An Appraisal of the Possibility of Customary Arbitration in Resolving Host Communities Trust Disputes Under the Petroleum Inustry Act 2021

Angela E. Obidimma*

Abasiama Augustine Umohatah**

Abstract

The enactment of the Nigerian Petroleum Industry Act (PIA) in 2021 marked a significant shift from voluntary to legally mandated community investment strategies for oil and gas companies in Nigeria. Previously, these companies relied on elective community investment strategies, such as Memorandums of Understanding (MoUs), to address conflicts with host communities and ensure uninterrupted operations. Chapter three of the PIA introduces the novel host community's development trust to address issues of marginalization, underdevelopment and environmental injustice in these communities. These issues over the years have resulted in violence, acrimony, killings and litigations. This paper aimed at evaluating the workability of customary arbitration as an effective mechanism in resolving host communities' issues under the PIA and its impact in community development. It adopts the analytical and doctrinal research methodology. It also examines the relationship between multinationals and their host communities in Nigeria's oil-rich Niger Delta region. Furthermore, it also analyses the legal and structural framework of the Host Communities Development Trust in the Act. It concludes that timely settlement of disputes between the oil producing host communities and oil and gas companies is very crucial to stability and sustenance of commercial harmony, and that customary arbitration if recognized, incorporated, fine-tuned and practised in the oil and gas industry in Nigeria based on the legal regime of the PIA and regulations made pursuant to it, can benefit the host communities and fulfill to a larger extent the intention of Chapter three of the PIA. It recommends that customary arbitration which today has gained global acceptance should be encouraged and considered as the first port of call in dispute resolution in the energy industry as opposed to the long-term bottleneck that parties face in litigation process.

Keywords: Arbitration, Petroleum, Mediation, Host Communities, Customs

1. Introduction

For many years, Nigeria's oil and gas sector has been the backbone of the country's economy.[1] However, this important industry was long controlled by the old and inadequate Petroleum Act of 1969.[2] This led to many problems that troubled the industry and host communities, including environmental harm, social unrest, and unfair economic conditions. Realizing the urgent need for change, the Nigerian government enacted the Petroleum Industry Act (PIA) of 2021("the Act") to bring major reforms to the sector[3]. The Act aims at promoting sustainable community growth in oil-producing areas through rules that increase lucidity, responsibility, and local involvement across the industry value chain. The Act prioritizes building the capacity of institutions involved across the oil and gas value chain through investments in training, technology, and infrastructure. It also establishes principles of sustainable community development lacking in previous legal frameworks.

Most importantly, by Section 277 of the Act, the Host Communities Development Trust (HCDT) has emerged as a recognized alternative model to the hitherto well criticized Corporate Social Responsibility (CSR) program model which was funded by oil companies. The recent enactment mandates energy firms to allocate 3% of their annual operating expenses to Host Community

* **Angela E. Obidimma,** BA, LLB, BL, LLM, PhD, Professor of Laws, Faculty of Law, Nnamdi Azikiwe University, Awka, Anambra State Nigeria. Tel. No. 234 8033151554, Email: aeobidimma@gmail.com.

** **Abasiama Augustine Umohatah,** LLB (Uyo) BL, LL.M (Uyo), PhD Candidate, Faculty of Law, Nnamdi Azikiwe University, Awka; Barrister and Solicitor of the Supreme Court of Nigeria. Email: semaumoh@yahoo.com.

[1] O. Taiwo (2022) 'A Critical study on Nigeria's Petroleum Industry Act 2021' <https://www.illuminem.com/illuminemvoices/a-critical-study-on-nigerias-petroleum-industry-act-2021>accessed on May 17 2024.

[2] CAP. 350 L.F.N 1990

[3] M. Uzorka and K. Henshaw, 'Petroleum Industry Act (PIA) and Conflict Reduction among the Oil-Bearing Communities of the Niger Delta,' *Khazar Journal of Humanities and Social Sciences* (2002)5(4)71

Development Trusts (HCDTs), overseen by community representatives. The establishment of Host Community Trusts has introduced new dimensions to community relations in the oil-rich Niger Delta. As expected, during HCDT's activities, disputes would arise, and this paper proposes that customary arbitration exists as a laudable dispute resolution mechanism that would yield bountiful results for the nation's oil and gas industry.

2. Overview of PIA and Host Communities Trust

The relationship between multinational oil companies and their host communities in Nigeria's oil-rich Niger Delta region has historically been fraught with tensions. Communities bearing the environmental and socio-economic brunt of oil exploration have decried their lack of commensurate benefit from the region's oil wealth. Successive governments have attempted to balance petroleum sector growth and community development needs. *Ad hoc* corporate social responsibility (CSR) initiatives by oil firms failed to deliver substantial improvements for the impoverished, and polluted Niger Delta. This failure, stemming from lack of legislative guidance on companies' responsibilities, fueled community unrest and disrupted oil operations.

In August 2021, the Petroleum Industry Act (PIA) was enacted to reform the sector. The PIA introduced Host Communities Development Trusts (HCDTs), funded by oil firms, to drive participatory and sustainable community development. The PIA mandates contribution of 3% of oil companies' annual operating expenditures to HCDTs of their host communities.[4] If properly implemented, this could guarantee funding that is independent of fluctuating oil prices or profits. Beyond infrastructure, HCDTs allow focus on human capital development initiatives with generational impact. Needs assessments and consultations aim to ensure projects align with community priorities. Oversight mechanisms and representation on HCDT boards provide increased transparency and accountability. The PIA thus shifted from corporate self-regulated CSR to legally binding provisions for community development. HCDTs became vehicles for realizing the PIA's mandate of "fostering sustainable prosperity" in host communities[5].

However, progress stalled due to disputes regarding HCDT governance and composition.[6] Ambiguities in the PIA on defining host communities created confusion over boundaries and representation. Vague provisions enabled continuation of patronage politics that had constrained CSR, as local elites monopolized decision-making. Disagreements over community representation on boards provoked tensions between youth, elders, oil firms and government.[7] Two years on, most oil firms are yet to remit contributions as governance issues remain unsettled[8]. The PIA's gaps expose communities to elite capture and loss of development funds to corruption. These risks sustaining historical neglect of ordinary people's welfare. True participatory development envisioned under the PIA requires reforms. Community boundaries must be delineated, and membership criteria established. Board representation should be based on inclusive, transparent processes recognizing communities as key stakeholders. Checks and balances are needed to ensure transparency and accountability in HCDT operations. Grievance redress mechanisms can help

[4]Petroleum Industry Act 2021, CAP 3

[5] PIA 2021 s 234(1) (a)

[6] K Jeremiah, Host Communities kick as proposed PIA Review 'Shrinks' 3% allocation, *The Guardian* (Lagos, 24 October 2023)7

[7]Nse Anthony Uko, 2 years of PIA: Oil Producers' Unpaid 3% Benefit Hits 100bn, *The Leadership* (Lagos, November 2023) < https://leadership.ng/2-years-of-pia-oil-producers-unpaid-3-benefit-hit-100bn/ > assessed 5 April 2024

[8] *Ibid*

resolve disputes exacerbated by current gaps. The PIA's HCDT vehicle has potential to catalyse sustainable, self-driven prosperity for host communities. However, the ongoing paralyses show the burden remains on assertive communities to demand good governance, representation and accountability at this critical juncture. Their vigilance and government willingness will be the key to realizing the PIA's promise of equitable, just and inclusive development.

According to the PIA, it is the objective of the HCDT, among other things, to finance and execute projects for the benefit and sustainable development of the host communities. The law also provides for the advancement and propagation of educational and healthcare development for the host communities members.[9] Every other form of development initiatives favorable to the host communities is impliedly encouraged. As laudable as the foregoing appears to be, the broader question is: to what extent does the aforementioned address the negative externalities of petroleum development, which include environmental degradation? The provision of educational and healthcare facilities in local communities in no way addresses the environmental pollution or gas flares. At best, with proper focus it could be used as a tool to stem the spate of local interference that results in contributing to oil pollution or to deal with the health impact of oil development of local communities. Consequently, this is an indication that there is a need to ensure that the regulation of the HCDT is not merely rooted in superficiality but attempts to protect the natural environment as well as addresses the needs of host communities. The PIA, 2021, clearly laid down a solid framework for the management of the HCDT and its funding, however the arrangement needs to be more sustainable with respect to environment protection.

As stated earlier, the Nigerian Petroleum Industry Act is made up of five (5) chapters. Our focus, however, is on chapter three (3) which is dedicated to host communities' development. According to section (234) of the Act, the objective of the PIA is to: foster sustainable prosperity, provide direct social and economic benefits for petroleum operations to host communities, enhance peaceful and harmonious co-existence between licensees and host communities, and create a framework to support development of host communities.

In line with the Petroleum Industry Act stipulation in section (235), the settlor or oil and gas company is expected to incorporate a host community development trust for the benefit of the host community for which the settlor is responsible. The host community development trust is a collection of several communities within the circumscribed area of the settlors operation. The objective of the host community development trust as stipulated in section 239, subsection (3) is as follows:

> (a) finance and execute projects for the benefit and sustainable development of the host communities; (b) undertake infrastructural development of the host communities within the scope of the funds available to the Board of Trustees for such purposed; (c) facilitate economic empowerment opportunities in the host communities; (d) advance and propagate educational development for the benefits of members of the host communities; (e) support healthcare development for host communities; (f) support local initiative within the host communities, which seek to enhance protection of the environment; (g) support local initiatives within the host communities which seek to enhance security; (h) invest part of the available fund for and on-behalf of the host communities; and (i) assist in any other

[9] Petroleum Industry Act, S.239

development purpose deemed beneficial to the host communities as may be determined by the Board of Trustee.

A cursory view or retrospection of the objectives of preceding interventions by the government and oil and gas multinationals show that there exist a high semblance of improvement, however with little or no positive outcome. Thus, the widespread fear amongst stakeholders in the industry, especially the impacted oil bearing and poverty-ravaged communities that this may just end up being another "white paper" exercise.

As stated in section 234(1), paragraph (d) of the PIA, a framework will be created to support and drive host community development. By framework, we are referring to a set of principles, philosophy, guidelines as well as institutions aimed at achieving target or stated objectives. Thus, the PIA framework is a conglomeration of all the institutions that are to be set-up for the purpose of achieving the objectives stated in section 234(1) as well as guidelines or principles spelling out the number of memberships in each segment of the institution, criteria for selection, duties and functions, and grounds for withdrawal of membership (or recall).

The PIA structural framework can be dichotomized into three main institutions namely:

a. The Commission or Authority
b. The Settlor
c. The Host Community Development Trust (HCDT)

a. The Commission or Authority

This is a body set-up for the purpose of making regulations and monitoring the activities of the settlor and HCDT to ensure compliance with the PIA ACT. Presently, the Nigeria Upstream Regulatory Commission (NURC) has been commissioned to play the aforementioned role. In addition to making regulations within its areas of jurisdiction, the commission is to provide a grievance handling mechanism to mediate in cases of conflicts between settlor and host communities.

b. Settlors

'Settlors' refers to all oil and gas companies (international and indigenous) operating in the Nigerian oil and gas upstream sector of the country.

c. The Host Community Development Trust (HCDT)

This is a grassroot institution designed to drive local community development. Section 235(1) of the PIA mandates the settlor to incorporate the HCDT (after prior consultation with the host community) within 12 months from the effective date for the existing oil mining lease. In line with Corporate Affairs Commission (CAC) requirement for registration, a Board of Trustee (BoT) selected from the concerned community shall be constituted. The criteria for the qualification and number of persons who shall constitute the BoT is to be determined by the Settlor. Also, the Nigerian Upstream Regulatory Commission (NURC) is to develop guidelines or regulations for the smooth operation of the HCDT. The objective of the HCDT as stated in Section 239(1) (a) is to *"finance and execute projects for the benefits and sustainable development of the host communities"*. To carry out the above objective and ensure equitable distribution of the envisaged development projects from the funds allocated to it from the settlor, other sub-committees such as the Management Committee (MC) and Advisory Committee (AD) are to be set-up. The Act mandates the BoT to set-up the Management Committee, while the Management committee set-

ups the Advisory committee. Figure 2 shows the diagrammatic view of the Petroleum Industry Act structural framework.

3. Legal Framework for Dispute Resolution under the Nigerian Oil and Gas Industry

The statutes that provide for arbitration in the Nigerian Oil and Gas sector include the ground norm, Petroleum Industry Act ("PIA"), the Petroleum Act ("PA"), Oil Pipelines Act, the Nigerian Investment Promotion Commission Act, the Nigeria LNG (Fiscal Incentives, Guarantees and Assurance Act) and the International Center for Settlement of Industrial Disputes (ICSID).

a) Petroleum Industry Act (PIA) 2021

Under the Nigerian legal system, arbitration is recognized as an effective means of dispute resolution. National laws (and in recent times, some sub-national laws e.g., Arbitration Law of Lagos State) have been enacted to incorporate arbitration in the country's legal system. The statutes enacted give recognition to arbitration as a prominent mechanism for the settlement of disputes in the Oil and Gas industry in Nigeria. Some of the national laws generally give room for voluntary arbitration by parties whilst some other statutes mandate compulsory arbitration.

Prior to the signing of the PIA bill into law, Section 11 of the now repealed PA stipulated that "(1) Where by any provision of this Act or any regulations made thereunder a question or dispute is to be settled by arbitration, the question or dispute shall be settled in accordance with the law relating to arbitration in the appropriate State and the provision shall be treated as a submission to arbitration for the purposes of that law." (2) In this section "the appropriate State" means the State agreed by all parties to a question or dispute to be appropriate in the circumstances or, if there is no such agreement, the Federal Capital Territory, Abuja." The above provision is an indication that arbitration is legally permissible in the settlement of disputes arising from transactions in the Oil and Gas sector. However, the PA did not lay down the procedure or rules to be followed in the conduct of arbitration of this nature.

The PIA was enacted, and it repealed the existing PA 2004. The PIA stipulates an array of provisions and innovations that influence the status of the private, and public sectors, as well as stakeholders in the oil and gas industry. The PIA was enacted after several attempts of the Nigerian government at developing a new legal, governance, regulatory, and fiscal framework for the Nigerian petroleum industry. Significantly, the new Act does not provide an equivalent provision to section 11 of the repealed PA. However, there are provisions in relation to arbitration in the PIA. We highlight below most of the provisions setting the background for arbitration or relating to arbitration or the consequences of arbitration or its awards on stakeholders in the Oil and Gas industry below.

i) Under the PIA, the Nigerian Midstream and Downstream Petroleum Regulatory Authority is charged with the duty of making regulations concerning dispute resolution. This is provided for in Section 33 (t) of the Act as follows "subject to section 216, the Authority shall make regulations concerning dispute resolution and customer protection"[10].

ii) Alongside the description of the acreage and the term and conditions of the licence and lease, section 76(1)(f) of the PIA mandates that the model licence or model lease for each bid round should include a clause containing the rules for the resolution of disputes

[10] PIA 2021.

including arbitration, mediation, conciliation or expert determination. The provision states: thus, "The model licence or model lease for each bid round shall reflect the conditions of the licensing round guidelines for the bid round and shall in all circumstances include the following clauses: rules for the resolution of disputes including arbitration, mediation, conciliation, or expert determination"[11].

iii) Section 96 of the PIA provides for the revocation of a license or lease where the licensee or lessee fails to abide by an arbitration award set forth in the licence, lease or the Act. Section 96 stipulates that "...upon receipt of the written recommendation of the Commission for revocation, the minister may revoke a petroleum prospecting license or petroleum mining lease, where the applicable licensee or lessee;[12] fails to abide by any expert determination, arbitration award or judgment arising from the dispute resolution provisions set forth in a license, lease or this Act."[13]

iv) Similarly, Section 120 of the PIA provides for the revocation of a license or permit in midstream and downstream petroleum operations where the holder does not abide by an arbitration award set forth in the license or the Act. The section states thus "Notwithstanding the provisions of Chapter 2 of this Act related to midstream and downstream petroleum operations, a license or permit may be revoked[14] where the holder fails to abide by any expert determination, arbitration award, or judgment arising from the dispute resolution provisions set forth in a license or this Act".[15]

v) Section 4 of the First Schedule to the PIA made pursuant to section 3(3) of the PIA also provides that: "Any disputes as to whether a delay was due to causes beyond the control of licensee/lessee shall be settled by agreement between the Minister and the licensee/lessee or in default of agreement by arbitration."

vi) Section 5 (b) of the First Schedule to the PIA made pursuant to section 3(3) of the PIA also provides that "Dispute as to price of petroleum products taken by the Minister at port of delivery pursuant to his pre-emptive right is to be settled by agreement between the Minister and the licensee/lessee or in default of agreement by arbitration."

vii) Section 7 of the First Schedule to the PIA made pursuant to section 3(3) of the PIA also stipulates that "Any arbitration under the First Schedule shall take place after the petroleum or petroleum products have been delivered."

viii) Section 16 (Grievance Mechanism) of the Petroleum Host Community (Commission) Regulations made pursuant to Section 235 PIA provides that grievances should be referred to the National Oil and Gas Excellence Centre (NOGEC) – the Alternative Dispute Resolution Centre (ADRC) established for the resolution of disputes through mediation, reconciliation and arbitration by the Department of Petroleum Resources

[11] PIA 2021
[12] s. 96 (1) PIA 2021
[13] s.96 (i) PIA 2021
[14] S.120 (1) PIA 2021
[15] s.120 (1) (j) PIA 2021

(DPR) now (the Nigerian Upstream Regulatory Commission). The ADRC was established and inaugurated in April 2021. 12The section provides for grievances to be resolved by arbitration after the host community and the settlor (and failing that, the mediator), have failed to resolve the dispute.

It should be noted that some of the disputes in the industry can still be referred to the local courts without exploring Alternative dispute resolution (ADR) first. For instance, Section 101 (d) provides that disputes between a licensee/lessee and owner of privately owned or legally occupied land as to compensation payment should be decided by the Federal High Court while section 163 provides that the Authority may mediate disputes in relation to third party access to gas transportation pipeline and networks. Section 179 (2) provides that the Authority may mediate disputes in relation to third party access to mid-stream petroleum liquid operations.

The above highlighted provisions made pursuant to the PIA provide context for arbitration in the Nigerian oil and gas industry. Although, arbitration is not directly provided for in the same manner as under section 11 of the repealed PA, the sections highlighted above show that the provisions of paragraph 42 of the First Schedule to the PA made pursuant to section 2(3) of the PA, paragraph 5 of the pre-emptive rights in the Second Schedule made pursuant to section 7(2) of the PA are all saved and become part of the extant law by the PIA given that paragraph 42 of the First Schedule to the PA is not inconsistent with the provisions of the PIA.

Section 309 of the PIA (Consequential Amendments) provides that subject to the provisions of the Constitution, upon the coming into force of this Act, where the provisions of any other enactment or law are inconsistent with the provisions of this Act, the provisions of this Act shall prevail and the provisions of that other enactment or law shall, to the extent of that inconsistency, be void in relation to matters provided for in this Act.[16]

b) **Arbitration and Mediation Act 2023**

The Arbitration and Mediation Act (AMA) embraces mediation as a legitimate dispute resolution mechanism within Nigeria. Unlike the ACA, the New Act defines ‘mediation’ as 'the process where parties seek the assistance of a neutral third party or parties to help them in reaching a mutually agreeable resolution for their dispute arising from a contractual or legal relationship'.[17] This definition gives an encompassing and wider application to mediation, conciliation, and other analogous mechanisms. The AMA framework defines the scope of disputes amenable to mediation under the Act, outlines the procedure for commencement of mediation, specifies the number of mediators required,[18] delineates the procedures at mediation, addresses issues bordering on the immunity of mediators[19] and their fees, and many more. Furthermore, the AMA acknowledges the applicability of the Singapore Convention on Mediation 2018, for enforcing international settlement agreements made outside of Nigeria, contingent upon the State's accession to the Singapore Convention.[20]

[16] s.309 PIA 2021
[17] Section 91 (1) of the Arbitration and Mediation Act 2023
[18] *ibid,* S.72
[19] *Ibid,* S.81
[20] *Ibid,* S.87

c) **The 1999 Constitution of the Federal Republic of Nigeria**

Section 6 of the Constitution established the judicial arm of the government vested with the responsibility to preside over legal issues and disputes between persons, persons and government, as well as disputes between governments[21]. Other relevant provisions of the Constitution that provide for judicial adjudication in oil and gas disputes include section 251(1) which states that:

> The federal high court shall have jurisdiction to the exclusion of other courts in civil cases and matters relating to mines and minerals (including oil fields, oil mining, geographical surveys and natural gas). The Federal High Court has original jurisdiction over disputes arising within the oil and gas sector in Nigeria.

d) **The Arbitration and Conciliation Act 2004**

This is the governing law on commercial arbitration in Nigeria. This law as it were, makes provision for methods by which parties may establish a legally binding arbitration agreement, it provides for how arbitration may begin and terminate together with clear procedure in constituting an arbitration tribunal. It must be noted that the Arbitration and Conciliation Act makes available a solid legal platform for the settlement of commercial disputes by arbitration. It is applicable to the 36 States of the federation and the Federal Capital Territory, Abuja. It is important to note that section 35 of the Act stresses the fact that the act does not affect other laws which provides for the settlement of dispute by arbitration. In essence, the Act recognizes validity of other laws relating to the settlement of dispute by use of arbitration. The Arbitration and Conciliation Act is modelled in line with the UNCITRAL (United Nations Commission on International Trade Law) model on arbitration though with minor adjustments.

e) **The Nigerian Investment Promotion Act 2004**

This legislation governs all forms of foreign investments. Section 26 of the Act provides that in the event of a dispute between an investor and any government of Nigeria to which this law applies, shall be settled via mutual understanding. By section 26(1) where the mutual discussion fails, the matter then can be tendered for arbitration. Section 26 (3) on the other hand encourages the settlement of disputes in the field of oil and gas in Nigeria by arbitration. The section provides that where a dispute or disagreement arises between an investor and the federal government in respect to mechanism of settlement to used, in that case, the international Centre for the settlement of investment disputes rules shall be applicable.

4. Customary Arbitration in Nigeria

The Supreme Court of Nigeria in the case of *Ohiaeri v Akabeze*[22] defines customary arbitration as arbitration in dispute founded on the voluntary submission of the parties to the decision of the arbitrators who are either the chiefs or elders of their community, and the agreement to be bound by such decision or freedom to resile where unfavorable.

Thus, this type of arbitration is not covered by the Arbitration and Mediation Act 2023. It is conducted in accordance with the customs, trade and usages of a particular community or group

[21] ss. 272 (1), 232 (1) of the 1999 Constitution
[22] (1993) 2 NWLR (pt 221) 1.

of people. The enforcement of an award under the customary arbitration depends on whether it satisfies certain conditions laid down by the court.[23] These conditions are:

i. That there had been a voluntary submission of the matter in dispute by both parties to an arbitrator or arbitrators.

ii. That there has been an agreement by the parties either expressly or by necessary implication that the decision of the arbitrators would be accepted as binding and final.

iii. That the arbitration was conducted in accordance with the custom of the parties or their trade or business.

iv. That the arbitrator or arbitrators reached a decision and published an award.

v. That the decision or award was accepted by the parties at the same time it was made.

Customary arbitration is not a new phenomenon in Africa as a whole. It is usually a means of resolving conflicts with a view to maintaining harmony between parties in a dispute. In Nigeria, for example there is the head of family who in all intents and purposes heads a nuclear family consisting of a man, his wife or wives and children. Oftentimes, there are members of the extended family living in the same habitation[24]. From the head of family, in a graduated from, there is the clan head. This is the head of a group of persons related by pedigree through an ancient but traceable ancestor. After this comes the village headship which in most cases is hereditary. In this case, by extension, the inhabitants of the village share a common ancestor. There is also the traditional ruler of the town who is assisted by eminent chiefs.

One of the main objectives of customary arbitration is that peace and harmony should be restored between contending parties through compromise and reparation for the wrong committed. Notwithstanding this, there is an inherent belief in and commitment to good relationships even after the award of the arbitration has been made. In practice, this traditional concept looks beyond legal rights of the parties to see what type of relationship is likely to prevail between the parties after the award.[25]

From the beginning, the practice of dispute resolution by community elders has been acknowledged within Nigerian jurisprudence. Thus, in *Assampong v Amuaku*[26] the West African Court of Appeal (WACA) held as follows:

> … where matters in dispute between parties are, by mutual consent investigated by the arbitrators at a meeting held in accordance with native law and custom and a decision given, it is binding on the parties and the Supreme Court will enforce such decision.

Similarly, in Agu v Ikewibe[27] the Supreme Court, per Karibi-Whyte JSC, held that:

[23] UU. Caleb, A Legal Appraisal of the Limitations to the Practice of Arbitration in Nigeria: A Review of the Arbitration and Mediation Act 2023<https://dx.doi.org/10.2139/ssrn.4842599> accessed 17 August 2024

[24] Prof. Justus A. Sokefun and Mr. Seun Lawal, School of Law, National Open University of Nigeria. capmai@yahoo.com and oluwaseunlawal@gmail.com respectively

[25] John Wud Makec; The Customary Law of the Dinka People of Sudan. 1988, Page 221

[26] (1932) 1 WACA.192

[27] (1991) 3 NWLR (Pt. 180) 385

> "It is well accepted that one of the many African customary modes of settling dispute is to refer the dispute to the family head or an elder or elders of the community for a compromise solution based upon the subsequent acceptance by both parties of the suggested award, which either party is free to resile at any stage of the proceedings up to that point. This is a common method of settling disputes in all indigenous Nigerian societies."[28]

4.1 Requirements of a Valid Customary Arbitration

The case of *Agu*[29] is usually regarded as the turning point in the articulation and elaboration of the rules of recognition of customary arbitration by Nigerian courts.[30] In *Agu*, Karibi-Whyte JSC defined a customary arbitration and listed the ingredients of that concept which appeared to him to have become clear from several cases. According to him, customary arbitration is 'an arbitration of a dispute 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 agreement to be bound by such decision or freedom to resile where unfavorable'.[31] The ingredients of a valid customary arbitration were set out as follows:

(a) If the parties voluntarily submit their disputes to a non-judicial body, to wit elders or Chiefs as the case may be for determination.

(b) The indication of the willingness of the parties to be bound by the decision of the non-judicial body or freedom to reject the decision where not satisfied

(c) That neither of the parties has resiled from the decisions so pronounced.[32]

5. Types and Causes of Conflicts within Host Communities

As the oil and gas industry becomes increasingly globalized, it now encompasses a diverse range of stakeholders, including not only international companies and their host governments but also powerful national oil companies, foreign and domestic contractors and subcontractors, lending institutions, local content firms, shareholders, regulatory bodies, environmental agencies, and more. The growing number of parties involved, combined with the inherent complexity of exploration, drilling, and production activities, heightens the potential for disagreements, conflicts, or differing interpretations of agreements, all of which are likely to lead to disputes.[33]

Key statistics indicate that the host communities have been hot spots for oil and gas-related crises, marked by significant community unrest. Between 2015 and 2020, over 1,300 oil spills were recorded primarily in this region, causing severe environmental damage and health issues for local communities[34]. Militant activities, such as those by the Niger Delta Avengers, have disrupted oil

[28] See also, the more recent decisions of Iwu v. Ogu (2019) LPELR-48020(CA), and Odonigi v. Oyeleke (2001) 6 NWLR (PT. 708) 12 @ 2723 L – A.

[29] *Agu v Ikewibe* (1991) 3 NWLR (Pt 180) 385

[30] The emphatic response by Nigerian courts that customary arbitration is valid in Nigeria is a reaction to the case of *Okporowo v Okpokam* [1988] 4 NWLR (Pt. 90) 554,

[31] (n 21)

[32] *Ibid*

[33] M. Ashong, 'International Arbitration Agreements and Non –signatories: The Challenge Going Forward for the globalised Petroleum Industry'

[34] NOSDRA Annual Reports:< https://nosdra.gov.ng/publications/> accessed 12 August 22024

production, with losses reaching up to 700,000 barrels per day in 2016[35]. The Nigerian government faces billions of dollars in annual losses due to oil theft and pipeline vandalism, with $2 billion worth of oil stolen in 2019 alone. The human toll has been substantial, with thousands displaced and over 2,000 lives lost between 2006 and 2016. Environmental degradation is so severe that the United Nations Environment Programme (UNEP) estimated it could take up to 30 years and $1 billion to clean up areas like Ogoniland.[36]

Amongst the various categories of disputing parties in oil and gas industry in Nigeria, it is common to have host communities register their discontent with the activities of oil companies operating within their territory. Most causes of these disputes include negative environmental impacts of oil and gas exploration activities, inadequate compensation for environmental damage, long years of neglect of the host communities by oil companies and the Government, inadequate provision of Community Assistance Projects *et cetera*.

5.1 Resolving Host Communities Trust Conflicts under the PIA 2021

Given the complexity of establishing and operating HCDTs across hundreds of communities with diverse interests, disputes are inevitable. However, the dispute resolution mechanisms outlined in the regulations are inadequate. The primary avenue is for aggrieved communities to first seek resolution through dialogue with the BoT and settlor - entities where the balance of power already favors the corporate actor as outlined earlier. Only after this can third-party mediation be pursued through the nascent Alternative Dispute Resolution Center whose ability to effectively handle the scale and stakes of prospective HCDT disputes remains unproven. Crucially, there is no provision for an independent tribunal or mechanism to adjudicate disputes in a manner that ensures parity for community's vis-a-vis powerful corporate and regulatory interests. This gap increases the potential for conflicts to fester unresolved or play out through extra-legal channels like protests that could undermine operations.

5.2 The Option of Customary Arbitration

Customary arbitration has long been recognized as an effective mechanism for resolving disputes in Nigeria, particularly within communities where traditional practices and local customs hold significant influence. In the southern part of Nigeria, however, the practice of arbitration is more pronounced. This fact is highlighted by the number of litigated cases on customary arbitration from that part of the region.[37] The method of dispute resolution still varies considerably in communities within the southern region, however, dispute resolution through arbitration are generally done by elders, family heads, and chiefs.[38] There are principally two types of traditional societies in southern Nigeria: the cephalous society that has a central authority like the kings and emperor and the acephalous society, which has a decentralized system of government but controlled through

[35] ICG Report on the Niger Delta, <https://www.crisisgroup.org/africa/west-africa/nigeria/niger-delta-insurgency-and-criminality-returns > accessed 11 August 2024

[36] United Nations Environment Programme (UNEP). (2011). *Environmental Assessment of Ogoniland Report*. Retrieved from <https://www.unep.org/resources/report/environmental-assessment-ogoniland-report > accessed 12 August 2024

[37] MM. Akanbi, LA. Abdulrauf and AA. Daibu, 'Customary Arbitration in Nigeria: A review of Extant Judicial Parameters and the Need for Paradigm Shift' *Afe Babalola Journal of Sustainable Development Law and Policy* (2015) 6 (1) 200

[38] VC. Igbokwe. "Socio Cultural Dimensions of Dispute Resolution: Informal Justice Processes among the Igbo speaking people of Eastern Nigeria and their implications for community/Neighboring Justice System in North America" *Africa Journal of International and Comparative Law* (1998) Vol. 10 (3) 1.

collective leadership. The latter are predominantly found in the eastern part of Nigeria.[39] In the cephalous society, the king or emperor[40] plays the role of final arbiter in any dispute arising within their domain[41]. The role of the arbitrator in most cases is delegated to lesser chiefs within the kingdom or heads of families.[42] The decisions of these lesser chiefs are however subject to the king's court if the need arises.[43] On the other hand, in the acephalous society, the administrative machinery is diffused, and disputes are normally resolved through a political arrangement whereby authority is wielded either by reason of headship of a very important and powerful family or clan or by being the oldest in the community.[44] The essence of the exercise of this function by elders in various communities lies in the philosophy that these respected members are vast in the customary law of their communities. Thus, customary arbitration ensures harmonious settlement, stabilities, and most importantly, the maintenance of social equilibrium within the community.

The HCDT are designed to ensure that local communities benefit directly from the oil and gas resources extracted from their lands. However, the complexities surrounding resource management, coupled with the diverse interests of various stakeholders, have led to potential conflicts within and between communities.

Customary arbitration, rooted in the principles of equity, fairness, and communal harmony, offers a viable approach to resolving these disputes. Unlike formal arbitration or litigation, customary arbitration is more accessible to local populations, less costly, and allows for the consideration of cultural and social nuances. Elders and respected community leaders typically preside over these proceedings, making decisions that are often accepted and respected by the parties involved due to their deep understanding of local customs and traditions.

The use of customary arbitration in resolving Host Community Trusts disputes can enhance the legitimacy and sustainability of the resolutions, fostering long-term peace and cooperation. However, the integration of customary practices with the legal frameworks established by the PIA 2021 requires careful consideration. Legal recognition of customary arbitration under Nigerian law provides a basis for its application, but there may be challenges in aligning traditional methods with formal legal requirements, especially when dealing with multi-party disputes involving external stakeholders such as oil companies and government agencies.

Customary arbitration though an imperfect art, is a better option for resolving host communities, and related disputes between oil companies and host communities in Nigeria because it seeks amicable agreement, where courts seek verdicts, thereby preserving the relationship between these parties. Even without the emergence of mediation in preference to litigation in the field of

[39] Akanbi M.M. "A Critical Assessment of the History and law of Domestic Arbitration in Nigeria" (3rd ed The Learned, Law Students' Association Kwara State College of Arabic and Islamic Legal Studies Ilorin) 40-41.

[40] Traditional kings are called "Emir" in the Northern part of Nigeria save for the Sultan of Sokoto whose traditional title is "Sultan"; virtually all traditional kings in the north are Emir. In the South-Western part of Nigeria traditional kings are generally referred to as Oba although with different tittles e.g. The Alafin of Oyo, Oni of Ife, Oba of Benin, Oba of Lagos, Olubadan of Ibadan, Alake of Egba and Timi of Ede to mention a few. See Daibu A. A (n 19) 104.

[41] Akanbi M.M. (n 32) 41.

[42] VC. Igbokwe, "Law and Practice of Customary Arbitration in Nigeria: Agu v Ikewibe and Applicable Law Issues Revisited." *Journal of African law* (1997) Vol. 41. No. 2, 201.

[43] The king's Court serves as Appellate Court, which can review the decision of the family heads, elders and chiefs at the instance of one of the parties.

[44] A. Emiola, *The Principle of African customary law* (Emiola Pub. Nig. 1997).

community related dispute resolution, the likely danger exists that these disputes may not be accurately and fairly resolved, owing to the numerous administrative loopholes which attend the judicial settlement of these disputes. Judges lack the time, the know-how, and even the rules (precedents) to enable the proper handling of these nature of disputes. Worse still, unavoidable delays caused by incessant adjournments and overloaded court dockets remind of the equitable maxim that justice delayed is justice denied. The disputes themselves are not suited to the dynamics of litigation as litigable issues often conceal underlying feelings, prejudices, and age-old grievances, none of which would normally be addressed in the course of litigation, or even considered relevant. The situation is aggravated by the technical nature of the issues involved in these disputes, especially where the question relates to the adequacy of, or compensation for environmental damage/pollution resulting from oil and gas activities. A successful mediation provides the parties with a chance to truly be heard, and to generate innovative solutions to their dispute, in a manner that focuses on the future and not the past. Its key advantages include the control which parties have over the process, especially in selecting their mediator, and avoiding trial. Nevertheless, environmental mediation is not a straightforward or an easy process, and its time-saving advantages are somewhat over-emphasized.

To maximize the benefits of customary arbitration in this context, it is crucial to ensure that the process is transparent, inclusive, and aligned with the broader legal and regulatory framework governing the oil and gas industry. This approach can help address the root causes of conflicts, build trust among stakeholders, and promote a more equitable distribution of resources.

6. Conclusion

Timely settlement of disputes among the oil producing host communities and operators of an oil and gas project is very key to stability, sustenance of commercial harmony, and to keeping the oil and gas fields in operation and ultimately securing the rents, royalties and taxes to government while helping asset holders to fulfil the conditions of their licenses. It is evident that customary arbitration if recognized, incorporated and in use in the oil and gas industry in Nigeria and the law continues to be fine-tuned to meet the current realities based on the legal regime of the PIA and regulations made pursuant to, can benefit the host communities and fulfill to a larger extent the intention of Chapter three of the PIA. The Nigerian Petroleum industry is an area of the economy that has been faced with various disputes arising from the inability of government and other critical industry stakeholders to fulfil their statutory obligation at the detriment of the other party.

It can then be said that customary arbitration should be used in settling host communities' disputes on the basis that such disputes are within a particular geographical area presided over by traditional chiefs. Where the disputes are of a commercial nature, other disputes settlement mechanisms can be utilized. However, the practice of customary arbitration in the petroleum sector has not received a light of the day as compared with other jurisdictions owing to the inability of Nigeria to develop a strong base of customary arbitration practice as a lot of disputes are most times referred to other jurisdiction as the lex arbitri of the arbitration panel.

7. Recommendations

This paper, having discussed the various mechanism of resolving dispute in the petroleum industry, makes the following recommendations.

a. Compulsory customary arbitration and its various forms should be encouraged; considering the long-term bottleneck that parties faced in litigation process; arbitration, which today has gained global acceptance, should be the first point of call-in dispute resolution.

b. The provisions of chapter three of the PIA that deals with host communities should be amended and a customary arbitration clause should be inserted. By this clause, all issues and disputes arising from community fall outs with oil companies should first be heard in the customary arbitration panel before appeals can lie to conventional courts. Also, other relevant statutes relating to the petroleum industry should include provisions on Arbitration as a mechanism for dispute resolution.

c. It is also recommended that members of the proposed customary arbitration panel should be trained and equipped with the basic mediation skills and techniques. This will to a large extent influence the quality of their decisions.