



# JOSEPH AYO BABALOLA UNIVERSITY LAW JOURNAL

VOL. 5, 2018

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**JOSEPH AYO BABALOLA UNIVERSITY  
LAW JOURNAL**

*This Journal may be cited as*

**VOL 5, 2018**

**PUBLICATION OF THE COLLEGE OF LAW  
JOSEPH AYO BABALOLA UNIVERSITY**

*(Established by Christ Apostolic Church World Wide  
And the First Entrepreneurial University in Nigeria)*

**IKEJI-ARAKEJI  
OSUN STATE, NIGERIA**

ISSN 2449-1853

## THE USE OF ONLINE DISPUTES RESOLUTION MECHANISMS IN THE SETTLEMENT OF COMMERCIAL DISPUTES IN NIGERIA: CHALLENGES AND PROSPECTS

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### Abstract

Commercial transactions have gone beyond traditional face-to-face level to online. Today, the distance between a seller and a prospective buyer of goods and services is only a click away as the internet has transformed the world to a global village. The evidence of this is seen in the emergence of online supermarkets such as jumia, konga, amazon, ebay, yudala, jiji, OLX, etc. which offer various products and services. It is needless to emphasize that in the course of transacting business whether online or offline, dispute may arise, hence, the need for disputes resolution. Traditionally, litigation have served as the main dispute resolution platform but due to certain inadequacies such as technicality and formality, there have been a move to Alternative Dispute Resolution (ADR) which is reputed as being informal, confidential, relatively cheap, speedier, etc. However, in settling disputes, providers and users of ADR have moved from offline ADR to online ADR (ODR) which is the use of online ADR Mechanisms in the online environment mainly precipitated by e-commerce. These ODRs mechanisms include online mediation, arbitration and negotiation through technological devices such as e-mails, e-signature, video-conferencing and chats. This article examines the meaning of ADR and ODR by accentuating the differences between them. It also discusses the types of ODR mechanisms, the legal framework of traditional ADR and ODR in Nigeria. The article further highlights the challenges confronting the utilization of ODR in Nigeria and ways to overcome them as well as the prospects of ODR in Nigeria. It makes some recommendations especially the need for the amendment of the Arbitration and Conciliation Act to give ODR statutory backing before concluding.

**Key words:** Online Dispute Resolution, Alternative Dispute Resolution, Jurisdiction, E-commerce, Confidentiality, Introduction

... why... are lawyers, in essence, such obscure men? Why do their undoubted talents yield so poor a harvest of immortality? The answer, it seems to me ... is their professional aim and function [is] not to get at the truth, but simply to carry on combats between ancient rules.<sup>1</sup>

The commercial life of man could be said to be the most active aspect of his life. Hence, people all over the world engage in commercial activities through international trade and commerce with the aim of meeting various human needs. Before now, international trade and commerce have taken a somewhat analog dimension wherein buyers and sellers of goods and services had to meet face-to-face to transact business. However, with the advancement in science and technology over the years, man has been able to migrate from analog commercial transactions to digital. The advent of internet made this radical change possible. Thus, all over the world today, the distance between a seller of goods and services and a prospective buyer is no longer measured in kilometers or miles but at the speed of internet which is only a click away. The internet has emerged as a global and borderless one stop market for all kinds of products and services. All that is needed to transact business in it is access.<sup>2</sup> This has transformed the world to a global village. This transformation is

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<sup>1</sup> Mencken, H. L., *American Mercury*, Vol. 13(1), 1928, P. 36.

<sup>2</sup> Ahmed, R. I., "The Concept of Online Dispute Resolution in the Administration of Justice", Vol. 12, *Nigerian Law Practice Journal*, 2013, page 136. Biukovic, L., *International Commercial Arbitration in Cyberspace: Recent Developments*, Vol. 22, Issue 3, *Northwestern Journal of International Law and Business*. Available at <<http://scholarlycommons.law.northwestern.edu/njilb/vol22/iss3/20>> Accessed on 23<sup>rd</sup> December, 2016. Arun, R., *The Legal Challenges facing Online Dispute Resolution: An Overview*, available at <[http://www.garlexia.com/public/research/articles/research\\_articles-art42.html](http://www.garlexia.com/public/research/articles/research_articles-art42.html)> Accessed on 23<sup>rd</sup> December, 2016.

evident in the emergence of several internet based (online) supermarkets including but not limited to the following kongka, OLX, Jumia, Amazon, ebay and yulada which offer several kinds of goods and services. Today in Nigeria, buying and selling has become very easy as anyone with an internet enabled device can purchase goods and have them within a short period of time delivered at his or her doorstep.

However, in the course of online transactions, the occurrence of dispute cannot be wished away. Traditionally, whenever a commercial dispute occurs, parties resort to litigation for settlement. However, due to certain impediments associated with litigation (such as inability to foster relationship through a win-win outcome, lack of confidentiality of proceedings (publicity), lack of party autonomy, relative high cost, formality, technicality, time consuming, etc.), prudent business men have had to seek alternative or complimentary means of dispute settlement which has led to the propagation and acceptance of Alternative Dispute Resolution (ADR) and it is reputed as being speedier, informal, confidential, less expensive, guaranteed win-win outcome and relationship fostering.<sup>3</sup> Thus, since its advent, ADR have been practiced offline but due to online or internet transactions, offline ADR mechanisms such as negotiation, mediation and arbitration are now being used online to settle both online and offline disputes necessitated by business exigencies and desire to legally obliterate jurisdictional and choice of law issues which usually plague normal offline ADR. This new modernized dispute resolution platform (i.e. ODR) is an offshoot of ADR which have been accepted in developed jurisdictions such as USA and UK.<sup>4</sup>

This article is aimed at examining the meaning of Alternative Dispute Resolution and its offshoot Online Dispute Resolution in the settlement of commercial disputes. It underscores the nexus between ADR and ODR while tracing the evolution, nature, scope and growth of ODR. The article further evaluates the platforms being used for ODR as well as the types of ODR mechanisms available to parties who may desire to opt for it. The legal framework of both ADR and ODR in Nigeria is discussed in the article. The article critically examines the problems confronting ODR in Nigeria as well as measures that have been and should be taken to surmount them. The prospects of ODR are also examined as well as matters arising. The article contains some recommendations and a conclusion.

#### **Alternative Dispute Resolution Defined**

The acronym ADR means Alternative Dispute Resolution, a group of flexible approaches to resolving disputes more quickly and at a lower cost than going through the tedious road of adversarial proceedings. It is a term which has become associated with a variety of specific dispute resolution options such as Negotiation, Mediation, Conciliation, Case Evaluation, and a lot of other hybrid mechanisms.<sup>5</sup> Borokini<sup>6</sup> states that the Alternative Dispute Resolution (ADR) is the method and procedure used to resolve disputes either as alternative to the traditional dispute resolution mechanism or as supplement to the traditional mechanism. Alternative Dispute Resolution as the name implies, are forms of dispute settlement mechanisms which have evolved as a result of business exigencies and the short comings of litigation coupled with the demands of modern commercial and socio-political agitations such as need for preservation of relationships at the end of dispute settlement, confidentiality, informality, avoidance of technicalities, the desire for expeditious dispute settlements, party autonomy, the need to minimize cost, unwillingness of a disputant to submit himself to the rules and laws of a forum other than his. Orojo and Agomo<sup>7</sup> opines that, the term "Alternative Dispute

<sup>3</sup>Shalagh Massingham, *Alternative Dispute Resolution – Qatari Perspective*, Vol. 10, NO. 2, Business Law International, (2009) 183-189 at 183, Akeredolu, E. A, *Mediation: What it is and How it Works*, Ibadan, Carenter Associates, 2011, page 7. Adenipekun, A., "Arbitration" Vol. 2, *Journal of the Law Students' Society, University of Ibadan*, 2008, page 11-28, at p. 11.

<sup>4</sup> Amid, R. I., *op. cit.* page 135.

<sup>5</sup> Dada, T.O. *General Principle of Law*, 3<sup>rd</sup> Ed., Lagos, Manure-Joe Production Ent., 2013, Page 528. See also Genn, H., *Civil Justice*, Cambridge, Cambridge University Press, 2009, P. 80. He stated that "ADR may be described as a spectrum of informal procedures for resolving disputes- ranging from negotiation, to non-binding third party intervention (such as mediation), to binding third party intervention (such as arbitration), outside the formal circuit of the courtroom."

<sup>6</sup> Borokini, A. A., "Is ADR the Death of Litigation" Vol. 4, No. 2, Fountain Quarterly Law Journal, 2006, page 43-55, at page 43. He asserted that "ADR is to supplement the available resources for justice by providing enhanced, more timely, cost effective and use-friendly access to justice,... the courts of this country should not be places where the resolution of disputes begins. They should be the place where disputes end-after all means of resolving disputes have been considered"

<sup>7</sup> Orojo, J. O., and Ajomo, M. A., *Law and Practice of Arbitration and Conciliation in Nigeria*, Lagos, Mbeyi & Associates (Nigeria) Limited, 1999, page 4. See also Akeredolu, E. A, *Mediation: What it is and How it Works*, Ibadan, Carenter Associates, 2011, page 5

Resolution” (abbreviated as “ADR”) is generally used to describe the methods and procedures used to resolve disputes either as alternatives to traditional dispute resolution mechanisms of the court or in some cases as supplementary to such mechanisms. The best known methods of alternative dispute resolution (ADR) apart from Arbitration are Conciliation and Mediation, Mini-Trial (known in Britain as Executive Tribunal) and Med-Arb. Alternative Dispute Resolution has been defined as a procedure for settling a dispute by means other than litigation.<sup>8</sup>

### Meaning, Nature and Scope of Online Dispute Resolution

This section of this paper examines the meaning of ODR, its nature and scope as it relates to commercial disputes in Nigeria. Online Dispute Resolution (ODR) “refers to a wide class of alternate dispute resolution processes that take advantage of the availability and increasing development of internet technology.” It is a set of DR processes that allow for the resolution of disputes via online mechanisms such as the Internet or some form of technology that allows for virtual communication without requiring the parties to be in a room together.<sup>9</sup> Although almost all ODR processes tend to be ones that allow for written submissions only, there is a broad spectrum of ODR services that range from online arbitration to fully automated online “blind bidding” 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 processes should also be convenient for the users and not cause any undue accessibility concerns.<sup>10</sup> Online Dispute Resolution (ODR) uses alternative resolution processes to resolve a claim or dispute. ODR can be used for disputes arising from an online, e-commerce transaction, or disputes arising from an issue not involving the internet, called an “offline” dispute. Online dispute resolution can involve the parties in mediation, arbitration, and negotiation. The parties may use the internet and web-base technology in a variety of ways. Online dispute resolution can be done entirely on the internet, or “online,” through email, videoconferencing, or both. The parties can also meet in person, or “offline”. Sometimes, combination of online and offline methods are used in ODR.<sup>11</sup> Online Dispute Resolution is a branch of dispute resolution which uses technology to facilitate the resolution of dispute between parties.<sup>12</sup> This technology which is also ICT has been named by Katsh and Rifkin as the “fourth party” because ODR is seen as an independent input to the management of dispute<sup>13</sup>

<sup>8</sup> Ajetumobi, A.O., *Alternative Dispute Resolution and Arbitration in Nigeria: Law, Theory and Practice*, Ikeja, Princeton & Associate Publishing Co. Ltd., 2015, P. 19.

<sup>9</sup> Feliskas, P., and Eglė K., *Online Dispute Resolution in Consumer Disputes*. Available online at <[https://www.mruni.eu/upload/iblock/f96/8\\_Petrauskas\\_Kybartienht-1.pdf](https://www.mruni.eu/upload/iblock/f96/8_Petrauskas_Kybartienht-1.pdf)> Accessed on 29<sup>th</sup> June, 2017. They assert thus “The collective term “On-line Dispute Resolution (ODR)” is used internationally for different forms of on-line dispute settlement by means of ADR-methods. ODR supplements existing ADR methods based on the assumption that certain disputes (more specifically e-disputes) can also be resolved quickly and adequately via the Internet. ODR can be defined as the deployment of applications and computer networks for resolving disputes with ADR methods. Both e-disputes and brick and mortar disputes can be resolved using ODR. At the moment there are four types of ODR systems”

<sup>10</sup> Dispute Resolution Reference Guide, Ministry of Justice, Canada. Available online at < <http://www.justice.gc.ca/eng/ro-pr/csi-sjc/dprs-sprd/res/drrg-mrrc/10.html>> Accessed on 28<sup>th</sup> June, 2017. See also Rule, C., *Introduction to Online Dispute Resolution for Business*. Available online at

<<https://www.mediate.com/articles/rule2.cfm>> Accessed on 28<sup>th</sup> June, 2017. She asserted thus “Online dispute resolution is not tied to geography, so disputants can reach resolution even if they are located on different continents. ODR can move to resolve matters before they escalate so that disputants can quickly resolve the matter and get back to business. ODR is not tied to particular bodies of law, so there is no need for each side to retain expensive legal counsel to learn the legal structure of the other side’s country. ODR can be priced much more reasonably than legal options, and even less than the cost of a single plane ticket. ODR can also leverage expertise from skilled neutrals around the world, ensuring that the participants will get a fair hearing from someone who has knowledge and experience in the matter at hand. ODR enables businesses, governments, and consumers to achieve the best resolution possible in the shortest amount of time.”

<sup>11</sup> American Bar Association Task Force on Electronic Commerce and Alternative Dispute Resolution Task Force Draft, March, 2002, P. 1.

Available online at<

[https://www.americanbar.org/content/dam/aba/migrated/2011\\_build/dispute\\_resolution/consumerodr.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/consumerodr.authcheckdam.pdf)> Accessed on 28<sup>th</sup> June, 2017.

<sup>12</sup> Petrauskas F and Kybartiene E. 2011, *Online Dispute Resolution in Consumer Disputes*. Available at [http://www.mruni.eu/en/mokslo\\_darbai/jurisprudencija/](http://www.mruni.eu/en/mokslo_darbai/jurisprudencija/) (last visited on 14th December, 2014). p.922.

<sup>13</sup> Katsh, E and Rifkin, J. 2001, *Online Dispute Resolution: Resolving conflicts in cyberspace*. Jossey-Bass: San Fransico at p. 93-117.

From the above, the scope of ODR covers both offline and online disputes. Thus, it is possible for a dispute which occur offline to be settled through online mechanisms. This is dependent on the agreement of the parties taking into cognizance their convenience and the subject matter of the dispute.

### The Legal Framework for ADR and ODR in Nigeria

Alternative Disputes Resolution (ODR inclusive) Proceedings in Nigeria are principally regulated by the provisions of the Arbitration and Conciliation Act (ACA).<sup>14</sup> The ACA is made up of 58 sections divided into four parts. Sections 1 and 2 provide the form in which an arbitration agreement must be in and makes it irrevocable subject however, to the agreement of the parties or an order of court.<sup>15</sup> The Act also makes provision for stay of proceedings, numbers of arbitrators, mode of appointment of arbitrators, grounds for challenge of an arbitrator and appointment of substituting arbitrator.<sup>16</sup> Also, as regard procedural matters, the Arbitration Rules set out in the first Schedule to the ACA provides the regulatory guidelines. Sections 12 and 13 therefore empower an arbitrator or tribunal to rule on its jurisdiction where there is a challenge as well as order interim measures of protection of the subject matter of arbitration.<sup>17</sup> Sections 29 and 30 of the Act makes provisions for recourse against an award while sections 31 and 32 deals with the subject of recognition and enforcement of awards.<sup>18</sup>

By virtue of section 53 of ACA another legal framework is the Arbitration Rules set in the first Schedule of the Act. These Rules regulate procedural matters in arbitral proceedings. The Rules deals with matters such as issuance of notice of arbitration, mode of representation of parties and assistance, composition of the arbitral tribunal, procedure for challenge of an arbitrator. etc.<sup>19</sup> By virtue of section 54 of the ACA, the Convention on Recognition and Enforcement of Foreign Arbitral Awards also forms the *corpus juris* of arbitration in Nigeria. However, with regards to ODR, the Nigeria law is way far back as the legal framework hereafter examined is silent with regards to ODR. This silence is one of the inhibitions to ODR in Nigeria as it is likely and safe too for one to close his eyes to modern day realities and argue that Nigerian law does not recognize ODR.

### Types and Platforms for Online Dispute Resolution

It has been established that ODR came into being as a result of the development of the internet and several disputes springing up from parties engagements. For instance, at the launching of the new EU ODR platform, Věra Jourová, Commissioner for Justice, Consumers and Gender Equality, stated that:

While we are still in an early phase of this new tool, we can already say that the Online Dispute Resolution platform has been well received by consumers. We also see that the mere fact of a consumer using the platform often is incentive enough for traders to resolve the dispute. We are giving consumers a practical tool to help them benefit from their rights in practice. On the other side, traders also have a lot to gain from this platform and should use it more. Particularly for online traders it is essential to be seen as reliable by potential consumers. Using this tool will help them earn consumer trust, whilst providing them with a simple and fast way of resolving disputes.<sup>20</sup>

<sup>14</sup> Arbitration and Conciliation Act, 1988, Cap. A18, LFN, 2010.

<sup>15</sup> *C. N. Onuselogu Ent. Ltd. v. Afribank Nig. Ltd.* [2005] 12 NWLR (Pt. 940) 577. See also Aderibigbe, S.I. "An Inquiry into the Formal Validity Requirement of Arbitration Agreements" Vol. 1, No. 1, Afe Babalola University Law Journal, 2014, pages 93 – 116 at 97.

<sup>16</sup> See sections 5, 6, 7, 8, 9 and 11 of ACA respectively.

<sup>17</sup> Amadi, E., "Kompetenz-Kompetenz: Can an Arbitral Tribunal Determine its Jurisdiction under English Law" *Journal of Arbitration*, Vol. 11, NO. 1, April 2016, P. 231.

<sup>18</sup> However, sections 51 and 52 of ACA contains provisions for the recognition and enforcement of Foreign Arbitral Awards in Nigeria.

<sup>19</sup> See Article 3, 4, 5, 6 and 9 of the Arbitration Rules respectively.

<sup>20</sup> Available at <[www.odr.info](http://www.odr.info)> Accessed on 16<sup>th</sup> April, 2017.

The above statement indicates that the establishment of the platform was timely and had been really beneficial to both consumers and traders. Thus, within the space of one year of its functioning, it has handled more than 24, 00 cases using distinct ODR methods in resolving numerous online disputes.

Therefore, about four different types of ODR mechanisms are available to disputing parties in resolving their disputes faster and cheaper online. They are:

- a. Online settlement, using an expert system to automatically settle financial claims;
- b. Online arbitration, using a website to resolve disputes with the aid of qualified arbitrators;
- c. Online resolution of consumer complaints, using e-mail to handle certain types of consumer complaints;
- d. Online mediation, using a website to resolve disputes with the aid of qualified mediators.

However, it is apposite to state that the rate at which these ODR mechanisms are being put to use are different. Hence, online settlement and online mediation are currently the most advanced and therefore most frequently utilized. Hereunder is an analysis of these mechanisms for better understanding of their workings.

**a. Online Settlement using an Expert System to Automatically Settle Financial Claims.**

Online settlement of claims is the most developed form of online dispute resolution. It is otherwise known as online negotiation. ODR provides both fully automated and assisted forms of negotiation which is very well advanced in the US. Automated negotiation covers many areas of disputes, including personal injury, divorce, uncollected judgments, and real estate, with the most frequent use being in the area of insurance.<sup>21</sup> Users of the various systems range from consumers through insurance companies and governments. Most service providers restrict their services to commercial matters arising out of ecommerce.<sup>22</sup>

Cybersettle<sup>23</sup> was the first website to offer online settlement of financial claims followed quite immediately by Clicknsettle.<sup>24</sup> While Cybersettle offers online settlement of insurance claims, Clicknsettle provides online settlement on any kind of monetary dispute. Both platforms offer settlement of claims via the use of an expert system. An expert system is one that matches double-blind offers and demands, and the systems are built in such a way that parties do not know the amount the other party is asking for or offering, that is, both sites guarantee that these settlement offers and demands are completely confidential.<sup>25</sup> The Cybersettle system permits the claims representative to make three offers, and the plaintiff may counter such with three demands. Clicknsettle gives the parties 60 days within which period they will submit as many offers or demands they want as possible.

If an offer and a demand are within an agreed-upon formula, the claim will automatically be settled for the median amount. However, if no settlement is reached, parties will still be able to negotiate without prejudice, because they will not know the amount the other party has offered or demanded during the e-settlement procedure. Also, both sites seem to use the same algorithm for matching the offers and demands.<sup>26</sup>

<sup>21</sup> See Thomas Schultz, Gabrielle Kaufmann-Kohler, Dirk Langer & Vincent Bonnet, 'Online Dispute Resolution: The State of the Art and the Issues', E-Com Research Project of the University of Geneva, December 2001, available at <http://ssrn.com/abstract=899079>. See also Melissa Conley Tyler & Di Bretherton, "Research into Online Alternative Dispute Resolution: Exploration Report". Prepared for the Department of Justice, Victoria, Melbourne, The International Conflict Resolution Centre, March 21, 2003. Executive Summary at 1. Available at: [www.adr.com.au/adr/odr/odr%20report%2015%20final.pdf](http://www.adr.com.au/adr/odr/odr%20report%2015%20final.pdf) 17th April, 2017.

<sup>22</sup> Some of the main service providers in this area are ClickNsettle, Cybersettle, MARS, The Claim Room, and Webmediate. See Brannigan, C., 'Online Dispute Resolution', CCH Canadian Limited, 12<sup>th</sup> December, 2007. Available at [http://www.mediate.ca/uploads/CCH\\_ODR\\_Chapter.pdf](http://www.mediate.ca/uploads/CCH_ODR_Chapter.pdf) 17<sup>th</sup> April, 2017.

<sup>23</sup> Op cit, no. 26.

<sup>24</sup> Formerly available at <http://www.clicknsettle.com> now at <http://www.namadr.com/aboutus.cfm> 16<sup>th</sup> April, 2017. National Arbitration and Mediation (NAM)'s ADR services include, but are not limited to, Arbitration, Mediation, Online and Offline Case Management, Trial Preparation Services, Mock Jury Trials, Dispute Resolution Training, Videoconferencing and myADR, the company's patented risk management system.

<sup>25</sup> Esther van den Heuvel, 'Online Dispute Resolution as a Solution to Cross-Border E-disputes: An Introduction to ODR.' Available at [www.oecd.org/internet/consumer/1878940.pdf](http://www.oecd.org/internet/consumer/1878940.pdf) 16<sup>th</sup> April, 2017.

<sup>26</sup> Ibid

An example of a comprehensive and multiparty online settlement or eNegotiation system currently available is the Smartsettle Infinity System developed by iCanSystems Inc. It incorporates sophisticated tools that enable non-linear modeling, uses effective optimization algorithms and puts users in control of the process. It also helps parties focus on, collaborating regarding their case; building a Framework for Agreement; keeping track of versions; allowing dynamic representation of issues; tracking shared issues and private variables with constraints and formulas; eliciting and analyzing user-preferences; providing a mechanism for the exchange of packaged proposals and making intelligent suggestions for resolution.<sup>27</sup>

Other online settlement websites like Ussettle<sup>28</sup> and Settlesmart<sup>29</sup> were also established in order to reduce cost and assist any number of parties to a relatively quick solution to their negotiation problem.

**b. Online Arbitration Using a Website to Resolve Disputes with the Aid of Qualified Arbitrators.**

Online arbitration is defined by Al-Khaledias "the contract in which the proposal and acceptance meet through the world communication network using electronic exchange of data with view to refer to arbitration all or some of the disputes arising or which may arise between them concerning a contractual or non-contractual specific legal relation."<sup>30</sup> Zamzam defined it as "the agreement of the parties on settling the dispute constituted between them or which may be constituted in the future by referring to arbitration using the internet."<sup>31</sup> Thus, online arbitration is a combination of two processes. It may involve the process of an agreement made traditionally on paper which will have recourse to resolution of any arising dispute through online arbitration, and secondly, it may be an agreement made online, that is, where an electronic means is used in entering into the agreement, which will be resolved by online arbitration.

It is apposite to note that online arbitration is also called cyber-arbitration,<sup>32</sup> cybitration,<sup>33</sup> cyberspace arbitration,<sup>34</sup> virtual arbitration,<sup>35</sup> electronic arbitration,<sup>36</sup> or arbitration using online techniques.<sup>37</sup> Its service is available for both online and offline commercial disputes involving consumers and businesses. The largest business-to-business dispute resolution organization in the United States is the American Arbitration Association (AAA).<sup>38</sup> Many business contracts include an arbitration clause specifying the AAA as the organization that will administer arbitration between the parties. This organization maintains a website which can be accessed by the public to file claims. There is a fee for filing a claim, but the process is fast and

<sup>27</sup> Ernest, T., Miniato, P., and Bruce, H., ODR and eNegotiation. Available Online at <<http://www.ombuds.org/odrbook/thiessen.pdf>> Accessed on 16<sup>th</sup> May, 2017.

<sup>28</sup> Welcome to ussettle. Available online at <<http://www.ussettle.com/>> Accessed on 16<sup>th</sup> May, 2017.

<sup>29</sup> The Workings of Settlesmart. Available online at <<http://www.settlesmart.com/>> Accessed on 16<sup>th</sup> April, 2017.

<sup>30</sup> Al-Khaledias, *Online Arbitration*, Cairo, Al-Nahdha Al-Arabia Publishers, 2008, P. 202.

<sup>31</sup> Zamzam Abdul Menem, *Law on Online Arbitration*, Cairo, Al-Nahdha Al-Arabia Publishers, 2009, P. 53.

<sup>32</sup> D. Girsberger & D. Schramm, 'Cyber-Arbitration', (2002) 3 *European Business Organization Law Review* 605 at 606; and T. J. Lanier, 'Where on Earth does Cyber-arbitration Occur?: International Review of Arbitral Awards Rendered Online' (2000) 7 *ILSA J. Int'l & Comp. L.* 1 at 1.

<sup>33</sup> Herrmann, G., 'Some Legal E-flections on Online Arbitration ("cybitration")' in: R. Briner, L. Y. Fortier, K. P. Berger, J. Bredow, eds., *Law of International Business and Dispute Settlement in the 21st Century* (Köln: Liber Amicorum Karl-Heinz Böckstiegel, 2001) at 267. Herrmann claims copyright for the word 'cybitration'.

<sup>34</sup> K. Lynch, 'The Forces of Economic Globalization: Challenges to the Regime of International Commercial Arbitration,' (The Hague: Kluwer Law International, 2003) at 389.

<sup>35</sup> Carrington, P., 'Virtual Arbitration,' (2000) 15 *Ohio St. J. on Disp. Resol.* 669 at 669.

<sup>36</sup> Cachard, O., 'International Commercial Arbitration: Electronic Arbitration,' (New York: United Nations Conference on Trade and Development, 2003), pg. 1 available online at <[http://www.unctad.org/en/docs/edmmisc232add20\\_en.pdf](http://www.unctad.org/en/docs/edmmisc232add20_en.pdf)> Accessed on 15<sup>th</sup> April, 2017.

<sup>37</sup> J. Hörnle, 'Online Dispute Resolution: More than the Emperor's New Clothes' in E. Katsh & D. Choi, eds., 'Online Dispute Resolution (ODR): Technology as the "Fourth Party". Papers and Proceedings of the 2003 United Nations Forum on ODR (2003), pg. 3, available online at <<http://www.odr.info/unece2003/pdf/Hornle.pdf>> Accessed on 15<sup>th</sup> April, 2017.

<sup>38</sup> Rule, Colin. (2002). *Online Dispute Resolution for Business*. San Francisco: Jossey-Bass, pg. 32.



confidential.<sup>39</sup> The AAA maintains a roster of over 9,000 trained neutrals and has a long history of working with the federal government.<sup>40</sup> Globally, the International Chamber of Commerce is the most prominent international arbitration body in the world. It maintains a website called NetCase, where arbitrators and the parties can conduct their arbitration in a secure environment.<sup>41</sup>

Online arbitration is the most formal and 'law like' of ADR processes. The fundamental requirement of due process of a private court and all arbitral processes is respected. For a dispute to be resolved via arbitration, and prior to filing and application, the parties must have agreed to submit the matter to a binding arbitration, meaning that they would be bound by the Arbitrator's decision. The parties involved are of three (3) groups. An Applicant, a Respondent, and a Neutral third party. The party who starts the arbitration is known as the Applicant while the other party is called the Respondent. The neutral third party called the Arbitrator eventually decides the matter. Most of them were and/or are magistrates, judges, law school professors and administrative hearing officers.

The Applicant starts the process by submitting an Application that has their reasons for why the other party(s) owes them money. The Respondent(s) then submits a Response to an Arbitrator explaining why they don't owe the Applicant any money. The Respondent's response may also include a claim for money against the Applicant, which is referred to as a counterclaim. When the parties submit the Application and Response(s), they will have the opportunity to submit any evidence (proof) which supports their position. The claim is then assigned to an Arbitrator. A telephonic hearing may be permitted by the Arbitrator. If such a hearing is requested, the latter will make their decision after the hearing. If no telephonic hearing is requested a decision will be made based on the Application and Response (s) along with the evidence that has been submitted.<sup>42</sup>

Some other arbitration processes like Arbiclaims,<sup>43</sup> also known as fair claims handle car accident, home improvement disputes, unpaid invoice, property damage, security deposit dispute and breach of contract types of claims. It resolves issues within three (3) weeks of submitting to the arbitration, and it is not limited to telephonic conversations alone. Emails, text messages may be exchanged, and online video hearing via webcam or phone also takes place between 15-30 minutes which enable the arbitrator to question both sides. There is also an opportunity for each side to present a witness, that is, the Applicant and Respondent. Finally, an assigned Arbitrator will issue a decision within 5 days of hearing the matter.

It is important to note that an arbitrator's decision has the same force of law as the decision of a court of law, that is, it carries the same weight and must be adhered to. It is a final judicially enforceable decision. It may or may not be taken to court in order to get an arbitration award.

Examples of leading online arbitration sites are OnlineArbitrators.com,<sup>44</sup> internet-ARBitration,<sup>45</sup> Arbitrate.com, American Arbitration Association, and Arbiclaims.<sup>46</sup>

**c. Online resolution of consumer complaints, using e-mail to handle certain types of consumer complaints.**

This ODR mechanism is most suitable for settling disputes arising between online traders/businesses and consumers. For instance, Better Business Bureau, also known as BBBOnline,<sup>47</sup> a subsidiary corporation of the Central Better Business Bureau (CBBB), deals with disputes that relate to marketplace issues experienced with

<sup>39</sup> American Arbitration Association. (2006), pg. 1. Available at <<http://www.aaa.org>> Accessed on 17<sup>th</sup> April, 2017.

<sup>40</sup>Rodriguez, R. M., 'Online Arbitration' World-Mediation-Centre, pg. 8. Available at <<http://worldmediation.org/education/paper-7.pdf>> Accessed on 17<sup>th</sup> April, 2017.

<sup>41</sup> International Chamber of Commerce. (2006). Pg. 2. Available online at <<https://www.iccwbo.org>> 17<sup>th</sup> May, 2017.

<sup>42</sup> See ARS, Arbitration Resolution Services, Inc; available online at <https://www.arbresolutions.com/> 17<sup>th</sup> May, 2017.

<sup>43</sup><http://www.arbiclaims.com/18th> May, 2017.

<sup>44</sup> OnlineArbitrators.com. Available online at <<http://onlinearbitrators.com/>> Accessed on 17<sup>th</sup> April, 2017.

<sup>45</sup>Internet-Arbitration, Available online at <<https://www.net-arb.com/Accessed>> on 17<sup>th</sup> April, 2017.

<sup>46</sup>Available online at <<http://www.arbiclaims.com/>> 17<sup>th</sup> April, 2017.

<sup>47</sup> Better Business Bureau. Available online at <<https://www.bbb.org.>> 17<sup>th</sup> April, 2017.

the services or products a business provides.<sup>48</sup> The procedure entails the consumer finding the business/trader that he/she wishes to make complaints against online using the trader's business name, phone number, website URL or an email address. Afterwards, the consumer will input information about himself/herself, that is, personal details. The next step will be to submit the complaints and upload evidence/proof. Following the receipt of a consumer complaint, BBBOnline will commence a simple conciliation, by approaching the business representative. This method frequently solves the problem immediately. However, if it does not work, a simplified mediation procedure begins via exchange of e-mails or telephone.

Everything submitted will be forwarded to the business within two (2) business days. The business will be requested to respond within fourteen (14) days. If no response is received, a second request will be made. Subsequently, the consumer will be notified if there is no response, and where there is one, of the business's response when BBBOnline receives it. Complaints are time-barred after 30 days. If these informal, semi-online efforts do not lead to a solution, BBB offers more formal options of offline dispute resolution, like face-to-face mediation and several arbitration programs.<sup>49</sup>

On the 15<sup>th</sup> day of February, 2016, the European Commission<sup>50</sup> released a new online platform, online dispute resolution,<sup>51</sup> to assist consumers to resolve disputes against online retailers. The platform is an online tool that allows consumers to make a complaint against a trader where goods or services have been bought online. Before traders will transact business online in the European Union, it is compulsory that they must provide consumers with two (2) important information. The first is a link on their website to the ODR platform,<sup>52</sup> and secondly, an email address on their website so that consumers have a first point of contact.

Where a dispute arises, consumers should first try to resolve it directly with the trader either in person, over the phone, by email, or the business' social media page. If this fails, the former can submit their complaints through the electronic complaint form on the ODR platform. Subsequently, the ODR platform will send the details of the complaint to the trader, and the latter has 10 days to state if they are obliged to use a particular ADR provider to assist in resolving the complaint. If there is none, the trader can decide within the 10-day period if they would like to choose an ADR provider. If an ADR provider is selected by the trader and a consumer agrees with it, they can confirm this on the platform. The complaint details will then be sent to the ADR provider for consideration. If, however, a consumer does not agree on the choice, then, such is opportune to provide a suitable alternative to the trader. The duration for the resolution is 30 days.

**d. Online mediation, using a website to resolve disputes with the aid of qualified mediators.**

Online mediation is defined by MediateNow.com<sup>53</sup> as 'a process in which a neutral and impartial third party (the mediator) facilitates communication between negotiating parties which may enable them to reach an agreement. Mediation is an efficient and cost effective method for the resolution of both simple and complex cases.' It is the most often used ODR process.

The Centre for Information Technology and Dispute Resolution at the University of Massachusetts conducted a study project in 1999 to ascertain how effective an online mediator could be to solve e-disputes arising out of online auction transactions on the eBay website.<sup>54</sup> One of the reasons the researchers chose online mediation over online arbitration was the fact that online arbitration projects have had great difficulty in obtaining cases.

<sup>48</sup>It also includes disputes involving vehicle, cell phone or wireless carrier, business's product or service (other than a vehicle or cell phone), business's advertising, business's privacy policy or practices, and charity.

<sup>49</sup>The Guidelines for Consumer Protection in the Context of Electronic Commerce, principle VI under B (sub iv), available online at <<http://www.oecd.org/dsti/sti/it/ec/index.htm>> Accessed on 17<sup>th</sup> April, 2017.

<sup>50</sup>Available online at <<http://www.ukecc.net/consumer-topics/online-dispute-resolution.cfm>> accessed on 17<sup>th</sup> April, 2017.

<sup>51</sup>Online Dispute Resolution, European Commission official website. Available online at <<https://webgate.ec.europa.eu/odr>> Accessed on 17<sup>th</sup> April, 2017.

<sup>52</sup> Ibid

<sup>53</sup>MediateNow.com, What is Mediation? Available online at <<http://www.mediationnow.com/communal/mediat.php>> Accessed on 18<sup>th</sup> April, 2017.

<sup>54</sup>[www.ebay.com](http://www.ebay.com) 17<sup>th</sup> April, 2017.

because potential respondents do not wish to consent to the decision-making authority of an arbitrator.<sup>55</sup> Thus, this explains why several online mediation websites are being launched every day; because unlike an arbitrator, a mediator does not have power to impose a decision, instead the participants normally agree on the solutions to their disputes, and furthermore, there are no formal rules of evidence or procedure that control the mediation process.

Furthermore, its importance cannot be over-emphasized as it helps to preserve the existing relationship between conflicting parties or put an end to an existing relationship in the least adversarial and most cooperative way.

It should be noted that in both offline (ADR) and online mediation, a neutral mediator trained in conflict resolution helps you and the other party communicate and negotiate a mutually acceptable agreement. However, the major difference between them relates to the channels through which communications take place. Offline mediation deals with face-to-face interactions while online mediation combines communications via video conference (e.g. with your PC, Mac, Ipad, Iphone or Android device), phone or email between the mediator and the parties.<sup>56</sup> Furthermore, many ODR providers offer mediation for any dispute that is 'amenable [to] mediation'. This ranges from e-commerce disputes to employment, insurance, neighbor v neighbor, commercial, personal loans, landlord v tenant, small claims, homeowner v contractor, and personal injury matters, but not family law. This is a significant difference from ADR, which does include family law. The preferred parties from an ODR provider perspective are those involved in commercial disputes.<sup>57</sup>

Basically, an online mediation involves the following procedures. Firstly, a party visits a mediation website and fills out an online form that identifies the problem and possible resolutions. A mediator subsequently then reviews the form and contacts the other party to see if they will partake in the mediation. If the other party agrees to join, they will, by email, either fill out a form or respond to the initial form. The purpose of exchange of correspondence is to help the parties to understand the dispute better and possibly to reach an agreement. If the parties do not reach an agreement, the mediator will then work with the parties to assist in determining issues, articulating interests, and assessing prospective solutions.

A typical example of a mediation process is described by National Arbitration and Mediation (NAM): the first part of the total time spent in mediation is done with all sides present. Each party will present the general outline of their case and discuss their position. After the Mediator has a general understanding for the basis of the dispute, the balance of the Mediation takes the form of breakaway or individual caucus conferences. It is in these caucuses that the Mediator works with each of the parties to analyze their case, develop options for settlement, and break the stalemate.<sup>58</sup>

From the foregoing, a mediation process has key elements, some of which are:

- i. An impartial person (the mediator) engages the parties in a series of confidential discussions, some being private with each party and others being joint. There is usually an initial joint discussion, followed by a series of private sessions with the mediator shuttling between the two, and with occasional joint discussions where appropriate, but especially at the conclusion.
- ii. The mediator's approach is non-judgmental and is not intended to impose a solution on the parties, but rather to assist the parties to come to their own solution...It is not the role of the mediator to try to pre-empt the way in which a court or tribunal might determine the legal issues. The objective is to reach a solution

<sup>55</sup> E. Katsh, J. Rifkin and A. Gaitenby, 'E-Commerce, E-Disputes and E-Dispute Resolution: In the Shadow of "eBay Law",' draft of an article to be published in the Ohio State Journal of Dispute Resolution, spring 2000, pg. 3, available at <http://www.disputes.net/cyberweek2000/ohiostate/katsh.htm> 17<sup>th</sup> April, 2017.

<sup>56</sup> GIUSEPPE LEONE, ONLINE MEDIATOR, available online at <<http://www.onlinemediationworks.com>> Accessed on 18<sup>th</sup> April, 2017.

<sup>57</sup> For a comprehensive view of the state of ODR, see Thomas Schultz, Gabrielle Kaufmann-Kohler, Dirk Langer & Vincent Bonnet, 'Online Dispute Resolution: The State of the Art and the Issues', E-Com Research Project of the University of Geneva, December 2001, available at online at <<http://ssrn.com/abstract=899079>>. Access on 18<sup>th</sup> April, 2017. And more recently, the excellent report of Melissa Conley Tyler & Di Bretherton, 'Research into Online Alternative Dispute Resolution: Exploration Report'. Prepared for the Department of Justice, Victoria, Melbourne, The International Conflict Resolution Centre, March 21, 2003. Executive Summary, pg. 1. Available at <[www.justice.vic.gov.au/CA256902000FE154/Lookup/Online ADR/\\$file/Research ADR Explorat ion Report 03.pdf](http://www.justice.vic.gov.au/CA256902000FE154/Lookup/Online%20ADR/$file/Research%20ADR%20Explorat%20ion%20Report%2003.pdf)> Accessed on 29<sup>th</sup> June, 2017.

<sup>58</sup> Mediation. Available online at <<http://www.namadr.com/mediation.cfm>> Access on 18<sup>th</sup> April, 2017.

that gives 'benefit', and is acceptable to, both parties rather than to decide on who is 'right' or 'wrong' in accordance with the law.

- iii. The focus is on a solution that is acceptable to both parties.
- iv. Nothing said or offered in the discussions is in any way binding on a party unless a mutually acceptable solution is reached, in which event a binding agreement will be drawn up and signed.
- v. To assist in achieving a satisfactory resolution, the initial objective of the mediator is to clarify all the facts and ensure both parties understand them correctly so as to remove any misunderstandings and misperceptions. The mediator will also need to empathise with each party (fully understand their view of the matter without necessarily agreeing with them) so as to recognise what the dispute means to them both on a practical and on an emotional level. The mediator will also try to encourage both parties to consider possible solutions and may occasionally use his or her experience to prompt them to consider possible solutions.<sup>59</sup>

Furthermore, the role of a mediator, facilitator or third party neutral should be highlighted. His role is to assist conflicting parties, who are attempting to voluntarily reach an agreement, to create a climate of understanding in order to facilitate an agreement. He owes the parties the responsibilities of being competent, effective, and impartial while conducting the mediation process. He is not entitled to descend into the arena of decision making, that is, he must not make any decision.

Likewise, there are some important points to be noted about mediation:

- i. The Mediator does not render a decision or force the parties to accept a settlement. Each party must mutually agree upon an outcome for a settlement to be reached.
- ii. All communications in a Mediation are confidential and the Mediator cannot be called as a witness in any subsequent litigation. Additionally, if settlement is not reached, any statements made during the proceedings are inadmissible as evidence in subsequent litigation. Any information disclosed to the Mediator by a party in private caucus will not be revealed to any other party unless permission has been given to do so.<sup>60</sup>

Finally, mediation is best conducted as early as possible in a dispute before relationship between parties worsens beyond repairs and specifically before litigation is commenced. However, if matters get to litigation stage, that is, law court, mediation is often useful at any stage. Hence, the importance of mediation cannot be over-emphasized in our society today as law courts encourage litigants to consider mediation prior to court settlement or pronouncement. Mediate.com,<sup>61</sup> OnlineMediators,<sup>62</sup> the Mediation Room,<sup>63</sup> Mediation Now,<sup>64</sup> and Resolve My Dispute<sup>65</sup> are few of the large number of mediation sites available on the internet.

### **Benefits of Online Dispute Resolution in Nigeria**

This part of the paper examined the benefits associated with ODR as a modern viable dispute resolution mechanism. It can be safely argued that the benefits of ODR are enormous. Aside the benefits traditionally associated with ADR, ODR offers some *sui generis* benefits. Some of these benefits are:

#### **i. Avoidance of Complex Jurisdictional Issue**

One of the benefits of ODR particularly that which is done totally online is that unlike traditional ADR it is not susceptible to jurisdictional tussles.<sup>66</sup> A common practice in traditional arbitration is for parties to insert a

<sup>59</sup> Ajetunmbi, A. O., *Alternative Dispute Resolution and Arbitration in Nigeria: Law, Theory and Practice*, Ikeja, Princeton and Associates Publishing Co. Ltd., 2015, P. 87.

<sup>60</sup> *Ibid.*

<sup>61</sup> Available online at <<http://www.mediate.com>> 17<sup>th</sup> April, 2017.

<sup>62</sup> Available online at <<http://onlinemediators.com>> Accessed on 17<sup>th</sup> April, 2017.

<sup>63</sup> <https://www.themediationroom.com/> 17<sup>th</sup> April, 2017.

<sup>64</sup> *Ibid.*

<sup>65</sup> Mediation. Available online at <<http://resolvemydispute.org/>> 17<sup>th</sup> April, 2017.

<sup>66</sup> Goodman, J. W., *The Pros and Cons of Online Dispute Resolution: An Assessment of Cyber-Mediation Websites*. Available online at <<http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1073&context=dltr>> Accessed on 29<sup>th</sup> June, 2017.

jurisdiction clause.<sup>67</sup> Thus, where parties have decided on a party jurisdiction as the forum for either the mediation or arbitration proceedings, they are bound by the agreement. However, in ODR, the issue of jurisdiction clause even where it exist cannot be given effect because of the fluid nature of the various mechanisms through which ODR is conducted particularly internet facilitated devices.<sup>68</sup> The internet does not amend itself to the vicissitudes of territorial jurisdiction since it is more of abstract than concrete. The parties through ODR save themselves from the stress of determining the *lex arbitri* as well as *lex situs*. The effect of a jurisdiction clause is to vest jurisdiction particularly territorial to a particular geographical area selected by the parties and the parties are bound to arbitrate or mediate within the selected jurisdiction.<sup>69</sup> They are also bound by the procedural law applicable there.<sup>70</sup> As can be seen in the section about jurisdiction, it is often necessary for a Plaintiff to seek redress in the forum where the defendant resides. That may in some circumstances, lead to a feeling of inferiority on the side of the Plaintiff. Dispute resolution in Cyberspace offers both parties a neutral forum, in which no party has a "home court advantage." While this may be only a psychological factor, a feeling of equality may well promote speedy resolution.<sup>71</sup>

ii. **Relatively Cheap and Convenient**

In traditional ADR mechanisms such as arbitration or mediation, parties are bound to make provisions for issues such as venue, movement of witnesses for presentation of evidence and other ancillary matters.<sup>72</sup> In doing all these, the parties are required to move from their respective locations to the venue of the proceedings at their own expense. Aside the risk involved in movement, the parties also incur a lot of travel expenses and where they may have to spent days, incur accommodation expenses aside fees to be paid to either the arbitrator or mediator.<sup>73</sup> The inconvenience that is most likely to be experienced by a party who has to travel from his country to another is unimaginable couple with barriers such as language.<sup>74</sup> All these can be conveniently avoided through ODR. In mechanisms such as online mediation or arbitration, parties are not required to travel or lodge over night in a hotel for the proceedings.<sup>75</sup> All the movement that a party is required to do is the movement of the hands on an internet enable device.<sup>76</sup> For instance, if the parties have determined liability and their dispute is solely over the amount of a monetary settlement, then the fully automated cyber-mediation or arbitration websites discussed above can sufficient and efficient to resolve the dispute.<sup>77</sup> The convenience

<sup>67</sup> Ndifon, C. O., *Issues in Conflict of Laws*, Vol. 1, Calabar, Vision Connect Digital Publishers, 2001, P.159 -160.

<sup>68</sup> Advantages of Alternative Dispute Resolution in Cyberspace. Available online at <<https://www.unc.edu/courses/2010fall/law/357c/001/AltDisputeResolution/whyadr.html>> Accessed on 28th June, 2017.

<sup>69</sup> McElevay, P., McLachlan, C., and Morse, C. G. J., *The Conflict of Laws*, 15<sup>th</sup> ed., Vol. 1, London, Sweet and Maxwell, 2012, P. 599-607; Clarkson, C. M. V., and Hill, J., *The Conflict of Laws*, 3<sup>rd</sup> ed., Oxford, Oxford University Press, 2006, P. 253; McClean, D., and Abou-Nigm, V. R., *The Conflict of Laws*, 8<sup>th</sup> ed., London, Sweet and Maxwell, 2012, P. 97.

<sup>70</sup> *Donohue v. Armco Inc.* (2001) UKHL, 64; *Trendex Trading Corp. v. Credit Suisse* (1980) 3 All E.R. 721; *Francis Travel Market Pty Ltd. v. Virgin Atlantic Airways* (1994) A.T.P.R. 41-332.

<sup>71</sup> Victorio, R. M., *Internet Dispute Resolution (iDR): Bringing ADR into the 21st Century*, 1 PEPP. DISP. RESOL. L. J., 2001, P. 279, 292.

<sup>72</sup> Ajetunmobi, A. O., *Alternative Dispute Resolution and Arbitration in Nigeria: Law, Theory and Practice*, Ikeja, Princeton and Associates Publishing Co. Ltd., 2015, P. 152.

<sup>73</sup> Freedman, G. H., *Alternative Dispute resolution and Emerging Online Technologies: The Internet and Cyberspace*, 1997, 19 HASTING COMM. & ENT. L. J. 695, 712.

<sup>74</sup> Gibbons, L. J., Kennedy, R. M., and Gibbs, J. M., "Frontiers of Law: The Internet and Cyberspace: Cyber-Mediation Communication Medium Messaging the Message" Vol. 32, N.M.L. Review, 2002, P. 27, 42.

<sup>75</sup> Bordone, R. C., "Electronic Online Dispute Resolution: A Systems Approach- Potential Problems and a Proposal" Vol. 3, *Harvard Negotiation Law Review*, 1998, P. 175, 176.

<sup>76</sup> Ayotomiwa, A. O., The Advantages of Online Mediation. Available online at <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2794283](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2794283)> Accessed on 30<sup>th</sup> June, 2017.

<sup>77</sup> Hang, L. Q., "Online Dispute Resolution Systems: The Future of Cyberspace" *Law*, Vol. 41, *Santa Clara Law Review*, 2001, P. 837, 855. Available at <<http://digitalcommons.law.scu.edu/lawreview/vol41/iss3/4>> Accessed on 29<sup>th</sup> June, 2017. See also Pappas B.A, 2008, *Online*

created by enabling the each party to chose the time when he or she wants to respond or participate; the value in permitting each party to reflect on their view and position before responding, and the luxury of having the time to explicate carefully the reasons for a position in an environment that insulates each party from the emotional impact of the other.<sup>78</sup>

iii. **Reduction of Emotional Hostility**

The possibility of parties getting confrontation during offline mediation or arbitration is not uncommon just like in anachronistic litigation where might is right. The possibility of confrontation which is inimical to ADR is made possible by the face-to-face interaction of the disputants.<sup>79</sup> However, in any of the ODR mechanisms such as automated mediation or arbitration conducted through any of the already discussed ODR provider platform such as cybersettle, clicksettle.com, settlementOnline, ClickNsettle, etc, face-to-face interaction is completely eliminated.<sup>80</sup> ODR provides the disputant a dispassionate approach to the merit of the case.<sup>81</sup>

iv. **Speedy Resolution**

One of the main advantages of ADR over litigation is that it is less-time consuming. Where offline ADR may help settle a matter in days or months, as compared to the years it may take to resolve litigation, online ADR promises settlement of disputes within days or even hours.<sup>82</sup> Online Dispute Resolutions can also help to significantly speed up the amount of time it takes to resolve a dispute. Time-consuming jurisdictional rules often burden litigation; however, many of the rules that would extend the timeframe for the resolution of a dispute are not required in online dispute resolution. The borderless nature of the Internet diminishes the communication problems faced by parties and counsel located in different time zones. Further, most of these ODR service providers are functioning round the clock.<sup>83</sup> Interested parties can merely visit the provider's website and fill in certain electronic forms, thereby also eliminating any delays associated with receiving appropriate forms. Moreover, the internet enables parties to easily obtain data and other information about their cases in real time. Furthermore, unlike in-person mediation or arbitration in which the parties must find a time when they are both available to meet at a physical venue, and possibly find times to return again in the future, online dispute resolution allows each party to "attend" the negotiation in accordance with its own timeframe. In addition to easy accessibility, e-mail simplifies the task of scheduling ADR proceedings and avoids any phone or fax-tags in the process.<sup>84</sup> E-mail is also a superior and swifter form of communication compared to fax, as it facilitates the sending of documents of multiple parties simultaneously, thus saving time and money.

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Court: *Online Dispute Resolution and The Future of Small Claims*. UCLA Journal of Law and Technology Volume 12, issue 2. p.6 Available online at <[www.lawtechjournal.com](http://www.lawtechjournal.com)> Accessed on 29<sup>th</sup> June, 2017.

<sup>78</sup>Creating an Environment for Mediating Disputes on the Internet. Available online at <<http://www.umass.edu/dispute/ncair/granat.htm>> Accessed on 30th June, 2017.

<sup>79</sup> Johnson, D. R., "Screening the Future for Virtual ADR", 51 DISP. RESOL. J. 1996, P. 117, 118.

<sup>80</sup> The Advantages of Alternative DISPUTE resolution in Cyberspace. Available online at <<https://www.unc.edu/courses/2010fall/law/357c/001/AltDisputeResolution/whyadr.html>> Accessed on 29<sup>th</sup> June, 2017.

<sup>81</sup>Creating an Environment for Mediating Disputes on the Internet. Available online at <<http://www.umass.edu/dispute/ncair/granat.htm>> Accessed on 30th June, 2017. "The reduction of emotional hostility between the parties. Often in a traditional mediation the dynamics of the interaction between the parties is reproduced in the mediation setting, with one party striving for dominance over the other. The mere sight of one party by the other is often enough to trigger emotions that were operative in the relationship when the parties were married and which in fact led to the break-up of the relationship. A competent mediator will seek to reduce the imbalance of emotional power between the parties. We believe that electronic communication can function as a mediating influence that reduces the amount of emotional conflict that each party brings to the conflict"

<sup>82</sup> Merits and Demerits of ODR. Available online at <<https://www.lawteacher.net/free-law-essays/commercial-law/merits-and-demerits-of-odr-law-essays.php#ftn11>> Accessed on 30<sup>th</sup> June, 2017.

<sup>83</sup> Rodriguez, R. M., *Online Arbitration*, P. 9. Available online at <<http://worldmediation.org/education/paper-7.pdf>> Accessed on 30<sup>th</sup> June, 2017.

<sup>84</sup> Kaufmann-Kohler, G., *Online Dispute Resolution and its Significance for International Commercial Arbitration*. Available online at <<http://k.k.com/wp-content/uploads/Online-Dispute-Resolution-and-Its-Significance-for-International-Commercial-Arbitration.pdf>> Accessed on 28<sup>th</sup> June, 2017.

## Challenges and Limitations of Online Dispute Resolution in Nigeria

Notwithstanding the benefits of ODR, its emergence has been plagued with certain challenges and limitations. These challenges range from systematic to human. Some of these challenges and are highlighted hereunder.

### i. Lack of Face to Face Encounter in Exclusive ODR

One of the fundamental challenges which ODR is plagued with especially where the whole process is strictly online is lack of face to face encounter/contact between the parties. The lack of face-to-face interaction also deprives the mediators and arbitrators of the opportunity to evaluate the credibility of parties and witnesses. When online disputes are settled over e-mail, the parties may engage in caucusing without the mediator's knowledge. While the physical separation of parties can help the neutral third-party focus on the substantive issues rather than on the parties' emotions, such physical separation also leaves ample opportunities for miscommunications between the parties or between one of the parties and the neutral third-party.<sup>85</sup> Even if a sender is able to adequately express him or herself in writing, the recipient may still misinterpret the message. This is especially likely to occur when parties are located in different countries and speak different languages. Moreover, the fact that the parties do not know each other may as it is cause tremendous misunderstanding between them.<sup>86</sup> A party to the dispute may also frustrate the process by not responding to e-mail other requests. This makes it almost impossible for the ADR provider to distinguish between a genuine technical difficulty and an uncooperative party.<sup>87</sup>

### ii. Confidentiality and Security of Online Dialogue

One of the hallmarks of traditional ADR is confidentiality as defined by Lord Goff in *A.G. v. Observer Ltd.*<sup>88</sup> With an exponential increase in the activities of internet hackers, the question that bothers the mind of potential ODR users is 'how can I be sure that the data I am sending will not be tampered with by an unauthorized third party in the course of the proceedings?'<sup>89</sup> It is pointless for anyone to want to argue that cyber insecurity is in the increase in this present age. Thus, organizations and even nations have fallen prey to the criminal activities of internet hackers in recent times. Jaberri has argued that lack of security not only weakens confidentiality in dispute resolution but also makes people reluctant to subscribe to ODR in resolving their disputes.<sup>90</sup> However, one of the safeguards which many nations have adopted is electronic signature.<sup>91</sup> This signature plays a vital role in ensuring the authenticity and integrity of data shared online. Also, nations have enacted laws criminalizing hacking of database as a further protection of online transactions. For instance in the US, the Digital Millennium Copyright Act (DMCA) was passed into law in 1998. The Act prohibits the circumvention of technological protection measures undertaken by owners of databases. This means that anyone caught circumventing a database without authorization from the owners will be punished in accordance with the Act. With these laws in place, issues of insecurity in the cyberspace are minimized and trust for the ODR process alive. Sadly, Nigeria is still yet to have a law prohibiting circumvention of technological prevention measure

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<sup>85</sup> Woodley, A. E., Online Dispute Resolution: Top Advantages to Consider. Available online at <http://www.attorneyatlawmagazine.com/phoenix/online-dispute-resolution-top-advantages-to-consider/> > Accessed on 30<sup>th</sup> June, 2017.

<sup>86</sup> Mcmurtry, B., Alternative disputes Resolution. Available online at [https://www.blaney.com/sites/default/files/other/adr\\_advantages.pdf](https://www.blaney.com/sites/default/files/other/adr_advantages.pdf) > Accessed on 28<sup>th</sup> June, 2017.

<sup>87</sup> Brannigan, C., Online Dispute Resolution. Available Online at [http://www.mediate.ca/uploads/CCH\\_ODR\\_Chapter.pdf](http://www.mediate.ca/uploads/CCH_ODR_Chapter.pdf) > Accessed on 29<sup>th</sup> June, 2017.

<sup>88</sup> (1990) 1 A.C. 109.

<sup>89</sup> "New ODR Initiatives at Onlinemediators.com, OnlineArbitrators.com & OnlineDisputeResolution.com," available online at [www.onlinemediators.com/article.cfm?fn=CaseloadManagerPR.cfm](http://www.onlinemediators.com/article.cfm?fn=CaseloadManagerPR.cfm). > Accessed on 27<sup>th</sup> June, 2017.

<sup>90</sup> Jaberri, M.S., "Online Arbitration: A vehicle for dispute resolution in Electronic commerce". Available online at [www.academia.edu/1842719/online\\_Arbitration\\_A\\_vehicle\\_for\\_Dispute\\_Resolution\\_in\\_Electronic\\_commerce](http://www.academia.edu/1842719/online_Arbitration_A_vehicle_for_Dispute_Resolution_in_Electronic_commerce) > Accessed on 30<sup>th</sup> June, 2017.

<sup>91</sup> For example see the US Electronic Signature in Global and National Commerce Act. Available online at [http://www.nileg.state.ng.us/2000/Bills/Pl01/116\\_PDF](http://www.nileg.state.ng.us/2000/Bills/Pl01/116_PDF) > Accessed on 29<sup>th</sup> June, 2017.

work.<sup>92</sup> Another useful technique especially for online arbitration is the "electronic file management" software. This is used for complex, large-scale arbitration. The software was invented as an alternative to email since emails cannot guarantee adequate security for online dispute resolution. The electronic file management means that all documents pertaining to the case in question are stored electronically in a systematic order. Electronic file management software permits individual documents or passages to be easily retrieved, displayed or printed, cross-referenced, compared, annotated and searched for keywords. Electronic file management is widely used in practice as it is more secured.<sup>93</sup>

### iii. Unable to Meet the "Writing" Requirement for Arbitration of Disputes

Many arbitration laws require the arbitration agreement to be in writing, or recorded in writing or something similar. This requirement is not completely fulfilled by electronic communications. Agreements to arbitrate online are usually entered into online.<sup>94</sup> Most domestic laws, however, do not consider an agreement to be in writing when it is recorded by electronic means.<sup>95</sup> In the absence of some international consensus on this issue, it may be difficult to enforce an online arbitration award in domestic forums that do not legally recognize online arbitration agreements as being "in writing." Even if online arbitration agreements are said to satisfy the "writing" requirement, not all formally executed and valid arbitration agreements may be enforceable.<sup>96</sup>

### Matters Arising in the Use of ODR in Nigeria

As it regards ODR in Nigeria, certain issues have emerged. This issues ranges from legal to human capacity development and may be regarded in general terms as inhibitions to the adoption of ODR in Nigeria. Foremost among these issues is that of legal constraints within the legal framework. The Arbitration and Conciliation Act which is the principal legislation on ADR in Nigeria is regrettably silent on ODR and its provisions particularly section 1 which requires that arbitration agreements should be in writing is vague as the manner of writing is not prescribed. It therefore becomes speculative whether ODR arbitration or mediation agreements are recognizable under the Act. Another issue is the lack of access to internet in Nigeria. Internet facility in Nigeria is regarded as a luxury though a necessity. It is trite that ODR thrives through the internet and where there is no or inadequate access to internet, disputants cannot avail themselves of ODR.

Furthermore, the issue of computer illiteracy is endemic in Nigeria. Regrettably, even some trained ADR personnel are not computer literate hence, unable to participate in ODR. Moreover, lack of ODR facilities for persons who may wish to engage in it is yet another issue confronting Nigeria. Currently in Nigeria, there are no ODR services providers where disputants can engage in ODR. These issues though enormous are surmountable.

### Conclusion and Recommendations

Extrapolating from the above analysis, it is obvious that modern day commercial transaction requires swift and less rancorous means of dispute resolution. Traditionally, ADR has been a viable supplement to litigation. However, owing to certain factors including technological advancement which has culminated into making the world a global village, ODR has emerge as a *sui generis* aspect of ADR. ODR has transformed amicable dispute settlement by offering disputants the opportunity of utilizing all the known ADR mechanism such as arbitration, negotiation and mediation from the usual offline environment to a borderless world of internet. Thus, today, there is online mediation, negotiation and arbitration being offered by several ODR providers. The benefits of ODR span from the fact of it being relatively cheap and convenient, able to avoid emotional hostility, speedier resolution of disputes and capable of avoiding jurisdictional limitations and vicissitudes. However, security risk and confidentiality of online date, impersonality, legal requirements, lack of awareness, computer illiteracy and access to computer and internet facilities are the factors militating against its adoption in Nigeria.

Thus, it is necessary and urgent that the current inadequate and anachronistic legal framework on ADR in Nigeria which is silent on ODR be given urgent legislative attention. The legislature should amend the ACA by

<sup>92</sup> There is currently a proposed legislation for amendment of the Copyright Act called "Copyright Act (Amendment) Bill, SB 03". The bill includes provisions prohibiting circumvention of technological measure works.

<sup>93</sup> Horne, J., 2002, "ODR in Business to consumer E-commerce. Available on at <<http://www2.warwick.ac.uk/fac/soc/law/eli/>> Accessed on 29<sup>th</sup> June, 2017.

<sup>94</sup> See generally section 1 of ACA.

<sup>95</sup> Merits and Demerits of Alternative dispute Resolution Systems.<<http://www.lawyersclubindia.com/articles/Merits-and-Demerits-of-the-Alternative-Dispute-Resolution-System-5225.asp>> Accessed on 29<sup>th</sup> June 2017.

<sup>96</sup> Merits and Demerits of Online Arbitration. Available online at <<https://www.lawteacher.net/free-law-essays/commercial-law/merits-and-demerits-of-odr-law-essays.php>> Accessed on 30<sup>th</sup> June, 2017.



incorporating provisions that will give statutory recognition to ODR in Nigeria. Also, there is dire need for creation of public awareness. The curriculum of Nigerian universities with regards to Alternative Dispute Resolution should be amended by incorporating ODR. This will help to create awareness of its numerous benefits and afford disputants to avail themselves of it in the event of a dispute. The Government and other stakeholders in the field of ADR should endeavour to provide adequate facilities for the engagement in hitch free ODR. Internet facilities should not be a luxury but a necessity. There is also need for manpower development for an effective ODR engagement. Most certified Arbitrators, Mediators and Negotiators in Nigeria are not competent to engage in ODR as they lack the requisite knowledge and expertise to engage professionally and ethically. Thus, facilities such as the Lagos State Multi-Door Court House under the auspices of the Conflict Management Group should be positioned for training in ODR.

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