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RECONDITE ISSUES REVOLVING AROUND ONLINE ARBITRATION IN NIGERIA

By

Polycarp Arinze Okoro* and Ogbole Ogancho O.**

Abstract

This paper focuses on the concept of online arbitration in Nigeria as one of the mechanisms for the resolution of disputes. The paper examines the issues revolving around online arbitration in Nigeria and interrogates the availability of specific laws in Nigeria under which online arbitration may be conducted. It further discusses other forms of online dispute resolution ODR techniques and underscores online arbitration as the most effective and suitable procedure for resolving disputes that arise from online commercial transactions and to an extent, from offline commercial transactions due to the advantages associated with it. In carrying out this exercise, the paper adopts the doctrinal research methodology and makes reference to statutes, judicial decisions, rules, regulations, textbooks, online publications, newspapers and other related materials. The article also makes reference to some common law and civil law jurisdictions where specific legislative provisions have been put in place to regulate online arbitration, and advocates the need for Nigeria to emulate such initiatives. It finds that, although there is no specific legislation in Nigeria which governs the conduct of online arbitration in Nigeria, there are possibilities of deciphering such rules from the existing Arbitration and Conciliation Act and the Arbitration Rules attached thereto, and the agreement of the parties when the need arises. The paper recommends the need for a thorough rejig of our legislation in this aspect with a view to creating a robust enabling law for a seamless online arbitration exercise in Nigeria. It also recommends the need for much awareness to be created on the existence of online arbitration, in addition to increase in the level of literacy as far as the use of computers and the internet is concerned.

Key Words: Online Arbitration in Nigeria, Online Dispute Resolution, Arbitration Rules, Arbitration legislation in Nigeria

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Introduction

All around the world, disputation is an inherent characteristic of human existence and interaction.¹ It may be domestic, international, civil, political, commercial or economic in nature especially as the society becomes more complex. Several factors generally give rise to the occurrence of disputes and such may include inadequate information, lack of skills, clash of personal values, environmental impact, ignorance of the law, intentional and unintentional breach of agreements et cetera.²

To effectively address the spate of conflicts and deviances in a society, the legal system must provide a plethora of mechanisms which can be applied to resolve disputes in an orderly and just manner.³ The adversarial process is the most widely recognized method all over the world even though it has a lot of challenges⁴ which affect the quick and effective adjudication of cases. The adversarial system of adjudication has been found to be slow, rigid, expensive, time wasting and sometimes destroys the relationship between parties.⁵ In litigations, for instance, parties bear the greatest brunt of the high cost of justice which ranges from monetary costs to opportunity and intangible costs. Under the adversarial system of judicial adjudication in Nigeria, both parties to the suit actually incur huge amount of expenses while enforcing their rights or defending

¹ Steve Earlam, 'Is Conflict Inherent in Human Nature? Will We Always be at War With Ourselves in Some Way?' *Counselling Directory* (18th May, 2011) <<https://www.counselling-directory.org.uk/memberarticles/is-conflict-inherent-in-human-nature>> accessed 28 October 2019; 'Human Nature Conflicts and How to Overcome Them' <<https://alparc.org/news/news-from-the-network-alparc/item/846-human-nature-conflicts-and-how-to-overcome-them>> accessed 28 October 2019.

² Gihan Perera, 'The Five Main Causes of Conflict in Distributed Teams and How to Manage Them', *Chartered Management Institute (CMI)* (22 May, 2021) <<https://www.managers.org.uk/knowledge-and-insights/article/manage-five-causes-conflict-distributed-teams/>> accessed 10 July 2021.

³ Pon Staff, 'What are the Three Basic Types of Dispute Resolution?' *The President and Fellows of Harvard College* (October 11, 2021) <<https://www.pon.harvard.edu/daily/dispute-resolution/what-are-the-three-basic-types-of-dispute-resolution-what-to-know-about-mediation-arbitration-and-litigation/>> accessed 28 October 2019.

⁴ Natalie Regoli, '11 Advantages and Disadvantages of Adversarial System', *ConnectUs* (July, 27, 2016) <<https://connectusfund.org/11-advantages-and-disadvantages-of-adversarial-system>> accessed 28 October 2019.

⁵ Ogunkorode Oluwayemi Oluwadunsin, 'An Overview of Recognition and Enforcement of Arbitral Awards in Nigeria and United Kingdom' (2017) Vol. 10 *JPLCP*, 64.

their interests⁶. The effect of high cost on both sides to a dispute was aptly captured by Lord Rupert Jackson⁷ in his report on how cost of civil litigation could be reduced. He said: ‘Access to justice entails that those with meritorious claims (whether or not ultimately successful) are able to bring those claims before the courts for judicial resolution or post-issue settlement, as the case may be. It also entails that those with meritorious defenses come before the courts for judicial resolution or alternatively, based on the merits of the case...’

Overtime, the delay of cases in courts, cost of litigation, technicalities of court procedures among others, formed the basis for the emergence of the concept of Alternative Dispute Resolution (ADR) as a means of resolving disputes. The term ADR is an acronym for Alternative Dispute Resolution which is often used to describe a wide variety of dispute resolution mechanisms or techniques that are alternative to full scale court action.⁸ According to Akinbuwa, the term ‘Alternative Dispute Resolution’ refers to a range of mechanisms designed to assist disputing parties in resolving their disputes without the need for formal judicial proceedings. It includes those mechanisms that are used to resolve disputes faster, fairer and without destroying on going relationships’.⁹ ADR has a very long history that the true ascertainment of its origin lies in the history of the evolution of man¹⁰. Different people of different ages in different communities have resolved disputes harmoniously using various methods or systems. Although various methods have been used in the past to settle disputes, modern ADR can be traced to the sixties. During that period, a number of developed countries such as the United States of America and Australia witnessed an extra-ordinary growth of

⁶ Mohammed Lawal Kafilat Omolola, ‘Examining the Effects of Costs of Justice on Access to Justice in Nigeria: Looking Beyond monetary Costs for Solutions (2017) Vol. 10 *JPLCP*, 165.

⁷ Lord Rupert Jackson ‘Review of Civil Litigation Costs: Final Report’ <http://www.judiciary.gov.uk/publications_reports/review-of-civil-litigation-costs> accessed 20 April 2017.

⁸ ‘Alternative Dispute Resolution (ADR) Meaning Definition’, *Lawnn Law News and Network* (September 12, 2014) <<https://www.lawnn.com/alternative-dispute-resolution-adr-meaning-definition/>> accessed 28 October 2019.

⁹ A. A. Akinbuwa, *Citizens Mediation Centre and Multi-Door Court House in Lagos State in Law, Politics and Development* (NBA Ikeja Branch, 2010) 327.

¹⁰ Jerome T. Barrett & Joseph Barrett, ‘A History of Alternative Dispute Resolution: The Story of a Political, Social and Cultural Movement’ <<https://www.wiley.com/en-ad/A+History+of+a+Political,+Social,+and+Cultural+Movement-p-9780787967963>> accessed 10 July 2021.

interest in alternative dispute resolution mechanism. In the seventies, the interest in ADR increased substantially as it was considered as a voluntary process meant to provide quick and effective solution to the problem of over congestion in the legal system. During the 1979 Pound Conference in Minnesota, reputable jurists and lawyers converged to address the popular dissatisfaction with the crowded justice system. It was at that conference that Professor Sanders, a renowned crusader of ADR proffered a radically different version of the American justice system in the name and style of multi door courthouse, a concept which provides a comprehensive approach to dispute resolution. The concept posits that the ideal court house is a multifaceted dispute resolution centre which offers disputants a number of options or doors in resolving disputes. Hence, instead of just one door leading to a courtroom, there are many doors through which disputants might pass to get the appropriate dispute resolution process.¹¹ The point of convergence in all ADR processes is that they are intended to bring about amicable settlement of disputes in a much faster, cheaper and less adversarial manner so as to achieve better outcomes for the disputants than they could achieve through the process of litigation¹².

In Nigeria, the concept of ADR is not novel to our society as there are various forms of dispute resolution mechanisms. Our customary legal system is basically hinged on ADR. Before colonization, each community had its own informal methods of resolving disputes.¹³ In the case of *Okpuruwu v. Okpokam*,¹⁴ Justice Oguntade J.C.A. (as he then was) held that in the pre-colonial times before the advent of the regular courts, our people (Nigerians) certainly had simple and inexpensive ways of adjudicating disputes between them. They referred to elders or a body set up for that purpose. The practice has over the years become strongly

¹¹ Brian Farkas and Lara Traum, 'The and Legacy of the Pound Conferences' <<https://papers.ssrn.com/sol3/papers.cfm?>> accessed 10 July 2021; Dele Peter, *Alternative Dispute Resolution in Nigeria, Principles and Practice* (Dee-Sage Nigeria Ltd., 2004) 15.

¹² Mark Albright, 'The Advantages and Disadvantages of ADR' <<https://www.albrightstoddard.com/advantages-disadvantages-adr/>> accessed 10 July 2021; Lorman Education, 'Advantages and Disadvantages of Alternative Dispute Resolution', *Lorman* (April 16, 2018) <<https://www.lorman.com/resources/advantages-and-disadvantages-of-alternative-dispute-resolution-16190>> accessed 10 July 2021; WIPO, 'ADR Advantages' <<https://www.wipo.int/amc/en/center/advantages.html>> accessed 10 July 2021.

¹³ G. Ezejiofor, *The Law of Arbitration in Nigeria* (Longman, 1997) 6.

¹⁴ (1998) 4 NWLR (pt 90) 554 572.

embedded in the system that they survive today as customs. As noted by Danna¹⁵, this mode of dispute resolution by elders, chiefs and kings is common in Nigeria and generally in Africa, where chiefs sit to resolve disputes amicably. The orientation of the people of Nigeria in terms of law, is towards the reconciliation of disputes through arbitration, mediation and conciliation. A typical example of this is the ancient Benin Empire where the family head served as a mediator and arbitrator.¹⁶

Arbitration is the most popular form of alternative dispute resolution mechanism and has been defined as the reference of a dispute or difference between not less than two parties for determination, after hearing both sides in a judicial manner, by a person or persons other than a court of competent jurisdiction¹⁷. The primary purpose of arbitration is to reach an amicable settlement of a dispute by ensuring that the award is final, certain, complete and enforceable. A major characteristic feature that distinguishes arbitration from other ADR techniques is that even though arbitral proceedings are not strictly a judicial process, but to qualify as an arbitration process, it must be conducted in a judicial manner. This means that the arbitrator adjudicates upon the dispute which has arisen between parties in an impartial manner by receiving evidence from the parties and their witnesses, carefully considering same and coming to a decision on the basis of such evidence.¹⁸

Recently, online commercial transactions have increased exponentially due to rapid technological innovations in information and communication technology. Generally speaking, information technology has positively impacted on almost every sector including the means of dispute resolution. This catalyzed the development of various online dispute resolution mechanisms to meet the demands of the present times and circumstances. Online arbitration is one of the online dispute resolution mechanisms and simply means the conduct of arbitration electronically using the gadgets of information technology. It has numerous advantages which include swiftness, easy accessibility, increased convenience, efficiency and effectiveness.

¹⁵ H. S. Danna, 'The Cephalous Society and the Indirect Rule System in Africa' *Journal of Legal Pluralism* (1994) (34) 61.

¹⁶ Ephriam Akpata, *The Nigerian Arbitration Law in Focus* (West African Publishers Ltd., 1997) 18.

¹⁷ Halsbury's Laws of England 3rd ed. (2) (2); *Miss (Nig) Ltd. v. Oyedele* [1966] 2 ALR Comm 157.

¹⁸ Ezejiofor, *op. cit.*, p. 6.

Notwithstanding these advantages, online arbitration also referred to as electronic arbitration is faced with some challenges which if not tackled may render the advantages nugatory. The effective operation of online arbitration requires that all the parties involved in the arbitration must possess adequate knowledge of the use of computers and the internet. This may be realizable to certain extent in developed climes but not in developing or undeveloped parts of the world such as Africa.

Similarly, the utilization of online arbitration mechanism for dispute resolution may be inhibited by poor telecommunications services. Online arbitration requires the availability of reliable telecommunication network externalities so as to enable all the parties to achieve the required connectedness and interconnectivity among the various gadgets put in place for use.

The issue bothering on jurisdiction is another big challenge confronting electronic arbitration. Since online arbitration is conducted virtually, it may sometime be difficult ascertaining the seat of the arbitration especially where arbitration agreement fails to disclose such. The reason for determining the seat of an online arbitration is to establish the choice of law that will govern the conduct of the arbitration.

The aim of this paper is to carefully examine the issues which revolve around online arbitration in Nigeria with a view to investigating whether under the Nigerian legal system there are laws which specifically provide for online arbitration in Nigeria. The paper shall also look into the mode and validity of online arbitration and award under the existing laws where there is no specific legislation on this subject-matter in Nigeria and make proposals for future reforms.

Dispute Resolution in the Epoch of Information Technology

The concept of information technology has greatly impacted on all facets of human endeavor¹⁹ including justice and commerce. Consequently, commercial transactions are now initiated and concluded using computers, the internet and other electronic devices.²⁰ The universal reach of cyberspace has engendered visions of borderless market place emerging in which vast geographical distances no longer deter persons from engaging in commerce.²¹ In order to facilitate the complete realization of these visions, internet users must possess a certain degree of confidence which enables them to seek effective means of redress should a dispute arise in the course of electronic transactions. Obviously, resorting to the primordial adversarial procedure for the settlement of differences arising from an online transaction may not be a palatable option as that would subject the parties to high level of inconsistencies in legal principles amongst different jurisdictions²².

In a bid to address the challenges presented by online commercial transactions, the adaptation of a resolution mechanism that is in consonance with the new realities of a networked world became imperative hence the emergence of Online Dispute Resolution (ODR) as a dispute resolution mechanism for online commerce in the late 1990s²³, although it has since been expanded to other areas of civil redress. Online Dispute Resolution refers to a set of dispute resolution processes that allow for the resolution of disputes through online technology such as the internet or some forms of technology that allow for virtual communication without requiring the parties to be in a room together.²⁴ Because ODR need not be

¹⁹ Mario Radovan, 'ICT and Human Progress', *Taylor & Francis Online*. <<https://www.tandfonline.com/doi/abs/10.1080/01972243.2013.825686>> accessed 28 October 2019.

²⁰ Salmunur Rahman, 'Introduction to E- Commerce Technology in Business', *GRIN*. <<https://m.grin.com/document/280494>> accessed 30 October 2019.

²¹ Elizabeth Timmis McHugh, 'Expanding Sales with Borderless E-Commerce', *Stella Rising* (12 April, 2019) <<https://www.stellarising.com/blog/borderless-ecommerce>> accessed 28 October 2019.

²² Wolski B, 'Recent Development in International Commercial Dispute Resolution: Expanding the Options' *Bond Law Review* (2001) Vol. 13 (2), 245.

²³ Ethan KatshOma Rabinovich-Einy, 'Online Dispute Resolution and Prevention: A Historical Overview' <<https://oxford.universitypressscholarship.com//mobile/view/10.1093/acprof:oso/9780190464585.001.0001/acprof-9780190464585-chapter-2>> accessed 10 July 2021.

²⁴ Al Nenstiel, 'Online Dispute Resolution: A Canada- United States Initiative' (2006) *Can-U S L J* (32) 313 <<https://scholarlycommons.law.case.edu/cuslj/vol32/iss1/51/>> accessed 9 July 2021.

tied to precedents or jurisdictions, ODR solutions work the way the internet works. In other words, ODR covers a broad spectrum of ideas and applications related to digital and online dispute resolution processes²⁵. Although almost all ODR processes tend to be those that allow for written submissions only, there is a wide spectrum of ODR services that range from online arbitration to fully automated online blind bidding,²⁶ negotiation services and chat based mediation programs. The selection of the appropriate ODR format may depend on the nature of dispute and the parties involved. ODR is expected to be ideal for settling international disputes compared to litigation and ADR, as it provides solutions for some issues that have been found in offline ADR and litigation, such as the enforceability of the final decision, increased efficiency and effectiveness, and saving extra costs and time.²⁷

The commonly practiced ODR methods can be divided into three main types, namely, online negotiation, online mediation and online arbitration. Negotiation is the way in which persons contact each other to reach an agreement.²⁸ It implies reaching amicable solutions. Before the advent of the internet, parties used to negotiate in courthouse corridors or in offices, but nowadays they can negotiate through the web.²⁹ The advancement of electronically based negotiations (online negotiation) means that the parties are not required to meet in a particular place. The main feature of negotiation is that it is informal and there is no third party to serve as a mediator.

Online mediation has been defined as online negotiation carried out with the assistance of a third party.³⁰ Mediation is the process of negotiation and communication between two parties with the interaction of a third party or the

²⁵ Lucinda Case, 'The Impact of ODR Technology on Dispute Resolution in the UK' <<https://blogs.thomsonreuters.com>> accessed 15 December 2019.

²⁶ 'Blind Bidding is an ODR negotiation process used to determine the quantum of an economic settlement for cases in which there is no question of liability or fault. It allows parties to participate in an automated negotiation process in order to achieve a resolution.

²⁷ Thomas Schultz, 'Online Dispute Resolution: Challenges for Contemporary Justice' *Kluwer Law International* (2004).

²⁸ Julio Cesar Betancourt and Elina Zlatanska, 'Online Dispute Resolution (ODR): What is it and What is the Way Forward?' *Arbitration* (2013) Vol. 79(3), 256.

²⁹ Regina Fazio Moruca, 'The Electronic Negotiator (Conversation with Kathleen Valley)' *Harv. Bus. Rev.* (2000) Vol. 78(1), 16 .

³⁰ Stephen B. Goldberg, *Dispute Resolution: Negotiation, Mediation and Other Processes* (Aspen Law and Business 2003) 107.

mediator. The procedure may take place wholly or partly online. The main advantage of conducting mediation online is that none of the parties will have to travel and pay extra costs in order to meet with the mediator.³¹ However, online negotiation and online mediation share a common feature in relation to being non-binding and if the parties fail to reach a final agreement, then they have no other choice than to resort to a binding dispute resolution mechanisms such as arbitration and litigation.

Online arbitration is the electronic version of offline arbitration.³² In other words, online arbitration is where the arbitration procedures are conducted wholly or partly on the internet, starting from the online agreement of the parties to the online arbitral procedures and ending with online arbitral award. This is further explained subsequently in this paper.

ODR has quite a significant number of advantages over the conventional adjudicatory system. It saves time and reduces costs of litigation as parties do not need to be physically present in the course of its conduct. The ODR system promotes e-commerce and counters geographical barriers by ensuring that justice is timely accessed irrespective of geographical distances. The use of ODR mechanisms makes room for the editing of communications compared to instantaneous responses that characterize interface encounters in litigation. The persistent loss and misplacement of files encountered in courts are grossly minimized as ODR system stores, saves and secures documents transmitted during resolution processes.

Despite the above benefits associated with the use of ODR, the system is encumbered with some challenges such as inadequate confidentiality and secrecy of proceedings, high rate of illiteracy in the use of the computers and the internet, absence of human interactions and communication, difficulty in determining the place of proceedings and jurisdiction and the problem of determining the applicable substantive law.

Online Arbitration (E-Arbitration)

³¹ Susan Summers Raines, 'Can Online Mediation be Transformative?: Tales from the Front' *Conflict Resolution Quarterly* (2005) Vol. 22(4), 437.

³² Gary Born, *International Commercial Arbitration* (Kluwer Law International, The Hague, 2009) 11.

Technological developments of recent years are significantly changing conventional arbitration processes and procedure. Nowadays, arbitration tends to involve more and more diverse online techniques which allow arbitration agreements and proceedings to be conducted and concluded by electronic means in online settings.³³ International arbitrators would naturally prefer to deliberate on disputes without leaving their hometowns and would gladly issue an arbitral awards in an electronic form. The development of online arbitration envisages that disputes arising online should be resolved online.³⁴ Both practitioners and scholars claim that it has become increasingly necessary to design more efficient mechanisms for resolving disputes arising from online transactions. Offline disputes on the other hand can also be more effectively resolved with the use of arbitration when it takes advantage of diverse online techniques. Online arbitration in a broader sense can be described as an arbitration procedure conducted, at least partly, through electronic means related to the advancement of the internet. In a totally online arbitration, the entire process is conducted online by the use of e mail, video conferencing and web based communications. On the other hand, a partly online arbitration is one conducted using a combination of the above mentioned communication means and offline features such as live in-person hearings and use of fax and post for the submission of evidence, communication between the arbitrators and deliberation of the award.³⁵ Due to the numerous advantages attributable to online arbitration, it has been argued that it would transform offline arbitration as a result of its ability to resolve high value disputes through technological means.³⁶

³³ Ihab Amro, 'Online Arbitration in Theory and in Practice: A Comparative Study in Common Law and Civil Law Countries' <<https://arbitrationblog.kluwearbitration.com/2019/04/11/online-arbitration-in-theory-and-in-practice-a-comparative-study-in-common-law-and-civil-law-countries/>> accessed 30 October 2019.

³⁴ Girs berger and D. Schramm, 'Cyber Arbitration' (2002) Vol. 3, *European Business Organization Aldn Review*, 604. <https://scholar.google.com/scholar?q=girs+berger+%26+schramm+cyber+arbitration&hl=en&as_sdt=0&as_vis=1&oi=scholrt> accessed 9 July 2021 .

³⁵ Farzaneh Badiei, 'Online Arbitration Definition and Its Distinctive Features <<http://ceur-ws.org/Vol-684/paper8.pdf>> accessed 30 October 2019.

³⁶ Beth Trent and Colin Rule, 'Moving Arbitration Online: The Next Frontier' *New York Law Journal* (2013) <<https://www.law.com/newyorklawjournal/almD/1202594177637/Moving-Arbitration-Online%3A-The-Next-Frontier/>> accessed 9 July 2021.

Generally, there are three possible ways to conduct arbitration procedures. The first method is to conduct the whole arbitration using traditional arbitration procedures. The second method is to follow the hybrid way using information technology and traditional arbitration procedures for example, using the internet to submit the dispute or sending documents via e mail while using traditional arbitration procedures for sending original documents and written arbitration agreement. The third method is by conducting an Arbitration procedure solely through electronic means from the beginning to the end.³⁷ There is an unfortunate tendency to think that online arbitration is a new form of ADR, administered by a new breed of techno-arbitrators, having little in common with its more traditional counterpart. This tendency is not plausible as online arbitration certainly remains arbitration, though may be seen as its new type or dimension.

There has been an increasing interest in the question as to whether an arbitration conducted online using electronic means for example, electronic mail (e-mail), is valid within the current legal framework provided by national laws and international treaties (the most important of which is the New York Convention on the Recognition and Enforcement of Foreign Arbitral Award) given that it came into existence prior to the phenomenon of dispute resolution taking place in an online setting.³⁸ For instance, it has often been asked whether an exchange of e-mail messages containing an arbitration clause satisfies the formal requirements of Article 11(2) of the N.Y.C since the exchange of e-mails can be likened to the exchange of telegrams. The majority of modern academic thoughts appear to suggest that such agreements, by analogy fall within the ambit of the phrase ‘an exchange of telegrams’ and as such covered by the Convention.³⁹

In Nigeria, this problem becomes more intractable as our legal system does not have a specific legal framework for online arbitration. Both the Arbitration and Conciliation Act of 1988 and the Arbitration Rules annexed thereto were enacted

³⁷ Mireze Philippe, ‘Offline or Online Virtual Hearings or ODR?’ <<http://arbitrationblog.kluwerarbitration.com/2020/04/26/offline-or-online-virtual-hearings-or-od>> accessed 10 July 2021.

³⁸ Arun Raghu, ‘The Legal Challenges Facing Online Dispute Resolution: An Overview’ <http://www.galexia.com/public/research/articles/research_articles-art42html> accessed 10 July 2021.

³⁹ Spencer Z., ‘The Impact of Information Technology on Processes of Dispute Resolution for International Trade and Commerce Matters’ (2004) Vol. 23(1) *Arbitrator and Mediator*, 53.

primarily to regulate offline arbitration. The reason for this is that, contextually, the arbitration option has long been embraced as an exciting and viable alternative to litigation in Nigeria. Available arbitration mechanisms in Nigeria are still largely paper-based involving cumbersome manual processes. As technology expands, legal systems globally are facing extraordinary challenges in providing access to justice. Today, any consumer with a web browser can make a purchase anywhere in the world. Teenagers have commercial disputes that can cover several continents in a matter of seconds. The expensive and manual commercial arbitration processes of old won't work for these new kinds of disputes. While the rich can afford high priced lawyers, the poor and the increasingly middle class, are left to fend for themselves as pro se litigants. We need a more streamlined and efficient form of arbitration that works for all types of cases and litigants. In the next few years, online arbitration will help to meet that need and in so doing, will expand access to fair and effective dispute resolution to populations that are currently underserved. This will not only facilitate the resolution of commercial disputes but will also increase access to justice across the realms of human existence.

Advantages of Online Arbitration

- i. Increased Efficiency – In offline arbitration, parties incur more costs as they pay arbitrators as well as pay rents for hearing room and travelling expenses. These costs do not apply to online arbitration as the parties do not necessarily have to attend the hearing. Conducting arbitral proceedings through the internet is faster and cheaper. Holding meetings online helps to save working time. By using e- mails instead of using mails and special courier, parties can save the cost of shipment of documents.⁴⁰ Online arbitration enables the parties to avoid the use paper documentation which is very cumbersome compared to electronic records.⁴¹
- ii. Increased Effectiveness- In addition to saving time and cost, conducting arbitration online makes it possible for parties to hear witnesses or

⁴⁰ Pablo Cortes and Fernando Esteban de la Rosa, 'Building a Global Redress System for Low – Value Cross-Border Disputes' (2013) Vol. 62 *International and Comparative Law Quarterly*, 407.

⁴¹ Ethan Katsh and Janet Rifkin, *Online Dispute Resolution: Resolving Conflicts Cyberspace* (John Wiley & Sons Inc., 2001) 81.

experts who would not otherwise be available.⁴² Through online arbitration, witnesses from any part of the world can participate in dispute resolution by using videoconferencing or other forms of modern electronic gadgets.⁴³

- iii. Increased Convenience- Arbitrations conducted online are more convenient. For example, it is easier to search through a particular document using the <find> function instead of going through the whole document.

Demerits of Online Arbitration

Although the benefits derivable from online arbitration are numerous, it is pertinent to point out that online arbitration also called electronic arbitration is not devoid of shortcomings. Some of the demerits associated with online arbitration are hereby succinctly mentioned. Where arbitration takes place online, parties must have the appropriate technological gadgets and also possess the ability to operate them. Indeed, meeting these demands has some cost implications. Incompetence on how to handle the necessary gadgets may hinder a party from effectively participating in the arbitral process.

The relationship in an online arbitration is impersonal as parties and arbitrators are not in the same room but may be very far away from one another. This makes it difficult to assess the demeanor and countenance of the parties during hearing. It is also believed that the asynchronous nature of online arbitration encourages the making of inflammatory comments. When parties are at different locations, defining the place of arbitration may somewhat become problematic as the proceedings take place virtually. It is for this reason that some scholars are of the view that virtual arbitration has no *situs*.⁴⁴ If the place of arbitration cannot be defined, there will also be controversies regarding the determination of the relevant substantive law that will govern the parties' arbitration agreement and proceedings (curial law or *lex arbitri*).

Major Online Arbitration Systems around the World

⁴² Thomas Schultz, *Information Technology and Arbitration: A Practitioner's Guide* (Kluwer Law International, 2006) 14.

⁴³ Gabrielle Kaufmann-Kohler, *Arbitration at the Olympics* (The Hague, 2001) 20.

⁴⁴ P. Carrington, 'Virtual Arbitration' (2000) Vol. 15 *Ohio State Journal on Dispute Resolution*, 669.

Various arbitration institutions across the globe have established different systems aimed at conducting the whole or large part of arbitration procedures online. Some online arbitration systems are hereunder examined.

- i.** American Arbitration Association AAA-WebFile - The AAA-WebFile provides parties with several tools such as the ability to track cases online even if submitted offline. The AAA-WebFile has been used mostly for commercial disputes including employment, construction, international and general commercial claims. It also provides parties with other tools that could be utilized online such as filing new claims, selecting neutral track financial transactions, communication with parties, case management through a message board and review of cases commenced by traditional offline method.⁴⁵
- ii.** Modria - Modria is an online arbitration system and a leading software provider for online dispute resolution for both high and low value disputes.⁴⁶ It provides the customers with the ability to link between negotiation, mediation and arbitration which supports the customers with the ideal process to settle their disputes. The American Arbitration Association started working with Modria.com in order to improve its dispute resolution mechanisms and to build a new ODR platform to manage AAA's New York No Fault (NYNF) caseload consisting of negotiation, mediation and arbitration.⁴⁷
- iii.** NetCase - The International Commercial Court (ICC) created the NetCase in order to provide arbitrators and parties with the ability to conduct the arbitration procedures online through a closed, secure system.⁴⁸ NetCase allows parties to post, read and respond to messages through a dedicated space for their case. Parties have the possibility to access all documents filed online or posted in the system by the Secretariat of the Court. The arbitrators and parties only need their username and

⁴⁵ Debi Miller-Moore, 'ODR at the AAA: Online Dispute Resolution in Practice Symposium on Enhancing Worldwide Understanding through Online Dispute Resolution Proceedings' (2006-2007) Vol. 38 *U Tol L Rev.*, 395.

⁴⁶ Juan Pablo Cortes, 'Online Dispute Resolution Services: A Selected Number of Case Studies' (2014) Vol. 6 *Computer and Telecommunications Law Review*, 172.

⁴⁷ Tim Wallis, 'Online Dispute Resolution: Will the Talk Turn to Action?' (2015) Vol. 3, *Journal of Personal Injury Law*, 210.

⁴⁸ Philippe Mireze, 'New Upgrades to ICC NetCase' (2008) Vol. 19(2) *Bulletin of the ICC International Court of Arbitration*, 23.

password to be able access the documents that have been exchanged through the NetCase and stored in the system. So far, NetCase arbitration procedures are hybrid as the system has not proved totally online.⁴⁹

- iv. World Intellectual Property Organization eADR - The World Intellectual Property Organization (WIPO) eADR is an optional online case management tool developed and managed by the WIPO Centre to facilitate the conduct of cases under the WIPO Mediation, Arbitration, Expedited Arbitration or Expert Determination Rules (WIPO Rules). Under it, parties and neutrals (mediators, arbitrators and experts) are allowed to share and access case - related information through a single and secure portal.⁵⁰ All information stored in WIPO e ADR is firewall protected and encrypted allowing parties and neutrals to securely submit communications electronically into an online docket.⁵¹
- v. Canadian Civil Resolution Tribunal - The Canadian Civil Resolution Tribunal has an online platform which provides parties with an option to settle their disputes out of court in a more convenient and less costly way. If the parties fail to settle their disputes, they are provided with the options of resorting to negotiation through an online platform supported by templates and argument tools. If they still fail to reach a settlement, the online tribunal will provide them with a mediator to reach a settlement online or over the phone. If the parties cannot achieve settlement, the online tribunal will appoint an arbitrator who will contact the parties, and via an online platform, over the phone or through videoconferencing and then render final and binding decisions.⁵²
- vi. Czech Arbitration Court - The Arbitration Court attached to the Economic Chamber of the Czech Republic and the Agricultural Chamber of

⁴⁹ Philippe Mireze, 'Where is Everyone Going with Online Dispute Resolution (ODR)?' (2008) *International Business Law Journal*, 167.

⁵⁰ WIPO e-ADR' <<https://www.wipo.int/amc/en/eadr/wipoeadr/>> accessed 10 July 2021.

⁵¹ *Ibid.*

⁵² Elizabeth Cordonier, 'An Introduction to British Columbia's Civil Resolution Tribunal' <<https://wt.ca/app/uploads/An-Intro-to-BC-Civil-Resolution-Tribunal.pdf>> accessed 21 August 2019; The Civil Resolution Tribunal and Strata Disputes <<http://www2.gov.bc.ca/gov/content/housing-tenancy/strata-housing/resolving-disputes/the-civil-resolution-tribunal>> accessed 21 August 2019.

Czech Republic (Czech Arbitration Court) has separate rules for online arbitration procedures⁵³ according to which parties are able submit all documents and to conduct all procedures online and the award can be rendered online. The Czech Arbitration Court entertains commercial disputes, consumer disputes, and domestic and domain disputes.

- vii. Rechtwijzer 2.0 - The Netherlands Ministry of Justice and Security established Rechtwijzer 2.0 for the Dutch Legal Aid Board by the Hague Institute for the Internationalization of the Law (HiiL) in October, 2014 as an online dispute resolution platform.⁵⁴ Rechtwijzer means ‘conflict resolution guide’ or ‘signpost to justice’. The service aims to settle disputes through various processes beginning with diagnosis of the problem. The service provides parties with automated legal guidance based on answers given by the parties during the question and answer session. If the parties fail to reach a settlement, they are taken to the next stage which is online mediation or online arbitration which takes place through a secure and confidential platform designed for asynchronous dialogue.

The main purpose of setting up the online arbitration platforms discussed above is to increase the efficiency of dispute resolution through the use of modern IT devices. Indeed, modern IT technology has greatly impacted on arbitration by providing effective case management systems. An ideal case management system is expected to address a number of factors such as enabling all documents required in a particular case to be run through a single platform in such a manner that the parties can file their submissions through the platform, upload all the exhibits there and the institution would also communicate with the parties through the same platform. By so doing, all communications and exhibits could be easily located when needed not minding the user’s location or whether a PC, tablet or smart phone is being used. However, the digital case management system is faced with some challenges. For instance, since such systems must satisfy the highest standards of cyber security, the cost of developing them is very high and may be discouraging to undertake.

⁵³ ‘Arbitration Court’ <<http://ensoud.cz/rules/additional-procedures-for-on-line-arbitration>> accessed 24 July, 2018.

⁵⁴ Oliver Robinson, ‘Rechtwijzer 2.0 and Justice’ <<https://tea2.codewest.uk/2020/05/15/rechtwijzer-2-0/>> accessed 10 July 2021.

Under the digital case management system, there are usually a clear set of technical rules, terms and conditions that govern its usage. In most cases, such technical rules, terms and conditions may be too cumbersome on the users. For instance the portal of the AAA-Webfile is operated in the United States of America. Its terms of use and the relationship between it and a user are regulated according to the laws of the state of New York. Some of the terms and conditions regulating the use of the portal are not in the interest of the user. A user is responsible for the provision of all equipment needed to facilitate access to the internet after paying all the service fees associated with the access. After satisfying all these conditions, the AAA and its agents are totally excluded from liability for incidental or consequential damages arising from the inability to use the portal or for any malfunctions, errors or other adverse events that may occur.

The Legal Framework for Online Arbitration in Nigeria

Although customary arbitration is recognized under the Nigerian legal system, the first statute on arbitration in Nigeria was the 1914 Arbitration Ordinance. The ordinance was based on the English Arbitration Act of 1889 and was applied to the whole country which was then being governed as a unitary state. When Nigeria became regionalized in 1951, the provisions of the ordinance were re-enacted as Chapter 13 of the 1958 Revised Laws of Nigeria and Lagos. The Federal Government later repealed Chapter 13 and promulgated the Arbitration and Conciliation Decree 1988 Laws of the Federal Republic of Nigeria hereinafter referred to as the Arbitration and Conciliation Act Cap 18 LFN 2004. The ACA is a domestication of the United Nations Commission on International Trade Law (UNCITRAL) on international arbitration.

In Nigeria, there is no specific legislation regulating the conduct of online arbitration. The legal framework for online arbitration in Nigeria can impliedly be garnered from institutional rules of arbitration, private arbitration agreements, soft or model laws (such as the UNCITRAL Model Laws), the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and national arbitration laws and rules. States that have adopted the Model Law are regarded as ‘investor friendly’. The Model Law is the result of the comprehensive study by UNCITRAL into arbitration laws throughout the world with a view to providing a

model law on arbitration which would lead to uniformity relating to international commercial arbitration.⁵⁵ The model law was adopted on the 21st day of June, 1985 by the United Nations General Assembly.⁵⁶ Nigeria was the first country in Africa to adopt the UNCITRAL Model Law on International Commercial Arbitration through the Arbitration and Conciliation Decree No.11 of 14 March, 1988.⁵⁷ It is believed that agreeing to arbitrate in a model law jurisdiction secures a minimum of rights in arbitral proceedings and reduces surprises. The adoption of the Model law worldwide signifies a new era in international commercial arbitration.

The New York Convention of 1958 on Recognition and Enforcement of Foreign Arbitral Awards (N.Y.C.) enjoins signatory states to refer to arbitration jurisdiction when an action is brought under a contract containing an arbitration clause and to recognize and enforce a foreign award without any review of the arbitrators' decision subject to limited exceptions.⁵⁸ Nigeria acceded to the New York Convention on the 17th day of March, 1970 and same is binding on Nigeria by virtue of Section 12 (1) of the Constitution of the Federal Republic of Nigeria, 1999 as amended. Under Article of the Convention, each contracting state shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon. What this means is that it is immaterial whether an award was delivered electronically or by any other means or sequel to online or offline arbitration procedure provided that the party applying for recognition and enforcement supplies the duly authenticated original award or a duly certified copy thereof and satisfies other conditions required of him.

⁵⁵ See Adedoyin Rhodes – Vivous, 'Arbitration and ADR as Instrument for Economic Performance' <ARBITRAIONto20&20A.D.R.1pdf> accessed 4 October 2017.

⁵⁶ UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006/ United Nations' <https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status> accessed 13 July 2021.

⁵⁷ 'Arbitration in Nigeria' <<https://www.acerislaw.com/arbitration-in-nigeria/>> accessed 13 July 2021.

⁵⁸ Lucky Greenwood, 'A New York Convention Primer' <https://www.americanbar.org/groups/dispute_resolution/publications/dispute_resolution_magazine/2019summer-2019-new-york-convention/summer-2019-ny-convention-primer/> accessed 13 July 2021.

The Arbitration and Conciliation Act, 1988 is an adaptation of the UNCITRAL Model Law on International Commercial Arbitration and the UNCITRAL Arbitration Rules. The provisions of the Model Law and the Arbitration Rules are informed by the concept of party autonomy to decide by themselves all the fundamental questions concerning their arbitration and minimal judicial control of arbitral process. The Act reflects the domestication of Nigeria's treaty obligation under the New York Convention and became operational on the 14th day of March, 1988 as a Decree but is now referred to as an Act by virtue of the provisions of Section 315 (1) (a) of the Constitution of the Federal Republic of Nigeria, 1999 as amended which provides that subject to the provisions of the Constitution, an existing law shall be deemed to be an Act of the National Assembly with respect to any matter on which the National Assembly is empowered to make laws. As far the provisions of Section 315 (3) (b) of the Constitution are concerned, the ACA falls under the category of laws which qualify as an 'existing law' and as such, its provisions apply to the resolution of disputes through domestic and international commercial arbitration, and conciliation.

In some parts of the world, there are a number of permanent institutional arbitrations that formulate rules and provide facilities for the conduct and supervision of arbitrations that take place in countries other than those in which they have their seats. Such institutional rules have procedural rules which parties must comply with in the conduct of their arbitration. Most arbitration institutions offer parties a choice of two or more sets of rules and usually allow the parties to modify any of the rules. Some of those institutions under certain circumstances may offer special tools that will enable the parties to file and administer their cases online. It is not a surprise that most often, parties to an arbitration agreement may stipulate therein all the procedural steps which will guide the conduct the arbitral proceedings by an arbitral tribunal without referring to any particular institutional rules.

Key Issues Surrounding Online Arbitration in Nigeria

As a matter of fact, the number of internet users has vigorously grown in recent times. According to available statistics, there were about 104.4 million internet

users in Nigeria as at January, 2021.⁵⁹ Few years ago, Dr. Peter Jack, a one-time Director –General of the National Information Technology Development Agency (NITDA) in a speech delivered in 2014 at the global media meeting in Dubai, noted that Nigeria’s active internet users stood at 48 million as at then⁶⁰. According to him, various activities are being carried out online and ICT contributes over 8 percent to the Nigeria’s Gross Domestic Product (GDP) and is now growing at 7 percent annually. Nevertheless, it has also been stated that in 2020, Nigeria had 99.05 million internet users and further projected to grow to 131.7 million internet users in 2023.⁶¹

The scope of electronic commerce, otherwise known as e-commerce, is wide and has been defined to include commercial transactions conducted electronically on the internet or, alternatively, as the buying and selling of information, products and services via the computer networks which make up the internet.⁶² Put differently, e-commerce is a relatively new, technologically advanced mode of doing business locally or globally. E-Commerce is basically significant due to its ability to offer a faster, more efficient and more cost effective way of carrying out commercial transactions by providing a broader market place in which potential buyers and sellers are able to trade goods and interact with one another.

Despite the various advantages and benefits derivable from e-commerce, its growing adoption as the preferred means of doing business in Nigeria also gives rise to a number of important concerns paramount of which, is the non-availability or inadequacy of a legal framework within which disputes arising from transactions concluded online can be resolved. The law of contract pervades virtually all spheres of human activity in the sense that all commercial transactions are governed by the established principles of contract. The legal rules evolved by the law of contract perspicuously allow parties to a contract to agree on such terms and conditions as they deem fit provided they are not illegal or

⁵⁹ Simon Kemp, ‘Digital 2021: Nigeria’ <<https://datareportal.com/reports/digital-2021-nigeria>> accessed 19 September 2021.

⁶⁰ NITDA, ‘Nigeria has 48 active internet users’ <www.vanguardngr.com/2014/wnigeria-48m-active-internet-sers-nitda/> accessed 18 April 2018.

⁶¹ Joseph Johnson, ‘Nigeria: Number of Online Users 2015-2025’ <<https://www.statista.com/statitics/183849/internet-users-nigeria/>> accessed 13 July 2021.

⁶² Elaniwun Ajayi L. P, ‘Regulating E-Commerce’ <<https://techpoint.ng/2015/07/23/regulating-ecommerce-in-nigeria/accessed>> accessed 19 July 2021.

affected by other vitiating factors. Apart from the express terms contained in a contract, the parties' responsibilities may further be amplified by other terms known as implied terms. Thus, terms may be implied by the usage or custom of a particular trade, and unless these are expressly excluded, they will be regarded as forming part and parcel of the contract.⁶³ Consequent upon the above premise, it follows that parties to any type of commercial transaction or agreement whether offline or online, may expressly indicate their desire to resolve differences between them through the means of online arbitration or any other form of online dispute resolution mechanism. This becomes more logically tenable as disputes arising from online commercial transactions invariably require settlement procedure that is timely, swift and efficient.

It is common knowledge that technology has significantly evolved in recent times. The ways and manner of doing business have comparatively changed. Due to the accelerated growth of e-commerce as a result of the increasing use of the internet, conventional methods of dispute resolution including offline arbitration are becoming inappropriate. This development necessitated the emergence of online dispute resolution (ODR) mechanisms such as online arbitration, cyber mediation, cyber negotiation etc. It has been observed that the online dispute resolution mechanism has through its diverse platforms, offered satisfactory and acceptable resolution of disputes.⁶⁴ As a matter of fact, the concept of ODR has become a major phenomenon in dispute settlement by making available better ways of getting access to the justice system.⁶⁵ It is believed that electronic arbitration is a more efficient and effective mechanism for resolving both online and offline disputes. Well aware of these realities, the International Chamber of Commerce (ICC), through its International Court of Arbitration, launched several projects in response to the demands of IT. These include issuing guidelines on the use of IT

⁶³ I. E. Sagay, *Nigerian Law of Contract* (Sweet and Maxwell, 1985) 92.

⁶⁴ Robert Ambrogi, 'Is There a Future for Online Dispute Resolution for Lawyer?' <<https://www.lawsitesblog.com/2016/04/future-online-dispute-resolution.html/>> accessed 14 July 2021.

⁶⁵ Colin Rule, 'Online Dispute Resolution Moves From E-Commerce to the Courts' <<https://www.pewtrusts.org/en/research-and-analysis/articles/2019/06/04/online-dispute-resolution-moves-from-e-commerce-to-the-courts>> accessed 14 July 2021.

on arbitration,⁶⁶ devising a web-based system for conducting and managing arbitration proceedings⁶⁷ and setting up an online clearinghouse system for small claims⁶⁸.

The dynamism of technological evolution often poses new challenges. Online arbitration is a product of technological advancement and as such, is confronted with some issues especially in developing climes. If rigorous efforts are not put in place to identify those challenges with a view to fashioning out tangible solutions, the tendency of embracing a stagnated business climate becomes inescapable. The major problem faced by online arbitration in Nigeria is that our law is obviously silent on it. The ACA was enacted before the internet boom and might not have envisaged the distinction between offline arbitration and online arbitration. Evidently, the Act did not contemplate online arbitration. The exponential growth of electronic commercial transactions globally requires an urgent need for the Nigerian legal system to reflect the changes as witnessed in other parts of the world. The reality is that in some countries, their legal systems have evolved to meet the current technological innovations and advancement and adapt to the new trend of a networked world. Citing Russia as example, it is expressly provided under Article 30 (6) of the 2017 Rules of the International Commercial Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation that, either party has the right to request to participate in the hearing by means of videoconferencing.⁶⁹ On the other hand, in Nigeria, the essence of Article 25(1) of the Arbitration Rules requiring the arbitral tribunal to give advance notice to the parties of the date, time and place of hearing is to ensure that the parties or their legal representatives ensure physical appearance and attendance during hearing. Virtual attendance to arbitral proceedings has no place by the reason of our laws in this field of discuss. Moving further, some nationals' enactments on arbitration in both common law and civil law countries may not

⁶⁶ *Operating Standards for Using IT in International Arbitration (The Standards) in using Technology to Resolve Business Disputes* (ICC ICArb. Bull Special Supplement ICC Publishing, 2004) 75.

⁶⁷ M. Philippe, *Natcase. A New ICC Arbitration Facility in Using Technology to Resolve Business Disputes* (ICC ICArb. Bull Special Supplement ICC Publishing, 2004) 53.

⁶⁸ C Rule Online, *Dispute Resolution B2B, E-C Commerce, Consumer, Employment Insurance, and other Commercial Conflicts* (San Francisco-Jossey –Bass, 2002) 115.

⁶⁹ Ihab Amro, *op. cit.*

require an award to be in a particular form.⁷⁰ In the U.K. for example, Section 52 of the Arbitration Act of 1996 provides that parties are at liberty to choose the form an award may take.⁷¹ Also, in Switzerland which is a civil law country, Article 189 (1) of the Swiss Code on Private International Law, permits an award to be in accordance to the procedure and form agreed by the parties. By a way of comparison with Nigeria, Section 26 (1) of the Arbitration and Conciliation Act unequivocally requires any award made by the arbitral tribunal to be in writing and signed by the arbitrator or arbitrators.

Another challenge which impedes the growth of electronic arbitration in Nigeria is low literacy level on the use of the computer and the internet. Unlike in other developed climes, many people in Nigeria are oblivious of how the computer and the internet operate. Parties who have no adequate knowledge of the use of modern technological communication gadgets may be unable to appreciate online arbitration as a means of resolution of disputes. Even though some people may possess a rudimentary concept of computers and internet operation, they may however be reluctant towards availing online services due to lack of trust. Online arbitration requires the exchange of confidential information between the parties to the dispute or their representatives.

Poor quality of telecommunications services in Nigeria is one of the major challenges to online arbitration. One of the causes of poor quality of telecommunications services has been inefficient power supply in Nigeria. Incessant power outages render ICT networks unreliable. Inefficient telecommunications network interconnection among telecommunications service providers is another visible factor that may hinder the use of online arbitration to resolve disputes. Due to huge interconnection debts in the telecommunications sector in Nigeria, the right to either totally or partly disconnect an erring service provider may be granted by the NCC and where this takes place, the implication is that all the subscribers to that network will find it difficult to use the facility for any meaningful purpose. Where adequate security is lacking, the fear is that confidential and sensitive information can be attacked by hackers. Closely related to this challenge is the problem of unawareness of the existence of online

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

arbitration even among lawyers due the fact that our legal system has no specific legislation on it.

Consequent upon the foregoing, the following questions have become imperative under our legal system, more especially in the face of the growing need to align arbitration in Nigeria with international best practices where e-commerce has significantly grown: -

1. Does the existing legal framework in Nigeria recognize an agreement concluded through an electronic means to arbitrate using an online platform?
2. Are arbitration proceedings conducted by electronic means valid under the current legal framework in Nigeria?
3. Can an arbitral award be validly delivered by arbitrators in an electronic form in Nigeria?
4. Where the parties to a commercial transaction in Nigeria expressly agree to settle their differences using the technique of online arbitration, what legal framework will govern the conduct of such proceedings and enforcement?

The first question raised above is germane considering the fact that in the entire gamut of the provisions of the Arbitration and Conciliation Act, tacit mention is not made of the concept of online arbitration and there is no legislation whatsoever in Nigeria which particularly regulates the conduct of arbitration electronically. In response to this, it can be succinctly argued that implied recognition and validity may be given to online arbitration when sought to be used in Nigeria by virtue of some provisions of the Arbitration and Conciliation Act and the Arbitration Rules annexed thereto. For instance, under Section 1 of the ACA, it is provided that every arbitration agreement shall be in writing contained in a document signed by the parties; or in an exchange of letters, telex, telegrams or other means of communications which provide a record of the arbitration agreement. This suggests that an arbitration agreement must not be made in any particular form. All that is needed is a sort of documentary evidence clearly setting out the intention of the parties to arbitrate. It is also not necessary that it be concluded in a single document. Indeed an arbitration agreement can be

incorporated into a contract by reference, or distilled from several letters, telegrams or other means forming part of a correspondence between the parties.⁷²

Concerning the second question on whether arbitration proceedings conducted electronically are valid under the Nigerian legal system, it may be canvassed that where the mode to be adopted in conducting arbitral proceedings (such as online arbitration proceeding) is not specified in the Arbitration Rules, Section 15 (2) of the ACA allows the arbitral tribunal to conduct the proceedings in such a manner as it considers appropriate so as to ensure fair hearing. The logical inference deducible from this provision is that an arbitral tribunal may decide to conduct arbitration proceedings in any form so long as the chosen form will promote fair hearing. It therefore follows that an arbitral tribunal may choose to conduct proceedings online using the internet technology and such will be valid provided that all the parties concerned are heard.

The third question which bothers on whether an arbitral award rendered electronically is valid is important due to the provisions of Section 26 of the ACA which states that an award must be in writing and signed by the arbitrator or arbitrators as the case may be and that if the arbitral tribunal is constituted by more than one arbitrator, the signatures of a majority of them are enough to give validity to the award, provided that the reason for the absence of any signature is stated therein. The emphasis is basically on the award to be in a written form and duly signed by the arbitrator for it to be valid. Since the Act did not specify whether or not the writing and signature can be done by any means, there may be an unfortunate tendency to conceive an impression that this requirement is limited only to situations where an arbitrator must physically sign the award before it can be considered to be valid. This conception is erroneous because any award signed by an arbitrator or arbitrators sitting at different locations electronically is valid by virtue Section 93(2) of the Evidence Act which provides that where a rule of evidence requires a signature, an electronic signature satisfies that requirement. This means that under the new Evidence Act, documents in electronic formats containing electronic signatures are admissible. In the same manner, an arbitral award in an electronic format bearing an electronic signature is valid and acceptable under our legal system.

⁷² *Fehr (Frank) & Co Ltd. v. Kassan Jivraji & Co. Ltd.* (1949) 82 LL. 1 Rep 673; *Arab African Energy Corporation Ltd. v. Olieprodukten Nederland B. V.* (1983) 2 Lloyd's Rep 419.

The rationale for posing question number four above is anchored on the need to determine the appropriate jurisdiction where valid judicial enforcement could take place in situations where two parties in different jurisdictions enter into an arbitration agreement and the arbitration proceedings conducted online. In this regard, resort may be had to the traditional solutions proffered by private international law through the ‘forum state’ and ‘target state’ systems.⁷³ Under the forum state, legal obligations may be restricted to a particular territorial jurisdiction defined in an online contract.⁷⁴ Where this is so stated, legal actions cannot be brought to enforce any obligations between the parties except in that jurisdiction. Under the target state system, legal obligations in cyberspace are not limited to a particular jurisdiction, but extended to the jurisdiction where a consumer is located.

It is apt to state that after over 30 years of existence, the ACA falls far short of providing adequate answers to contemporary issues of great importance such as online arbitration in the field of international commercial arbitration. The efforts made by the Lagos State House of Assembly in 2009 in the area of arbitration are quite commendable even though it did not in its Arbitration Law expressly provide for online arbitration but in the bid to provide that an arbitration agreement shall be in writing, goes further to explain that “writing” includes data and that data includes information generated, sent, received or stored by electronic, optical or similar means such as but not limited to Electronic Data Interchange (EDI), electronic mail, telegram, telex or telecopy. This approach is in consonance with many national laws and international conventions which regard data messages as meeting the writing requirement provided they are accessible for later reference. One of the seminal texts in this field is Article 6.1 of the UNCITRAL Model Law on Electronic Commerce, which is based on the principle of functional equivalence. Functional equivalence advocates media neutrality when electronic documents fulfill the same function as paper communication. Similar provisions have been found in a number of instruments such as the US Uniform Computer Information Transactions Act, (UCITA),⁷⁵ the

⁷³ ‘ICT Laws in Nigeria: Planning and Regulating a Societal Journey into the Future’ <<http://www.saflii.org/za/journals/PER/2014/4.html>> accessed 11 November 2021.

⁷⁴ *Ibid.*

⁷⁵ Article 102 (a) 55 provides that “record” means information that is inscribed on a tangible medium or that is store in an electronic or other medium and is retrievable in perceivable form

US Uniform Electronic Transactions Act (UETA),⁷⁶ the UNIDROIT Principles of International Commercial Contract⁷⁷ and the Brussels 1 Regulation.⁷⁸

Conclusion

E-Commerce is among the fastest growing industries in the whole world. Advances in computer and information technology have contributed to this tremendous growth. Indeed, such growth needs to be matched by appropriate legal framework that caters for this type of economic activity. Due to the fluidity of e-commerce transactions over national boundaries and multivariate number of actors involved, the possibilities for conflicts arising from breaches of certain laws and jurisdictions have increased. In Nigeria, the absence of a regulatory framework detailing the modus of conducting online arbitration and enforcement of electronic awards, may seriously truncate any attempt by the parties to resolve their disputes by way of arbitration using the electronic means. As noted above, some countries have developed systems and institutional rules guiding the conduct of online arbitration procedures. Specific legislations designed to regulate online arbitration in Nigeria is imperative as it would maximize the benefits of e-commerce.

Proposals for Reform

while Article 107(a) states that: (a) record or authentication may not be denied legal effect or enforceability solely because it is in electronic form.

⁷⁶ Article 7:(a) A record or signature may not be denied legal effect or enforceability solely because it is in electronic form. (b) A contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation. (c) If a law requires a record to be in writing, an electronic record satisfies the law Article 8(a): If parties have agreed to conduct a transaction by electronic means, and a law requires a person to provide, send, or deliver information in writing to another person, the requirement is satisfied if the information is provided, sent or delivered as the case may be in an electronic record capable of retention by the recipient at the time of the receipt.

⁷⁷ Article 1.11 defines the written form as any mode of communication that preserves a record of the information contained therein and is capable of being reproduced in tangible form.

⁷⁸ Council regulation (EC) No.44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgement in civil and commercial matters, Article 23 (2) of which states: Any Communication by electronic means which provides of durable record of the agreement shall be equivalent to "writing".

The above exercise identified some of the major challenges that can inhibit the use of online arbitration procedure in Nigeria to resolve disputes. It becomes relevant for our legislative institutions to carefully evaluate the current legal framework in Nigeria with the aim of ushering in legislative provisions that will solve the problems highlighted above and address the pertinent questions raised herein. The importance of such a reform lies in the fact that it will greatly bring about tremendous growth in the use e – commerce in Nigeria as the stakeholders will be adequately assured of expeditious means of resolving any dispute arising therefrom. Such a reform will concretize procedural rules which will govern the conduct of online arbitral proceedings, the delivery of electronic awards and the enforcement thereof.

Since online arbitration is dependent on ICT, it is recommended that regulatory institutions should provide adequate enforcement mechanism so as to address the concerns of quality of service, establish safeguards and security measures to protect privacy in ODR, e-commerce and other online transactions. New laws should be enacted to establish confidence, trust and guarantee information security in the internet. There is also the need for a legislation to be put in place to regulate interactions among service providers in Nigeria. By so doing, online arbitration will be placed on a sound base and will attract the requisite confidence from users.

The primary vehicle for online arbitration is the internet and information technology and as such, the issues identified as being responsible for poor quality of telecommunications services should be well attended to. Tangible efforts should be made to address incessant power outages in Nigeria as this will make room for the smooth operation of online arbitration. Those factors which give rise interconnection disputes among telecommunications service providers leading to eventual disconnections should be effectively tackled to avoid disruption of telecommunications services upon which online arbitration predominantly depend. The populace, legal practitioners and ADR practitioners should be educated on the need to embrace online arbitration as a procedure which is best suitable for the resolution of dispute arising from online transactions due to its inherent peculiar benefits highlighted in this paper.