visible means that he is willing to arbitrate. He must do this satisfactorily by notifying the other party in writing of his intention to refer the matter to arbitration and thus, proposing in writing an arbitrator or arbitrators for the arbitration.

#### 4. Observance of the Principle in *Scott v Avery Clause* in Customary Arbitration

Ordinarily, the *Scott v Avery Clause* is usually contained in a written arbitration agreement. Although in very rare instances, the clause may not be written expressly in an arbitration agreement but the fulfilment of something which is to be done by an arbitrator is made a condition precedent before resort to action at law has been held to embody the clause<sup>31</sup>.

As noted earlier, customary law is based on native customs. 'Custom' encapsulates the established or commonly accepted usage of people of a given community.<sup>32</sup> Its' acceptance indicates its binding and obligatory nature.<sup>33</sup> These customs which are transmitted orally from one generation to another, constitute the customary law of the people. The customary law is thus, a body of existing rules regulating rights and imposing correlative duties which are fortified by established usage, appropriately applicable to any given cause, matter, dispute, issue, or question.<sup>34</sup> The customary law is thus, the organic law of the people, regulating their lives and transactions.<sup>35</sup> It is not static, it is rather flexible, reflecting societal dynamism in accordance with changing times without entirely losing its character.<sup>36</sup>

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<sup>26</sup> G. Ezejiofor, *ibid*, 45.

<sup>27</sup> *Toronto Railway v National British etc Insurance Co* (1914) 20 Com Cas 1. See G. Ezejiofor, *ibid*.

<sup>28</sup> (1947) AC 428.

<sup>29</sup> See also *Hickman v Roberts* (1913) AC 229.

<sup>30</sup> (2023) 14 NWLR (pt. 903) 95.

<sup>31</sup> See (n.25).

<sup>32</sup> O.N. Ogbu, *Modern Nigerian Legal System*, (3rd edn, Enugu: SNAAP Press Ltd, 2013) 92.

<sup>33</sup> A.O. Obilade, *The Nigerian Legal System*, (London: Sweet & Maxwell, 1979) 83.

<sup>34</sup> See Customary Court Law, Cap 32, Revised Laws of Enugu State 2004 (As Amended in 2011), section 2.

<sup>35</sup> Obaseki, JSC in *Oyewunmi v Ogunesan* (1990) 3 NWLR (pt. 137) 182 at 207.

<sup>36</sup> Osborne, CJ in *Lewis v Bankole* (1908) 1 NLR 81 at 100-101; Karibi-Whyte, JSC in *Kimdey v Military Governor of Gongola State & Ors* (1988) 2 NWLR (pt. 77) 445 at 461; Obaseki, JSC, *ibid*.

Customary arbitration flows from the customs, norms, practices and usages of a given native community.

Let it be said at once, that customary arbitration is systemic and accordingly, circumscribed and subsumed within the applicable customary law, customs, norms and practices. It follows therefore, that submission to customary arbitration implies *ipso facto*, submission to the intrinsic procedures of such arbitration. And so, embedded in the procedures of customary arbitration is by analogy, the unwritten requirement but express practice of the principle in the *Scott v Avery clause*. This could be appreciated in the fact that under the procedure of customary arbitration within most indigenous communities in Nigeria, dispute settlement processes commence at the 'lower unit' levels of societal strata.

Thus, a disputant cannot take his or her dispute to the royal court of the *Igwe* or *Obi* or *Oba* of his or her community in the first instance. Dispute settlement commences at the lower units of the social strata of the community formation before proceeding, if need be, usually on appeal to higher unit levels. For instance, the process of settlement of a land dispute in an indigenous community must commence at the family level where the family head and elders hold sway as 'systemic arbitrators'. The expression 'systemic arbitrators' is instructively used because the chiefs and elders are thrown up by the customary law of the people by which such positions are attained by age and in accordance with the rules of primogeniture.<sup>37</sup> This constitutes a 'condition precedent' which must be fulfilled before a party who is dissatisfied with the decision of the family level arbitration could proceed to a higher level on appeal.<sup>38</sup> Unless and until this condition is fulfilled, the appeal cannot be entertained at a higher level of customary arbitration. In some communities, it is the custom that upon customary appeal, if the decision of a higher body upholds that of the lower body in the hierarchy, the unsuccessful appellant will be subjected to payment of a fine to the lower body whose decision was upheld.<sup>39</sup>

This application of the principle in *Scott v Avery clause* at customary arbitration may not seem to approximate to a denial or derogation of right of access to justice. It is rather, a postponement of 'right of action' until the fulfilment of a condition precedent. Although this is so, taking cognizance of the fact that a decision to resort to customary arbitration, a private channel for settlement of a dispute instead of the court, the public channel,<sup>40</sup> is a voluntary option of the disputant, yet the system must be encouraged to inspire confidence in those who access it. One of the means of achieving this could be by liberating the disputant from the circumscription of choice of fora for his or her dispute resolution in the hierarchy.

## **5. Conclusion**

The choice to resort to customary arbitration confines the parties to the systemic procedures of the customary law of the *situs*. Although the practice of observing the rule of 'condition precedent' thereunder may not empty the customary arbitration regime of substantial content as a veritable means of dispute resolution in traditional African societies, yet it could be positively impacted. It will for instance, inspire greater confidence and trust in the disputants if they are allowed a choice of who should or should not sit as arbitrators in their dispute and *a fortiori*, at which level of societal strata they should commence their dispute settlement. It could be that a party to a dispute has misgivings with the head of his family or *Umunna*. Under such circumstance, nothing should be allowed to prevent him or her from proceeding to a higher body for the resolution of the dispute. To do otherwise, will approximate to a derogation of the disputants' right of access to justice at the local level. This will ultimately negative the whole essence of building a more peaceful and harmonious co-existence in our indigenous communities.

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<sup>37</sup> This was, and to a limited extent, appears to still be the position under native custom in primordial indigenous communities before the corruption of soulless materialism and mammonism. See C.U. Agbo, (n. 8) 160–161.

<sup>38</sup> Such appeals could move from the immediate family to the *Umunna*, the village, the town, the *Igwe-in-Council* and in some cases, to the clan level.

<sup>39</sup> This is the prevailing custom in Ngwo, Enugu State and some other Igbo speaking communities of South Eastern Nigeria.

<sup>40</sup> See the Constitution, section 6. See also Nnaemeka-Agu, JSC (n. 11).