ONLINE DISPUTE RESOLUTION: ANOTHER VOICE IN THE COVID-19 PANDEMIC DIALOGUE IN NIGERIA

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1.0 ABSTRACT

Despite being the largest ADR community in Africa, Nigeria still experience the flight of domestic arbitration to foreign jurisdictions. This implies a huge loss of revenue to the Nigerian government and her ADR practitioners and ultimately threatens the growth of ADR in Nigeria. To improve the ease of doing business and impact positively on investment dispute resolution in Nigeria, Online Dispute Resolution (ODR) plays a pivotal role. The importance of ODR cannot be better felt at any other time than the Covid – 19 pandemic period. As the corona virus redefined human spatial existence, the internet displayed its capacity to build a global village, where sundry human activities could continue unabated despite movement restriction. As mankind groaned

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in the hotchpotch effects of the pandemic, the cyberspace offered a potpourri of relieves as reflected in e-commerce, e-banking, online schooling and lots more. All these also generated e-disputes to be resolved via the (ODR) mechanism. This paper interrogates ODR as a catalyst that can promote efficient domestic and international arbitration in Nigeria, during the Covid-19 pandemic period and beyond, to enable the country maintain its lead as the arbitration hub in Africa. Again, the paper investigates whether the rules of arbitration seat and applicable law in traditional ADR applies to ODR. The various weaknesses of ODR did not escape from the author's radar. On the whole, it was found that ODR is a beacon of hope, that could create an efficient dispute resolution regime in Nigeria, provided its weaknesses are addressed.

2.0 INTRODUCTION

The local Huanan Seafood Market in Wuhan, Southern China, will remain visible on the global map of infectious diseases for a long time to come. In early December 2019, coronavirus was reported among a cluster of patients with pneumonia of unknown cause in the said Seafood Market in Wuhan China.[3] Within the spate of about thirty days, the World Health Organization

[3] In early December 2019, a severe acute respiratory syndrome coronavirus 2 (SARS -CoV-2) broke out in a local Huanan Seafood Market in Wuhan, Southern China. Severe acute respiratory syndrome coronavirus (SARS-CoV1) had earlier been reported in 2003 and Middle East respiratory syndrome coronavirus (MERS-CoV) was reported in 2012 and both caused human epidemics. See Jiang F. et al.: Review of Clinical Characteristics of Coronavirus Disease 2019, *Journal of General Internal Medicine* (March 2020) p. 4 < DOI:

(WHO) on the 30th day of January 2020, declared the virus a Public Health Emergency of International Concern (PHEIC) and an epidemic and officially designated it Covid -19 on the 11th day of February, 2020. As at the 5th day of February, 2021, the WHO put the total number of cases and deaths worldwide at 104,370,550 and 2,271,180 respectively, while Nigeria has 136,030,000 cases and 1,632 deaths.[4] The pandemic has left our world with a medley of discordant tunes, as reflected in business closure, job losses, decline in production and supply chain of goods and services, insolvencies, travel bans and border closure among others. The situation in Nigeria is not an exception, every sphere of human endeavour was disrupted in order to interrupt human-to-human transmission of the virus, in consonance with the WHO strategic objectives[5]. This mélange also led to an assortment of legal issues, such as breach of contract, defence of frustration, *force majeure*[6] and

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10.1007/s11606-020-05762-w> accessed 5th May, 2023. Covid – 19 was reported among a cluster of patients with pneumonia of unknown cause in the said Seafood Market in Wuhan China. See: World Health Organisation Coronavirus Disease 2019 (Covid-19) Situation Report, <https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200505covid-19-sitrep-106.pdf?sfvrsn=47090f63_2 > accessed 5th January, 2021. The virus has been found to have higher levels of transmissibility and pandemic risk than the SARS CoV-1. The coronavirus belongs to a family of viruses that may cause various symptoms such as pneumonia, fever, cough, fatigue, headache, diarrhea, hemoptysis, and dyspnea breathing difficulty, and lung infection among others. See; Adhikari S.P et al. Epidemiology, Causes, Clinical Manifestation and Diagnosis, Prevention and Control of Coronavirus Disease (COVID-19) During the Early Outbreak Period: A Scoping Review, *Infectious Diseases of Poverty* (2020) 9:29< https://doi.org/10.1186/s40249-020-00646-x > access 4th January, 2023.

[4] < https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200703-covid-19-sitrep-165.pdf?sfvrsn=b27a772e_2> accessed 5th February, 2023.

[5] World Health Organisation Coronavirus Disease 2019 (Covid-19) Situation Report, <https://www.who.int/docs/default-source/coronaviruse/situation-reports/20202905covid-19-sitrep-106.pdf?sfvrsn=47090f63_2> accessed 29th January, 2023.

[6] The legal effect of the pandemic is a global phenomenon that affects every facet of human life. For instance, Bureau of the FIFA Council recognised COVID-19 as a *force majeure* event. In line with the powers conferred on the Council by Article 27 of the Regulations on the Status and Transfer of Players (RSTP) to recognise and decide on *force majeure* cases affecting the contracts for both players and clubs; player registration periods as well as the

wrongful termination of employment. Other legal issues include; fundamental rights to freedom of movement and liberty and freedom of thought, conscience and worship as well as right to peaceful assembly and association as provided in sections 35 (1), (38) (1) and 40 of the Constitution of the Federal Republic of Nigeria 1999 (as amended) respectively.

As the country groans in the crucible of unpleasant effects of the pandemic, many facets of human activity are gradually moved from the traditional physical realm to the virtual realm, including the administration of justice. In a bid to prevent the spread of the coronavirus, the Chief Justice of Nigeria, on the 23rd day of March, 2020, directed all courts in Nigeria to suspend sittings for a period of two weeks in the first instance, except for matters that were urgent or time-bound. On the 6th day of April 2020, after the expiration of the initial two weeks, His Lordship gave another directive, suspending court sittings *sine die*, except those that are essential, urgent or time-bound. Following the foregoing directive, the Chief Judge of Lagos State signed the Remote Hearing of Cases (Covid-19 Pandemic Period) Practice Direction[7]. The purpose of the Practice Direction which became effective from May 4,

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status of players in a football club, the Council established a working committee to proffer solutions to the difficulties arising from the COVID-19 pandemic.

[7] The movement of court proceedings to the digital realm is not limited to Nigeria. Upon the breakout of the COVID-19 Pandemic and the lock down, the Chief Justice of Kenya proactively issued a practice direction providing for electronic case management. Kenyans lawyers are allowed to file and serve court processes electronically. In the first wave of Covid – 19, Justice Hannah Okwengu of the Kenyan Court of Appeal delivered 57 Rulings and Judgements of the court via video link with a promise that the judgements/Rulings would be available for download 48 hours after. Similarly, the High Courts in Kenya continue to hold sittings via video conferencing and Criminal Justice Administration is not halted as cases are conducted via video conference. See: <https://www.judiciary.go.ke.kenya> accessed 11-5-2023. On Friday March 20, 2020, the Chief Justice Brat Katureebe in line with the executive order by President Museveni of Uganda, suspended all court hearings for a period of 32 days. The directions however made provisions for urgent proceedings via video link, judgement and rulings online via electronic mail. See: <ttps://www.softpower.ug/chief-justice-suspends-court-sessions-due-to-coronavirus/> accessed 10-5-2023

2020, is to ensure the hearing and determination of time-bound and urgent cases through digital platforms such as Zoom, Skype or any other video or audio conferencing platform approved by the court.[8]

The foregoing is due to the importance of legal services in our society. As a matter of fact, legal services are essential services within the provisions of Article 1 (7) of the Covid – 19 Regulations 2020 [9]. In tandem with this, the Federal High Court Sitting in Abeokuta on the 4th day of December, 2020, in Suit Number FHC/AB/FHR/57/20 held thus: ''Having stated this, I have no choice but to firmly hold that Article 1 (7) of the Covid – 19 Regulation is plain and unambiguous as to what are and what are not essential services. Legal services within the context of the Regulation is essential service''. In the physical sphere, court proceedings are fraught with delay, technicalities and high cost of justice among others[10]. While the movement of court proceedings to the virtual realm on account of Covid-19 pandemic in some quarters, is appreciated, it does not denude the Nigerian court of its traditional problems. As many human activities moved to the internet to prevent the spread of Covid – 19, these online activities also generated e-disputes arising from acts or omissions of parties in connection with their online transactions, such as e-contract, e-commerce and conventional activities which have found their niche on the internet. As a natural complement of the formal court proceedings, Alternative Dispute Resolution (ADR) with the internet flavour tagged Online Dispute Resolution (ODR) is no less an essential service, as

[8] Lagos State Judiciary Remote Hearing of Cases (Covid -19 Pandemic Period) Practice Direction May, 2020.

[9] The regulation dated 30th March 2020, was made pursuant to The Quarantine Act CAP Q2 Laws of the Federation of Nigeria 2010.

[10] See generally; A. A. Sanda, *Justice delayed is Justice denied: Problems and Solutions*, (Spectrum Books Limited 2001)

dispute resolution must also move to the virtual realm along with human activities and the legal proceedings as dictated by the Covid – 19 pandemic safety strategy. The main thrust of this paper is to interrogate the relevance of ODR in an ADR community like Nigeria, during the Covid – 19 pandemic period and beyond. This paper, examines the potentials and the shortfalls of ODR as a dispute resolution mechanism that is applicable during and after the corona virus outbreak in Nigeria.

3.0 THE CONCEPT OF ONLINE DISPUTE RESOLUTION

It is pertinent to reiterate that ODR is pivoted on the traditional Alternative Dispute Resolution (ADR), hence, many writers have simply perceived ODR as a means of using the internet to provide ADR[11]. According to Hornle[12], ODR is dispute resolution outside the courts, based on information and communications technology in particular. It is also pivoted on the power of the computers to efficiently process enormous amount of data, store and organise such data and communicate it across the internet on a global basis and with speed. In the words of Karnika Seth[13], ODR is an internet-based mechanism, targeted at resolving internet related disputes such as domain name disputes and encompassing other conventional disputes that may or

[11] ODR has thus been variously referred to as: Internet Dispute Resolution (iDR), Electronic Dispute Resolution (eDR), Electronic ADR (eADR) and Online ADR (oADR). See: Petrauskas F and Kybartiene E. 2011, Online Dispute Resolution in Consumer Disputes. Available at <http://www.mruni.eu/en/mokslo_darbai/jurisprudencija/> accessed on 18th June, 2023. p.922.

[12] J. Hornle, ''Encouraging Online Dispute Resolution in EU and Beyond: Keeping Cost Low or Standard High?''. E-Lawyer Assistance. Available at < http://www.e-lawyerassistance.com > assessed 12/8/2023.

[13] K. Seth, Computers, *Internet and New Technology Laws* (2nd ed. LexisNexis 2016) p. 583

may not involve internet transaction or communication but is resolved by the use of online resolution mechanism. To Arun,[14] ODR involves the use of information technology to facilitate the application of traditional alternative dispute resolution mechanisms in the cyberspace. As an offshoot of ADR, ODR employs various ADR methods to settle online disputes. Therefore, Van den Heuvel[15] defines ODR as the deployment of application and computer networks for resolving disputes with ADR methods[16]. Information and Communications Technology in dispute resolution has been tagged by Katsh

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[14] R. Arun, The Legal Challenges Facing Online Dispute Resolution: An Overview (2007) Available at <http://www.galexia.com/public/research/articles/research_articles-art42.html> Accessed 11th April, 2023.

[15] E. Van den Heuvel, Online Dispute Resolution as a Solution to Cross-border E-disputes: An Introduction to ODR. Paper presented at Building Trust in the online environment: Business to customer Dispute Resolution, a conference jointly organized by Organization for Co-operative Development (OECD), Hague conference on Private and International Law and International Chamber of Commerce (ICC). The Hague, 11-12 December 2002, The Hague. Available at < http://www/oecd.org/dataoecd/63/57/1878940.pdf > accessed 12th August, 2023.

[16] ODR therefore settles disputes through the medium of the internet, using ADR methods as follows; (1) Online negotiation: Through these medium, financial claims can be settled via online negotiation. Online negotiation is simply the use of software to automatically settle financial claims without human intervention. One technological sphere commonly in use in online negotiation is automated negotiation commonly known as "blind-bidding'. This is a negotiation process designed to determine economic settlement for claims which liability is not challenged but the amount of compensation is in dispute. See, J. Hornle, ODR in Business to Consumer E-commerce Transactions. *Journal of information Law and Technology,* (2002) No.2. p. 5. Available at <http://www2.warwick.ac.uk/fac/soc/law/elj/> Accessed on the 17th August, 2023. (2) Online arbitration: this has attracted the attention of legal scholars and is variously referred to as cyber-arbitration, cybitration, cyberspace arbitration, virtual arbitration, or electronic arbitration. Like the offline arbitration, is the process where a neutral third party delivers an award which is final, and binding on the parties. It is capable of resolving both online and offline disputes. See: T. Schultz, *Online Arbitration: Binding or Non-Binding?* (Interactive). ADR Online Monthly. UMASS (2002). Accessed the 15th July, 2023. (3) Online mediation: this is offered by several ODR providers using websites to facilitate the resolution of disputes. These websites make use of online technologies such as email, chat rooms and instant messaging in addition to the communication methods used in traditional (offline) negotiation process. See: F. Petrauskas and E. Kybartiene, Online Dispute Resolution in Consumer Disputes (2011) p.922. Available at <http://www.mruni.eu/en/mokslo_darbai/jurisprudencija/> accessed on 15th July, 2023.

and Rifkin[17] as the ''fourth party'' because ODR is seen as an independent input to the management of dispute. According to Karnika Seth[18], ODR has brought about greater accessibility, flexibility in choice of governing law, procedure, appointment of judges, reduces animosity among parties, brings about transparency, reduces cost and time consumed to resolve inter-party disputes.

4.0 CLASSIFICATION OF ONLINE DISPUTE RESOLUTION

ODR could be broadly classified into adjudicative, assisted or automated[19]. In case of adjudicative ODR, the arbitration proceedings take place online where the arbitrator decides the dispute and makes the award. One of the leading online arbitration institutions is "internet-ARBitration''[20]which prides itself as a world leading low-cost arbitration, as parties can file their cases free of charge. Others are; onlineARBITRATION.net[21], eQuibbly[22] and FINRA[23]. Automated ODR is more like e-settlement. Automated negotiation relates to those methods in which technology takes over some aspects of a negotiation[24]. ODR resolves disputes between parties by using information

[17] E. Katsh, and J. Rifkin, Online Dispute Resolution: Resolving conflicts in cyberspace. Jossey-Bass: (San Fransico 2001) at p. 93-117.
[18] K. Seth, Computers, *Internet and New Technology* p. 586
[19] G.K. Kohler, ''Online Dispute Resolution and its Significance for Commercial Arbitration'' in Asken et al. (Eds), *Global Reflections on international Law, Commerce and Dispute Resolution* (ICC Publishing 2005)
[20] Internet-ARBitration: How net-Arbitration Works. Available on < http://www.net-arb.com/howarbitration_works.php > Accessed 20/07/2023
[21] http://www.onlinearbitration.net
[22] https://www.equibbly.com.
[23] http://www/finra.org.
[24] S. Kalani, Transition to Online Dispute Resolution: A Mechanism to Curb Transaction Cost in Access to Justice, in R.Nagar et al. (Eds). *Law and Economics Breaking New Grounds*, Lucknow (Eastern Book Company 2017) p.316

technology including computers, scanners, web camera, cell phones, fax machines and other communication devices of a third party service provider. Such service providers further include; *Cybersettle*, *Settlement Online*, *mediate.com*, *modria.com, clicknsettle.com*, *webmediate.com* and *conflict resolution.com* among others[25]. Some of these ODR service providers, offer automated services that settle monetary disputes, such as pecuniary civil claims or insurance claims through automated processes. Some of the service providers use computer programme which assist disputants to discuss variables arising from conflicting objectives with a view to settling such disputes. Many negotiation support systems like *Adjusted Winner*[26] and *Smart Settle*[27] use *Bargain and Game theory* to provide fair solutions to parties. ''Split up'' advises disputants on property distribution after divorce. ''Asset divider'' is a service provider that advice on trade-offs.[28] For domain name disputes, World Intellectual Property Organisation (WIPO) and other accredited registrars have been appointed under WIPO domain dispute resolution policy adopted by Internet Corporation for Assigned Names and Numbers (ICANN) to resolve domain name disputes[29]. WIPO prepared the Uniform Domain Name Dispute Resolution (UDRP) Policy that was adopted by the ICANN on 26th day of August, 1999[30]. This policy stipulates the

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[25] K. Seth Computers, *Internet and New Technology* p.593. See also < http://odr.info/provider-list/ >accessed 13/02/2023

[26] S.J. Brams, and A.D. Tylor, *Fair Division From Cake Cutting to Dispute Resolution*, (Cambridge Press. Cambridge U.K 1996).

[27] Thiessen and J.P. Mac Mahon ''Beyond Win-Win in Cyberspace'' *Ohio State Journal on Dispute Resolution*, (2000) 15, 643.

[28] K. Seth Computers, *Internet and New Technology* p.595.

[29] *Ibid*

[30] Ever since, this policy has been used to resolve a number of domain name disputes. In the famous case of *Tata Sons Ltd. v The Advanced Information Technology Association* (Case No. D2000-0049) WIPO held that the domain name 'Tata.org' registered in the name of Advance Information Technology Association, Mumbai should be transferred to the complainant, Tata Sons Ltd. In *Maruti Udyog Limited v Maruti Software Pvt. Ltd* (Case No.

administrative dispute resolution proceedings administered by a dispute resolution service provider duly approved by ICANN. Some of the accredited domain name dispute service provider are; WIPO, National Arbitration Forum, and Asian Domain Name Dispute Resolution Center[31]. ODR could be Business to Customer (B2C), Customer to Customer (C2C), Business to Business (B2B) or Government to citizens (G2C) interaction. In (B2C) transaction, ODR increases customer loyalty and minimizes corporate liabilities. In (C2C) transaction, ODR reduces anonymity between the parties involved and minimizes the risk of fake transactions. In (B2B) transaction ODR mechanism is employed to avoid litigation expenses, while in (G2C) interaction, disputes between citizens and public authorities are easily resolved[32].

5.0 ORIGIN OF ONLINE DISPUTE RESOLUTION

As a dispute resolution mechanism, ODR made its debut in 1996 when its conception and practice came to fruition through the Virtual Magistrate project established to offer online arbitration to resolve online defamation matters. One of the earliest cases mediated by the Online Ombudsman office was at the University of Massachusetts in the US, involving an individual website owner and a local newspaper in respect of a Copyright

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D20000-1038) the respondent domain name Maruti Online.com was held to be identical to Trade Mark 'MARUTI' which belonged to the complainant. In order to decide domain name disputes, three essential parameters are laid down by the Uniform Domain Name Dispute Resolution Policy as follows: (1) the domain name was identical or deceptively similar to the Complainant's Trade Mark, (2) the Respondent had no legitimate interest in the mark, and (3) such registration constitute bad faith a registration. These three conditions were held to be present and the domain name in question was directed to be ceded to the Complainant. See generally; K. Seth *op cit* p.596.

[31] K. Seth Computers, *Internet and New Technology*.

[32] K. Seth Computers, *Internet and New Technology* p.586.

infringement[33]. Massachusetts Online Ombudsman has also successfully resolved banking related disputes since inception in 1996. ODR has since gradually spread across global jurisdictions with the rise of various service providers as discussed above. By 1999, commercial institutions began to embrace online dispute resolution. It was at this stage that ODR became more acceptable as the most suitable dispute resolution process in the cyberspace. It has been proven to be capable of resolving both online and offline disputes. Today, ODR thrives in the developed countries. Hence, it has been recognized by both governmental and commercial institutions as the first choice for settlement of disputes arising from online activities[34]. ADR is an entrenched dispute resolution mechanism in Africa, with Nigeria as the leading ADR community in the continent. With the outbreak of Covid – 19 pandemic and the attendant lockdown, various human activities migrated to the cyber space. Greater percentage of such activities fall in the category of human commercial endeavours. This has ultimately engendered the need for ODR, as dispute is inherent in all human activities.

6.0 JUSTIFICATION AND LEGAL FRAMEWORK FOR THE APPLICATION OF ODR IN NIGERIA

With the wave of information revolution as driven by the internet, many human endeavours in the physical world are replicated in the cyber sphere.

[33] Center for Information Technology and Dispute Resolution, Online Ombud's Narrative I: Website Developer and the Newspaper, available at : <www.ombus.org/narrative 1.html> accessed 19th July, 2023.

[34] M. Rafal, Regulation of Online Dispute Resolution: Between Law and Technology. (2005) Available at <http://www.odr.info/cyberweek/Regulation%20%of20ODR_Rafal%20Morek.doc> (accessed on 20 th July, 2023).

This has made the number of internet users to surge exponentially, with an accompanying potential to generate sundry dispute from human activities on the internet. Among other human activities, e-commerce is a great beneficiary of the information revolution. The total number of business and consumer emails sent and received per day in 2019 is estimated to have exceed 293 billion, and is forecast to grow to over 347 billion by 2023.[35] By the end of 2023, the number of business and consumer emails stood at 347.3 billion and projected to reach 376 billion in 2025.[36] Within and beyond the Covid 19 pandemic period, e-commerce has provided an enabling environment for the development and growth of ODR in Nigeria. Jumia[37] came on board as a local online store on the 3rd day of July, 2012.[38] Others such as DealDey, Konga.com etc. were also launched the same year. Today, e-commerce has grown so fast in Nigeria that there are over 200 online Nigerian stores in the cyberspace.[39] Over 300,000 orders are made daily, while there are over 500 visits to each site of the web shop every day.[40] The Nigerian e-commerce started with Jumia as the pioneer local online store, with only $10 million driving the e-market economy. Today, numerous online stores have joined

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[35] The Radicati Group, Inc., Email Statistics Report, 2019-2023, <http://www.radicati.com> accessed May 15, 2023.

[36] The Radicati Group, Inc., Email Statistics Report, 2023- 2027, <http://www.radicati.com> accessed March 05, 2024.

[37] Jumia was launched, initially with the name, Kasuwa, a Hausa word meaning Market. See: N. O. Chinedu, Holistic Presentation of Online Shopping in Nigeria, *Journal of Arts, Science & Commerce* (February 2019) p.25 available <https://www.researchgate.net/publication/326911722>. Accessed 20th May 2023

[38] *Ibid*

[39] Few of the leading online stores in Nigeria are listed as follows: Jumia.com.ng, Konga.com, DealDey.com, Kaymu, Slot.ng, OLX.com.ng, Jiji.ng, Parktelonline, Mystore.com, Ojashop.com, Adibba.com, Supermart.ng, Kara.com.ng, Fouani.com and Buyam.com.ng among others. Available at: <www.mobilemediainfotech.wordpress.com> accessed on 20th May 2023

[40] *Ibid*

the business and the Nigerian online consumption is worth about $12 billion in 2016, with a projection of $154 billion by 2025.[41] Nigeria is setting the pace as the leader in online shopping in Africa, with 66% against South Africa's 60% and Ghanaians 55% e-market penetration.[42] This heavy traffic of e-commerce on the Nigerian internet high way, naturally translates to increase in e-disputes for the attention of the Nigerian ADR community, especially during the Covid – 19 pandemic period and beyond.

On the 26th day of January 2021, the Corona Virus Disease (COVID-19) Health Protection Regulations 2021, was signed by the President of the Federal Republic of Nigeria, pursuant to the Quarantine Act, Cap. Q2 Laws of the Federation 2010. This Regulation further restrict human gathering and physical contact on account of the second wave of the deadly virus. Section 5 of the Regulation stipulates conditions for the operation of open markets, Malls, Supermarkets, Shops, Restaurants, Hotels etc. Sections 16 and 17 stipulates the conditions for the operation of Commercial Banks. While section 34 in accordance with section 5 of the Quarantine Act prescribes 6 months imprisonment for any violator of the Regulation, with an option of fine. The coming to force of this Regulation[43], further increase the patronage of e-commerce, e-banking and other traditional activities via the internet

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[41] N. O. Chinedu, and U. Ata Obot, A Holistic Presentation of Online Shopping in Nigeria, *Journal of Arts, Science & Commerce* (February 2019) p.25 available <https://www.researchgate.net/publication/326911722> accessed 20th May 2023.
[42] N. O. Chinedu, Holistic Presentation of Online Shopping in Nigeria
[43] Section 35 of the Regulation empowers the personnel of the Nigeria Police Force, the Nigeria Security and Civil Defence Corps, the Federal Road Safety Corps, the Nigeria Immigration Service, the Federal Airport Authority of Nigeria and other relevant Local Government, State and Federal Government agencies to enforce the provision of these regulations.

medium, with a potential increase in disputes that may emanate from such activities.

As a regional ADR hub in Africa[44], the Nigerian ADR community[45] has a compelling reason to improve on the ODR component of its activities in other to maximize the opportunities that lay in the horizon for individual practitioners and the country at large. As a leading ADR community in Africa, Nigeria has large number of professionals who are qualified arbitrators and arbitration Counsel. In a groundbreaking research carried out by the School of Oriental and African Studies (SOAS) in London, tagged '2018 SOAS Arbitration in Africa Survey', which surveyed African arbitrators over a five-year period, data obtained by SOAS from the Chartered

[44] The ADR culture in Nigeria is well rooted, as there is a favourable legal regime for its development. Majority of the Nigerian laws have provisions for Alternative Dispute Resolution. Some of the laws and their ADR provisions include: Section 19 (d) of the 1999 Constitution which provides for respect for international law and treaty objectives, as well as the seeking of settlement of international disputes by negotiation, conciliation, arbitration and adjudication; Arbitration and Conciliation Act, Cap. A18, LFN 2004; section 17 of the Federal High Court Act, which provides for reconciliation in civil and criminal case; section 2 (a) – (c) of the Consumer Protection Council Act Cap. C25, LFN 2004, which encourages negotiation with parties' concern and endeavour to bring about a settlement; section 11 of the Matrimonial Causes Act Cap M, LFN 2004. Others include but not limited to; Section 1 (1) of the International Centre for Settlement of Investment Disputes (Enforcement of Awards) Act, Cap. 120, LFN 2004, section 4 (a) – (h) of the Regional Centre for International Commercial Arbitration Act, Cap. R5, LFN 2004, sections 27,28 and 30 of the Public Enterprise (Privation and Commercialisation) Act, Cap. P18, LFN 2004, section 5 (1) of the National War College Act, Cap.N82, LFN, 2004, section 5 (b) of the Energy Commission of Nigeria Act, Cap. E10, LFN 2004, section 4 (k)-(i) of the Nigerian Communications Commission Act, Cap. N97, LFN 2004 and section 4 (e) Nigeria Export Processing Zones Act, Cap. N107, LFN 2004.

[45] There is a considerable number of ADR institutions these include but not limited to: Nigerian Chartered Institute of Mediators and Conciliators, Nigerian Institute of Chartered Arbitrators (NICArb), Chartered Institute of Arbitrators UK (Nigeria Branch), Lagos Regional Centre for International Commercial Arbitration (LRCICA), Lagos Court of Arbitration (LCA), Lagos Chamber of Commerce International Arbitration Centre (LACIAC), and International Centre for Arbitration and Mediation Abuja (ICAMA). Apart from the aforementioned institutions, many courts in Nigeria have ADR department known as Multi-door Court outlets.

Institute of Arbitrators (UK) CIArb revealed that 2,483 of its 15,000 members are domiciled in African States, while more than half of this number – 51.3% (i.e. 1,250), are Nigerians[46].

Despite the huge commercial transactions generated in Nigeria and the latent potentials of the Nigerian ADR community, disputes arising from these transactions that are basically Nigerian and can be termed *'domestic'* are ultimately arbitrated in foreign jurisdictions. The flight of these *Domestic* (i.e. purely Nigerian) arbitration cases to arbitral seats outside Nigeria is harmful to the development of ADR in Nigeria. It also translates to the loss of revenue in billions of dollars to the majority of practitioners and revenue generation for Nigeria. Again, it has negative effects on investment dispute resolution, growth of arbitration practice/culture and militates against the ease of doing business in Nigeria.[47] In order to widen the vistas of

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[46] *A National Policy on Arbitration in Nigeria,* A publication of the Arbitration and Dispute Resolution Practice Group of Olisa Agbakoba Legal. (February 6, 2020) <https://oal.law/national-arbitration-policy-critical-next-step-following the PI&D> accessed January 20, 2023.

[47] It is for this reason that Arbitration and Dispute Resolution Practice Group of Olisa Agbakoba Legal (OAL) proposed a National Arbitration Policy that will require amending the Arbitration and Conciliation Act (Repeal and Re-Enactment) Bill 2019, which has eventually been passed into law. The policy gave birth to the Arbitration and Mediation Act (AMA) 2023, which was signed into law on 26th May, 2023. The objective of the policy is premised upon the concept that arbitration agreements in respect of all disputes arising from contractual relationships in Nigeria, will have Nigeria as the seat of arbitration. In cases where the whole of the contract or transaction will not be performed in Nigeria, the National Arbitration Policy will still be applicable as long as a significant aspect of the contract will be executed in Nigeria. If the connecting factors in relation to the contract show that it is closely connected to Nigeria, then it is logical to say that any arbitration by the parties should be conducted in Nigeria as the seat. The rationale for the proposed National Arbitration Policy and statutory intervention that will designate Nigeria as the seat of arbitration can be considered in light of the principles of connecting factors as decided by the Supreme Court in the case of *The Noordwind* (1987) All N.L.R. 54, in that case, the Supreme Court extensively considered the issue of connecting factors in relation to a failed contract that ought to have been performed in Nigeria and concluded that it would amount to absurdity to permit the case to be litigated in a foreign country when all the factors favoured it to be litigated in Nigeria. See generally, *A National Policy on Arbitration in*

opportunities for the Nigerian ADR community, ODR must become a permanent feature of the Nigerian ADR mechanism beyond the Covid-19 pandemic restriction. ODR is a convenient medium of settling disputes as the internet has redefined space. ODR mechanism is applicable any time, the internet is available for the use of ODR service providers 24 hours of the day. ODR also save cost as parties and their witnesses can participate from anywhere with less stress and quick result. Ultimately, ODR promotes international trade and ease of doing business as the internet has removed geographic barriers to justice.

The Restriction of movement, social distancing and other Covid – 19 protocols have endeared many Nigerians to online shopping and e-commerce activities in general. Many e-market service providers have made the health and safety of their customers and delivery agents an absolute priority, by implementing a "contactless" delivery option, which eliminates any possibility of physical contact[48]. With the enabling environment for the development and growth of ODR in Nigerian, the ADR community in Nigeria must prioritise a paradigm shift, to accommodate the ODR mechanism during and after the restrictions of the Covid – 19 pandemic.

Nigeria, A publication of the Arbitration and Dispute Resolution Practice Group of Olisa Agbakoba Legal. (February 6, 2020) <https://oal.law/national-arbitration-policy-critical-next-step-following the PI&D> accessed Decembr 27, 2022.

[48] Logistics in Nigeria: Keeping soul of e-Commerce operational during COVID-19 pandemic (14 April, 2020) available at <https://nairametrics.com/2020/04/14/logistics-in-nigeria-keeping-the-soul-of-e-commerce-operational-during-covid-19-pandemic/> accessed 21 May, 2023.

7.0 CHALLENGES OF ODR

Despite the numerous advantages of ODR stated above, there are a lot of factors that could militate against its application and its wide acceptance. This section of the paper focuses on these factors.

The absence of face to face encounter

Perhaps, what is perceived as the weakest point of ODR is the absence of face to face encounter between parties involved in a dispute. It is believed that lack of personal interaction between parties reduces the chances of dispute resolution. Some psychological variables such as body language, mannerism and tone of negotiations assist parties to achieve amicable resolution,[49] which video conferencing may not achieve. In tandem with Michael King's[50] theory of therapeutic jurisprudence in non-adversarial justice, ODR, like the traditional ADR spectrum is also expected to be therapeutic, if it must be as effective. This is because dispute is a psycho-social phenomenon which requires psychotherapy. The ADR service provider is a therapist of a sort, while disputants are analogous to patients[51]. It thus becomes difficult for the third party to achieve effective resolution in the absence of face to face interaction between parties. Hence, for a

[49] K. Seth Computers, *Internet and New Technology* p.600

[50] M. King etal, Non - Adversarial Justice, Australia: The Federation Press (2009) p. 23

[51] Lateef A. Adeleke, Psychotherapeutic Elements in Customary Arbitration among the Yoruba of South-Western Nigeria. *Journal of Arbitration (*2019) vol. 14 No 1 p. 5, See also, P. S. Duane and E. S. Sydney, Theories of Personality, 10th Edition, United State of America (2013), p.358, R.H.J Hornsveld etal, ''The Novaco Anger Scale-Provocation Inventory in Dutch Forensic Psychiatric Patients'', *Psychological Assessment*, (1994) vol. 23 NO. 4 (2011) p.937-944.

dispute resolution mechanism to succeed, it must take human psychology into consideration. According to Sternlight[52], human disputes are intimately connected to human psychology and it is critically important to use a psychological lens to evaluate all approaches to human dispute resolution. Sternlight[53] posit that, non-verbal communication speaks volumes about our positions on issues better than our words. Through our body language, facial expressions, and tone of voice, we communicate enthusiasm or boredom, confidence or skepticism, sympathy or disinterest, and much more. While our non-verbal communication can reinforce our spoken or written words, they can also contradict them at times or reveal that there is more to the story than we may be expressing[54]. Goffman's 'Face theory' strengthens the foregoing position. Goffman[55] propounded that resolution of dispute between individual disputants depends on the communication that ensue between them. He added that negative emotions and commands reduce the likelihood of dispute settlement[56]. All these effects are moderated in the traditional ADR to achieve positive resolution, because parties have physical interaction[57].

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[52] J.R. Sternlight, Pouring a Little Psychological Cold Water on Online Dispute Resolution, *Journal of Dispute Resolution* Winter (2020) At 1 p.3

[53] J.R. Sternlight, Pouring a Little Psychological Cold Water on Online Dispute Resolution p.19

[54] *Ibid*

[55] E. Goffman, *Interaction Ritual*, Garden City. (New York: Doubleday 1967)

[56] *Ibid*

[57] Other authors have opined that the essence of face to face encounter in ADR is to enable parties vent their feelings and emotions and to enable them look directly in the face of the other party and feel the grievance and loss suffered. This is perceived as very difficult to obtain when parties communicate via computer screens. See: E. Katsh, The new Frontier: Online ADR becoming a global priority,

Despite the above critique of ODR, many ODR mechanisms may not be necessarily ineffective because of the absence of face to face interaction of parties. Such ODR channels include automated negotiation in which technology takes over some aspects of a negotiation[58]. This is applicable in circumstances where ODR service providers, offer automated services that settle monetary disputes, such as pecuniary civil claims or insurance claims through automated processes[59]. In the words of Karmika Seth[60], ODR helps to reduce acrimony between parties and the absence of physical interaction is rather an advantage than a disadvantage. For instance, in automated ODR the parties may not be known to each other, as such, the elements of emotion and sentiment is minimized. Where software automated resolution is effective, the face theory becomes inapplicable.[61]

Dispute Resolution Magazine, (2000) p.8 available at <www.umass.edu/cyber/katsh_aba.pdf> accessed on 17th August, 2023.
In the view of Katsh, there is richness in face to face meetings because interaction can occur quickly and spontaneously and often on a non-verbal level. According to Hornle, lack of face to face encounter makes it difficult for the mediator to establish parties' trust and confidence in the procedure. See, J. Hornle *op cit.* Manvey has also posited that without face to face encounter (F2F), the parties may not be satisfied with any settlement that is concluded, regardless of the speed and efficiency of the process. See; I. Manevy, Online dispute resolution: What future? (2001) P.14. Available at <http://ithoumyre.chez.com/uni/mem/17/odr01pdf >accessed 19th July, 2023

[58] S. Kalani, Transition to Online Dispute Resolution: A Mechanism to Curb Transaction Cost in Access to Justice, in R.Nagar et al. (Eds). *Law and Economics Breaking New Grounds*, Lucknow (Eastern Book Company 2017) p.316

[59] K. Seth, Computers, *Internet and New Technology Laws* p.593

[60] K. Seth Computers, *Internet and New Technology Laws* p.600

[61] *Ibid*

The Admissibility of e-arbitration Agreement

Characteristically there are arbitration agreements in form of a written contracts in which parties agree to settle a dispute outside the court through arbitration. In the original contract between parties, the arbitration agreement is one of the numerous clauses in a larger contract. When a party signs an arbitration agreement, he simply agrees to arbitrate in the likely event of any dispute in the future[62]. Contrary to the physical signature applicable in traditional arbitration, in ODR or e-arbitration, endorsement is simply done by clicking either the "I agree" or "I accept" button while filling a consumer agreement form online[63]. This and other forms of electronic procedures have generated a lot of validity questions. For instance, the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (also referred to as the New York Convention) strictly requires that an agreement must be in writing for it to be valid. This requirement seems to smear online arbitration agreement with the hue of doubt, regarding its written nature and validity. Article 2 of the Convention provide thus:

> Each contracting state shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any

[62] Free-Advice: What is in Arbitration Agreement? Available at <http://law.freeadvice.com/litigation/arbitration/agreement_arbitration.htm.> Accessed 17th June, 2023.

[63] As Mason observed, in English law, the validity of a signature depends upon the function it performs, not necessarily the form it takes. The only issue with this kind of signature is proving the identity of the originator. An unauthorised user of a computer or any electronic device could have clicked the ''I agree'' or ''I accept'' button. See: S. Mason, Electronic Signature in Law, 3rd ed. Cambridge (2012) p. 1.

> differences which may have arisen or which may arise between them in respect of a defined legal relationship.

Similar to the above provision, the Nigerian courts in many decisions attached value to the traditional form of signature and consider an unsigned document to be worthless. In the case of Omega Bank Nig. Plc. v O.B.C. Ltd[64], the Supreme Court per Niki Tobi JSC held that ''a document which is not signed does not have efficacy in law. Such a document is considered worthless, valueless, ineffective, insignificant, and cannot be accorded any recognition or consideration in court.[65]'' Many writers have held that the New York Convention is an outdated document which lost sight of the present information revolution[66]. Scholars like Hill further argued that since the Convention made mention of fax and telegram, email is similar in nature and credibility to a fax or telegram[67].

However, Article 6 (1) of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Electronic Commerce 1996 has resolved this challenge. By virtue of this Article, an e-arbitration agreement has the same status as the traditional arbitration agreement and therefore becomes valid. The Article provides thus: "where the law requires information to be in writing, that requirement is met by a data message if the

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[64] (2005) LPELR-2636 (SC)

[65] See also: *Jinadu* v *Esurombi-Aro* (2009) 9 NWLR (Pt. 1145) 55; *Anunobi* v. *Hassan & Anor*. (2003) LPELR-21870 (CA); *Omole v Aluko & Anor*. (2015) LPELR- 25671 (CA); *Enebong & Anor*. v *Edem & Ors*. (2016) LPELR-411190 (CA).

[66] L. Biukovic, International Commercial Arbitration in Cyberspace: Recent Development'', Northwestern Journal of International Law and Business, (2002) Vol. 22: Issue 3. Available at <http://scholarlycommons.law.northwestern.edu/njilb/vol22/iss3/20> Accessed 18th August, 2023.

[67] R., Hill, Online Arbitration: Issues and Solutions. 15 ARB. Int'l (1999). Available at <http://www.umass.edu/dispute/hill.htm> Accessed 20th August, 2023.

information contained therein is accessible so as to be usable for subsequent reference". This is in tandem with the provisions of section 84 of the Nigerian Evidence Act 2011, where e-signature falls into the category of computer documents which is admissible in evidence. Section 93 (2) of the Act gives specific recognition to electronic signature as follows: ''where a rule of evidence requires a signature or provides for certain consequences if a document is not signed; an electronic signature satisfies that rule of law and avoids those consequences''. In case of any contention with respect to electronic signature, section 17 (1) (b) of the Cybercrime Act 2015 provides that: ''whenever the genuineness or otherwise of such signature is in question, the burden of proof, that the signature does not belong to the purported originator of such electronic signature shall be on the contender''

From the foregoing provisions, it can be concluded that the Nigerian law is ultimately ODR friendly, the decision of the Court of Appeal per Ogunwumiju JCA, in *Continental Sales Ltd. v. R. Shipping Inc.*[68] further leads credence to this. In this case, the contention was whether communication by email was permissible communication under the English Arbitration Act, 1996, which stipulated that a notice or other document may be served on a person ''by any effective means''. It was contended that communication by email was not one of such ''effective means.'' In dismissing this argument and properly situating communication by email as an effective communication in arbitration matters, his Lordship in his lead judgment held on page 1393 thus:

[68] (2012) All FWLR (PT.630) 1377 CA

> Since the intention of the e-mail messages and correspondence from the respondent, the solicitors, Philip A. Bush, and the arbitrator, Mr. David Aikman to the appellant was to achieve the result of communicating the fact that the arbitration proceedings had been initiated, and the various stages of the process, I am of the view that there has been effective service of the whole arbitration process on the appellant. The spurious argument that the service of notice was not in writing cannot fly. E-mail is a form of communication that is set down in writing. It is not oral. The fact that it is electronic is immaterial, it is not in the thin air. It can be downloaded and (is) as real as a hard copy of the letter or mail in your hand.

Therefore, electronic signature made by electronic process is qualified as a computer document that can be safely recognized and accepted in arbitration agreement as similar to paper documents.

Issues of Confidentiality and Security

A very important feature of ADR is confidentiality, once the system displays high level of confidentiality, disputants have trust in such system and are ready to submit their dispute. The element of confidentiality is very much threatened in the ODR mechanism, because it is driven by the internet. The internet is vulnerable to cyber-attack and this could compromise the confidentiality and trust of parties in ODR. The tools used by cyber attackers

are numerous. These include: hackings[69], SQL injection[70], password cracking[71], sniffers[72], and viruses and worms[73] among others[74] Consequent upon these concerns have been shown about the ability of the ODR mechanism to keep confidential, parties' deliberations and decisions. Questions have been raised about the protection of the data sent and received in ODR mechanism against unauthorised third party. Katsh[75] has opined that protecting trust and the discussion process in ADR is very important because parties are more likely to speak freely when they are sure of the confidentiality of the whole process. To surmount this challenge, some

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[69] The Australian Law Dictionary defines hacking as unauthorized access to a computer or computer system usually with intent to cause harm or damage. Trischa Mann, Australian Law Dictionary (2nd edn Oxford University Press 2013) p. 163 – 164 Often times, hackers impersonate the system administrator by employing default maintenance password that the system administrator failed to change, to gain access to the system.

[70] SQL injection is a type of security exploit whereby the attacker injects Structured Query Language (SQL) code through a web form input box, to gain access to resources, or make changes to data. Here, the attacker injects SQL commands to exploit non-validated input vulnerabilities in a web application database backend and consequently execute arbitrary SQL commands through the web application. The aim of a password cracker is mostly to obtain the root/administrator password of the target system

[71] Password cracking is a term used to describe the penetration of a network, system, or resource with or without the use of tools to unlock a resource that has been secured with a password.

[72] Sniffers is a programme or device that captures the vital information from the network traffic specific to a particular network. Sniffing is basically a data interception policy whose objective is to steal passwords (from email, the web, FTP, SQL or telnet), email text, files in transfer etc. Dasuki, M.S 'National Cyber Security Policy' (December, 2014) available at <https://cert.gov.ng/images/uploads/NATIONAL_CYBESECURITY_POLICY.pdf> accessed on 20th August, 2023.

[73] A virus is a self-replicating malicious programme that replicates its own code by attaching copies of it into other executable codes and operates without the knowledge of the computer user posing serious threat to both business and personnel. It resides in the memory and replicates itself while the programme where it is attached is running.

[74] Oludele, A.*et al* 'Vulnerabilities in Network Infrastructures and Prevention/Containment Measures' (Paper presented at the Proceedings of Information Science & IT Education Conference (InSITE, 2012) available at <http://proceedings.informingscience.org/InSITE2012/InSITE12p053-067Awodele0012.pdf> accessed on 2nd August, 2023.

[75] Katsh E., Dispute Resolution in Cyberspace, 28 CONN. L. REV. (1995) p. 971

security measures have been prescribed. One of such is the digital signature which plays an important role in ensuring the authenticity, integrity and nonrepudiation of data communication thereby enhancing trust. It is an authentication method that uses public-key cryptography[76]. The public-key cryptography consists of two keys. Private and public keys which is used to secure data communication. A message sender uses the recipient's public key to encrypt a message, to decrypt the sender's message, only the recipient's private key may be used.

Enforcement of ODR Award

The ultimate goal in traditional arbitration proceeding is to enter an award. An award is the decision of an arbitral tribunal similar to the judgement of a court and must be enforced[77]. With the nature of ODR, the entire proceeding of e-arbitration up to the entry of an award is a virtual exercise. Concerns have been raised with respect to the enforcement of e-arbitration award in view of the provision of Article 2 of the New York Convention which read thus: "To obtain recognition and enforcement, the applicant party shall, at the time of the application, supply duly authenticated originals or duly certified copies of the award and the arbitration agreement". The implication is that the requirement of authenticity and originality cannot be reconciled with the online award, which is not rendered in hard copy. A very close solution is inherent in Article 3 of the York Convention. Article 3 of the New York Convention provides that "the contracting state shall recognize and enforce arbitral awards in accordance with the procedural laws of the territory where the award is relied upon." Simply put, once the state where an award is to be

[76] K. Seth Computers, *Internet and New Technology Laws* p.146-149

[77] USLEGAL: Arbitral Award Law and Legal Definition. Available at <http://definitions.uslegal.com/a/arbitralaward/> accessed on 20th July, 2023.

enforced accepts an electronic form of writing, there should be no barrier to the enforcement of the electronic award. Further still, Karnika Seth observed that if an ODR mechanism succeeds in settling a dispute, it could culminate in a binding settlement agreement, which is legally binding and enforceable in a court of law[78].

Arbitration seat and applicable Law

Arbitration seat and applicable Law is not an issue that started with ODR. It is an age long phenomenon with the traditional ADR. Over the years, there have been difficulties in determining a seat of online arbitration and the applicable law in online arbitration. The solution to this is not far-fetched. By the provision of Article 20 (1) of the Model Law on Arbitration, parties are free to choose the seat of arbitration. Where they fail to reach an agreement as to the choice of seat of arbitration, the seat of arbitration shall be determined by the arbitral tribunal. In similar vein, the proper response to the problem of applicable law in ODR/online arbitration is that of place of arbitration in traditional ADR. In line with the principle of party autonomy, the parties are free to choose the law applicable to the substance of their dispute. Like it is applicable in international commercial arbitration, it is only when parties fail to make a choice that the arbitral panel chooses the applicable law. According to Biukovic[79], international commercial arbitration gives parties the opportunity to shop around for the most favourable law. By its nature, e-arbitration is an aspect of international commercial arbitration, parties involved should also be afforded the opportunity to search for the most favourable law. The goal of the National Arbitration Policy proposed in 2020

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[78] K. Seth Computers, *Internet and New Technology Laws* p.602
[79] L. Biukovic , International Commercial Arbitration in Cyberspace: Recent Development p.333

is aimed at making Nigeria the hub of arbitration in Africa and to ensure that Nigeria remains the venue of arbitration for transaction in respect of government contracts especially with foreign entities. Also, private commercial transactions originating from Nigeria shall be determined in Nigerian.

The policy birth the Arbitration and Mediation Act (AMA) 2023, which was signed into law by President Muhammad Buhari on 26th May, 2023. The Act repeals the country's 35-year –old Arbitration and Conciliation Act 1988 and will govern both domestic and international arbitration and mediation proceedings in Nigeria providing a unified framework for the fair and efficient settlement of commercial disputes by arbitration and mediation. The Act seeks to strengthen Nigeria's position as a leading arbitration hub in Africa, and promote the efficient use of arbitration within its borders. The Act in Section 73 (4), also encourages the use of ODR in dispute resolution in Nigeria.

8.0 CONCLUSION

ODR is an efficient medium of dispute resolution in the cyberspace. It represents a beacon of hope with a promising future to create an efficient dispute resolution regime, using the information and communications technology. The corona virus outbreak has led to the migration of many human activities to the cyberspace, thereby generating disputes that will also be settled in the cyberspace. In order to sustain the growth and development of Nigerian vast ADR community, ODR should not be treated as seasonal practice that will fade off, once the world conquers Covid-19. As a primary requirement for the growth of ODR, Nigeria needs to improve in terms of power supply and internet connectivity. For ODR

to be impactful, some basic conditions must be satisfied, this include; accessibility, appropriate training of neutrals and parties, as well as creations of trust and awareness. It has been established in this paper, that human psychology is at the core of many disputes, therefore, we need to design ODR hardware and software to take human psychology into consideration.