

## THE LEGALITY OF ONLINE ARBITRATION AGREEMENT UNDER NIGERIAN LAW\*

### Abstract

Generally, to engage in an arbitration procedure, parties must first enter into an arbitration agreement. The arbitration agreement constitutes the basis upon which the disputing parties resort to arbitration. Therefore, arbitration agreement is the bed rock of all arbitrations. It is the arbitration agreement that gives the tribunals the power or jurisdiction to arbitrate the dispute for the disputing parties. Nowadays, as society steadily moves online in all areas of human endeavours, various agreements are entered into expressly or impliedly online. Online arbitration agreement is the founding source of all online arbitrations. Its legality is *sine qua non* to the initiation of valid online arbitral proceedings in Nigeria. The aim of this work is to appraise the legality of online arbitration agreement in Nigeria with the objective of evaluating the Nigerian Arbitration and Conciliation Act 2004 with some selected international treaties to know whether online arbitration agreement can be considered valid under those laws. The work adopted doctrinal research methodology through library based and internet materials. The research found that online arbitration agreement is not well covered by the Nigerian legislation. It is recommended that Nigeria Legislation on arbitration should be amended to accommodate online arbitration agreement under them.

**Keywords:** Arbitration, E-arbitration, E-agreement, New York Convention, Technology and E-commerce.

### 1. Introduction

Generally, to engage in an arbitration procedure, parties must first enter into an arbitration agreement. The arbitration agreement formulates the basis upon, which the disputing parties' resort to arbitration. Nowadays, as society steadily moves online in all areas of human endeavours, various agreements are entered into expressly or impliedly online. Online arbitration agreement, therefore, is an agreement, in which parties agree to settle their dispute in arbitration, which would be held through medium of technology (i.e., internet)<sup>1</sup>. Such agreements are made electronically'. This agreement must be made available for the arbitration award to be valid; otherwise, the award will be rendered invalid. Arbitration agreement is the bed rock of all arbitrations<sup>2</sup>. It is the arbitration agreement that gives the tribunals the power or jurisdiction to arbitrate the dispute for the disputing parties. Consequently, there is need to consider the legality of online arbitration agreement as online arbitration is an emerging area in the global world. To this effect, this work will restrictively review the Nigerian Arbitration and Conciliation Act<sup>3</sup>, the UNCITRAL Model Law on International Commercial Arbitration of 1985 as Amended in 2006, and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 ('The NYC'), International Centre for the Settlement of Investment Disputes (ICSID)<sup>4</sup> and the Foreign Judgement Reciprocal Enforcement Act<sup>5</sup>. This is partly because no specific rules regulating online arbitration have been promulgated yet in Nigeria, although there is a bill awaiting presidential consent to become a law. This bill will also be analyzed in this work. Here, this work will show how much (if any) these laws provided for online arbitration agreement. The work will also refer to some of the modern laws which seem to have better provisions for online communications and transactions. They are: UNCITRAL Model Law on Electronic Commerce of 1996 and the UNCITRAL Model Law on Electronic Signatures of 2001.

### 2. The Arbitration and Conciliation Act 2004

The extant law on arbitration in Nigeria is the Arbitration and Conciliation Act 2004. The aim of the Act is to provide a unified legal framework for the fair and efficient settlement of commercial disputes by arbitration and conciliation; and to make applicable the Convention on the Recognition and Enforcement of Arbitral Awards (New York Convention) to any award made in Nigeria or in any contracting State arising out of international commercial arbitration<sup>6</sup>.

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<sup>1</sup>J. Herboczkova, 'Certain Aspects of Online Arbitration' available on <<https://www.law.muni.cz/sborniky/dp08/files/pdf/mezinaro/herboczkova.pdf>> accessed on 3<sup>rd</sup> March 2023.

<sup>2</sup> G. Nwakoby, *et. al*, 'Arbitration Agreement: The Issue of arbitrability in Nigeria Arbitration Practice' *International Journal of Law and Society*, vol. 1 (2) June 2018, pp. 92 – 101.

<sup>3</sup> Cap A 18 Laws of the Federation of Nigeria, 2004

<sup>4</sup> International Centre for the Settlement of Investment Dispute (Enforcement of Award) Act Cap 120 Laws of Federation of Nigeria 2004

<sup>5</sup> Cap F 35 Laws of Federation of Nigeria 2004

<sup>6</sup> The Recital to Arbitration and Conciliation Act Cap A 18, Laws of Federation of Nigeria, 2004

The foregoing legal regime is an indication that Nigeria possesses adequate provisions for the institutionalization of arbitration in Nigeria. It also shows that the Act provides a specialized and highly supportive legal regime for most contemporary international commercial arbitrations<sup>7</sup>. But the question remains, does the Act cover online arbitration agreement? We shall appraise this by looking at some of the provisions governing the validity of an arbitration agreement to see if arbitration agreement entered electronically satisfies the requirements under the Act. In Nigeria, for an arbitration agreement to be valid and enforceable under the Act, it must be in writing. The Act thus provides that:

1. Every arbitration agreement shall be in writing contained-
  - (a) In a document signed by the parties or
  - (b) In an exchange of letters, telex, telegrams, or other means of communication which provide a record of the arbitration agreement; or
  - (c) In an exchange of points of claim and defence in which the existence of an arbitration agreement is alleged by one party and not denied by another<sup>8</sup>

The term ‘agreement in writing’ shall include an arbitral clause in a contract or arbitration agreement signed by the parties contained in an exchange of letters, telex, telegrams or other means of communication which provide a record of the arbitration agreement. In other words, the Act does not specifically state anything about the electronic transmission as a possible means of conclusion of an arbitration agreement. Asia in his article opined that in most online transactions, the terms and conditions of the transaction agreement are represented by three terms- they are clickwrap, browsewrap and hybridwrap<sup>9</sup>. In clickwrap agreements, users are mandatorily required to click on an ‘I agree’ button or expressly assent to the terms and conditions before they can continue with the transactions. Browsewrap agreements on the other hand, are provided through a hyperlink on the website, often at the bottom of the screen. They do not require the user to manifest his or her consent to the terms and conditions but instead the party consents simply by using the website. Hybridwrap agreements have the characteristics of both and typically prompt the user to manifest assent after presenting a hyperlink to the terms and conditions, rather than displaying the terms themselves. In most standard online terms and conditions, arbitration clauses are inserted. Depending on the nature of the terms, online users merely click to indicate acceptance<sup>10</sup>. The question is whether, a clickwrap, browsewrap, hybridbrid as explained above qualifies as writing under the Act? The word writing in section 1b of the Act if liberally interpreted can be said to have accommodated online arbitration agreement. Section 1(b) acknowledges arbitration agreement in writing when it is contained in an exchange of letters, telex, telegrams, or other means of communication which provide a record of the arbitration agreement<sup>11</sup>. In this second arm, the provision that the written agreement could be contained in any other communication which provides a record of the arbitration agreement seems to have given a wider scope to cover electronic means. Computer is a means of communication which can provide a record of any agreement. For example, if the arbitration agreement to be made in writing by means of electronic exchange (through email) then there should not be a problem to recognize the submission of claim and the further replies to be conducted by means of electronic email submission<sup>12</sup>.

In this research, we interpret section 1 of the Act to mean that an arbitration agreement shall be deemed to be in writing once it is contained in any of the limbs (a – c) of the provision. These limbs of the section are disjunctive and not conjunctive. This is to say that, where the arbitration agreement is contained in an exchange of telex, telegram, or other means of communication, the issue of signing may not arise. Signing is peculiar when the agreement is contained in a document. The key requirement for arbitration agreement contained in telex, telegram and other means is ‘exchange’. It must be exchanged between the parties. This presupposes that arbitration must be consensual, whether it is contained in a separate document or in telex or telegram or any other communication like then, the trend of online agreement<sup>13</sup>. For the law to recognize and enforce an arbitration agreement, it must be clear that there was a *consensus ad idem* on the issue of arbitration. It shows that an arbitration agreement cannot be entered into by accident or by implication. There must be the element of voluntariness and agreement by parties to submit their dispute to arbitration<sup>14</sup>.

<sup>7</sup> O. O. Abe, ‘The Legal Framework for Institutionalization of International Commercial Arbitration in Nigeria: A Critical Review’ *Afe Babalola University Journal of Sustainable Development Law and Policy*, vol. 1 (1), 2013 pp. 132 - 147

<sup>8</sup> Arbitration and Conciliation Act 2004, s. 1

<sup>9</sup> E. E. Asia, ‘Enforceability of Arbitration Clauses in Online Agreement under the Nigerian Law’ October 29<sup>th</sup>, 2019, available on <[https:// www.lawfuturepartners.com](https://www.lawfuturepartners.com)> accessed on 23<sup>rd</sup> January 2023.

<sup>10</sup> E. E. Asia *op. cit.*

<sup>11</sup> Arbitration and Conciliation Act, *op. cit.*, s. 1 (b).

<sup>12</sup> E. E. Asia, *op. cit.*

<sup>13</sup> E. E. Asia, *ibid.*

<sup>14</sup> *Iwuala v. Chima* (2016) LPELR – 40970(CA)

From the foregoing, it can be inferred that the Arbitration and Conciliation Act 2004 by its provisions covered online arbitration, but it did not specifically and copiously provide for it. This could be the reason for the move by the Nigerian Senate in passing a bill which seeks to repeal the Arbitration and Conciliation Act. On 10<sup>th</sup> May, 2022, the Nigerian Senate passed the Arbitration and Mediation Bill 2022 (the Bill) which seeks to repeal the Arbitration and Conciliation Act. The Bill provides a unified legal framework for the fair and efficient settlement of commercial disputes by arbitration and mediation by setting out substantive and procedural provisions that are not in the Act. Indeed, the bill presents a positive restructuring of arbitration and mediation proceedings in Nigeria<sup>15</sup>. Notably, for the requirement that an arbitration must be in writing, it provides that it can now be satisfied by an electronic communication that is accessible to be useable for subsequent reference<sup>16</sup>. While electronic communication is defined as any communication that the parties make by means of data messages, data messages is defined as information generated, sent, received, or stored by electronic, magnetic, optical, or similar means<sup>17</sup>.

Although the extant Arbitration and Conciliation Act tried to contain a similar provision when it provided that an arbitration agreement is in writing when it is contained in other means of communication,<sup>18</sup> it is unclear whether electronic communication falls within 'other means of communication' as contemplated by the Act. Indeed, the bill expressly recognizes e-mail correspondence and other mediums of electronic communication referring to agreement by both parties to submit disputes to arbitration. This clears any ambiguity as to what qualifies as a legally binding agreement under Nigerian law. The only challenge is that this is still a bill. The bill is yet to receive the assent of the president of the Federal Republic of Nigeria<sup>19</sup>. The bill is a welcome development to the application of online arbitration in Nigeria but until the bill receives the assent of the president, it can never become a law and cannot be operational in the country. Though a better provision, yet it is still in the pipeline waiting for its operation. So, as it is today, the Arbitration and Conciliation Act still subsists as its supposed successor is still in its embryo.

### **3. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention)**

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the 'New York Convention', is one of the key instruments in international arbitration. The New York Convention applies to the recognition and enforcement of foreign arbitral awards and the referral by a court to arbitration<sup>20</sup>. The New York Convention came to be as the International Chamber of Commerce of Paris (ICC) in 1953, promoted a new treaty to govern international commercial arbitrations. The ICC's proposals were taken up by the United Nations Economic and Social Council (ECOSOC) and resulted in the New York Convention which was adopted in 1958<sup>21</sup>. The convention came into force on the 7<sup>th</sup> day of June 1959<sup>22</sup>. It was ratified by Nigeria on the 17<sup>th</sup> day of March 1970. The New York Convention subsequently became part of Nigerian domestic law in 1988 through the promulgation of the Arbitration and Conciliation Act of 1988<sup>23</sup>. The Convention has been described as the single most important pillar on which the edifice of international arbitration rests and which perhaps could lay claim to be the most effective instance of international legislation in the entire history of commercial law<sup>24</sup>. It may be regarded as a major factor in the development of arbitration as a means of resolving international disputes. The convention obliges the courts of signatory states to recognize and enforce arbitration agreements and awards in the territory of other states. Many legal questions about the enforceability of electronically signed documents have arisen because of this paperless process. In the case of the arbitration

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<sup>15</sup> S. U. Nweke, 'The Nigerian Arbitration and Mediation Bill 2022: The Dawn of a New Era?' Available on <<https://www.africaarbitration.org>> accessed on 30<sup>th</sup> January 2023.

<sup>16</sup> The Nigerian Arbitration and Mediation Bill 2022, s. 2 (4)

<sup>17</sup> The Nigerian Arbitration and Mediation Bill 2022 *ibid*, s. 1 (7)

<sup>18</sup> Arbitration and Conciliation Act, *op.cit*, s. 1

<sup>19</sup> M. Odimegwu & E. Gabriel, 'Arbitration and Mediation Bill, 2022: What's New?' available on <<https://www.businessday.ng>> accessed on 24<sup>th</sup> January 2023.

<sup>20</sup> New York Arbitration Convention, 'New York Convention' available on <<https://www.newyorkconvention.org/>> accessed on 25<sup>th</sup> January 2023.

<sup>21</sup> A Redfern *et al*, *Law and Practice of International Arbitration*, (4<sup>th</sup> edn, London: Sweet & Maxwell Limited, 2004) p. 68

<sup>22</sup> New York Arbitration Convention, [www.newyorkconvention.org/new-york-convention-countries/contracting-states](http://www.newyorkconvention.org/new-york-convention-countries/contracting-states) accessed on 30<sup>th</sup> December 2022.

<sup>23</sup> E. Dike, 'Facts and Myths on the Enforcement of Arbitral Awards in Nigeria' <<http://www.cdr-news.com/categories/Nigeria/facts-and-myths-on-the-enforcement-of-foreign-arbitral-awards-in-nigeria-2012>> accessed on 21<sup>st</sup> January 2023.

<sup>24</sup> B. Mustill, 'Arbitration: History and Background' (1989) 6 *JIA* 43

agreement, the same issue arises<sup>25</sup>. Using modern technology to bring arbitration to a conclusion may raise some concerns about the enforceability of the agreement with respect to the New York Convention. The electronic conclusion of arbitration agreements raises some issues concerning the formal requirements of the provisions of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('New York Convention'). Pursuant to Article 11 of the New York Convention:

1. Each Contracting State shall recognize an *agreement in writing*<sup>26</sup> under which the parties undertake to submit to arbitration all or any differences which have arisen, or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration<sup>27</sup>
2. The term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams<sup>28</sup>.

From the above provision of the New York Convention, it is certain that for arbitration agreement to be recognized as valid, it is a prerequisite that the agreement must be in writing<sup>29</sup>. It also went further to state that an agreement in writing shall include an arbitral clause in an arbitration agreement, signed by the parties or 'contained in an exchange of letters or telegrams'<sup>30</sup>. This requirement, prima facie contradicts with the concept of the e-agreement<sup>31</sup>. This is slightly different from the provision of the Nigerian Arbitration and Conciliation Act which added the phrase 'or other means of communication which provide a record of the arbitration agreement.' This phrase as stated earlier seems to have encapsulated e- arbitration agreement. In considering whether online arbitration agreement complies with the requirement of writing under New York Convention, the purpose of the requirement needs to be known. The purpose of the written form is to ensure that the party is aware that he is agreeing to arbitration<sup>32</sup>. Thus, it is a matter of evidence, as evidence of the parties' consent to arbitration<sup>33</sup>. More concretely, as Landau puts it, the essential functions, and justifications for a written form of arbitration agreement is to prove the initial consent of the parties and further to prove the terms of the agreement itself<sup>34</sup>. Indeed, the New York Convention have been drafted in this spirit and thus written form of arbitration agreement is necessary for enforcement of arbitral award where the convention is applicable<sup>35</sup>.

The emergence of technology and modern means of communication have made it that nowadays, arbitration agreements are concluded via internet<sup>36</sup>. And it seems difficult to declare such online agreement valid under the New York Convention. Mohanta, in his article was of the view that, these long-standing requirements are of course no longer in line with today's realities. The drafters of the New York Convention considered the exchange of letters or telegrams to be modern, as they were in 1958. As a result, they failed to anticipate that electronic exchanges would become a regular part of everyday commercial transactions<sup>37</sup>. It is apparent that by the penetration of the modern means of communication, like the internet to the legal world, the legal language must be broadened. The reason is that modern technology has outgrown this convention. However, there are other modern laws in which the means of proving consent may be broader than those expressly mentioned in the New York Convention<sup>38</sup>. Those modern laws will be discussed in this work.

<sup>25</sup> T. Mohanta, 'Electronic Arbitration Agreement in International Commercial Arbitration' A Research Work Submitted to National University of Study and Research in Law (NUSRL), available on <papers.ssrn.com/so113/papers.cfm?abstract\_id=4009480> accessed on 25<sup>th</sup> January 2023.

<sup>26</sup> Emphasis mine

<sup>27</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York 1958), Art. 2(1)

<sup>28</sup> *Ibid*, art. 2(2)

<sup>29</sup> New York Convention *op. cit*, art. 2(1)

<sup>30</sup> *Ibid*, art. 2(2)

<sup>31</sup> A. Chakraborty, 'Online Arbitration Model: A Need of the Hour' available on <[https://papers.ssrn.com/so13/papers.cfm?abstract\\_id=3536252](https://papers.ssrn.com/so13/papers.cfm?abstract_id=3536252)> accessed on 2<sup>nd</sup> May 2023.

<sup>32</sup> A. Jan van den Berg, 'The New York Convention of 1958' (Deventer: Kluwer Law and Taxation Publisher, 1994) p. 171 cited in G. Kubicova 'Electronic Form of Arbitration Agreement' A Research Work Submitted to Central European University Legal Studies Department Buda Past Hungary, 2009, available on <<https://www.etd.ceu.edu.kub.pdf>> accessed on 24<sup>th</sup> January 2023.

<sup>33</sup> G. Kubicova, *Ibid*, p. 5

<sup>34</sup> T. Landau, 'The Requirement of a written Form for an Arbitration Agreement When Written Means Oral' the ICCA Congress Series No. 11 pp. 20- 24 cited in G. Kubicova, *ibid*, p. 6

<sup>35</sup> G. Kubicova, *op. cit*, p. 6

<sup>36</sup> *ibid*, p.5

<sup>37</sup> T. Mohanta, *op. cit*, p. 3

<sup>38</sup> T. Mohanta, *op. cit*.

Another issue is the issue of enforcement of the online arbitral award under the New York Convention. One of the reasons why parties have recourse to arbitration as a means of resolution of their dispute is the finality and easy enforceability of the award, especially due to strong influence of the New York Convention. If the award fulfills the procedural requirements provided for in Article V and was issued in the territory of country signatory to the Convention, it is almost certain that the award will be enforced in that other country<sup>39</sup>. Article IV of the New York Convention provides that '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'<sup>40</sup>. Its requirements for enforcement of the arbitral award are irreconcilable with the specifics of the online arbitration. How can these requirements be reconciled with the online award which is issued by electronic means? Herboczkova<sup>41</sup>, in his article suggested that Article IV must be read together with the Article III of the New York Convention, which stipulates 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'. This means that if the state of enforcement accepts an electronic form of writing there should be no barrier to the enforcement of the electronic award. Although an extensive interpretation of its provisions can be of some help, its modernization and amendment are necessary to keep track with the developments of modern society.

#### **4. United Nations Commission on International Trade Law (UNCITRAL Model Law) 2006**

The UNCITRAL Model Law on International Commercial Arbitration is a model law prepared by UNCITRAL, and adopted by the United Nations Commission on International Trade Law on 21 June 1985. In 2006, it was amended. The main purpose was (and still is) to create a uniform or at least a harmonized legal background for international commercial arbitration on the national level<sup>42</sup>. Nigeria adopted the UNCITRAL Model Law in 1988 with the promulgation of the Arbitration and Conciliation Act<sup>43</sup>. The Model Law had a tremendous impact in the formulation of the Nigerian Arbitration and Conciliation Act.<sup>44</sup> Article 7 (2) of the Model Law of 1985 reads as follows: 'The arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams, or other means of communication which provide a record of agreement'<sup>45</sup>.

The above provision of the 1985 Model is a replica of what is provided in the Nigerian Arbitration Act 2004. This provision in the 1985 Model was among the provisions that were amended in 2006 to keep the requirements of the law in line with the needs of current commercial practice and technological developments<sup>46</sup>. The novelty brought by the 2006 amendment is, however, the expanded interpretation of what writing means -

(4) The requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference; 'electronic communication' means any communication that the parties make by means of data messages; 'data message' means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.<sup>47</sup>

From this perspective, it is particularly important to mention the 4th part of the Article 7 of 2006 amendment quoted above. The paragraph totally accommodated online arbitral agreement because online arbitral agreement is an agreement entered and concluded by electronic means. The importance of the amendment is hard to underestimate. This rule provides a possibility to conclude the arbitration agreement with electronic means or any means that is currently available and may in future be developed so far as that means is subject to the criterion that, such information contained therein need to be accessible to be usable for subsequent reference. Such amendment at least has an impact on the creation of the proper environment for further development of the e-arbitration in its complete form<sup>48</sup>. The UNCITRAL Model Law amendment of 2006 is a radical and positive departure from the provisions of the Nigerian Arbitration Act 2004 and the New York Convention earlier discussed. The Nigerian Arbitration Act needs to be amended in line with this Model Law Provision.

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<sup>39</sup>J. Herboczkova, 'Certain Aspects of Online Arbitration' available on <<https://www.law.muni.cz/sborniky/dp08/Files/pdf/Mezinara/herboczkova.pdf>> accessed on 28<sup>th</sup> January 2023.

<sup>40</sup> New York Convention, *op. cit.*, art. 1V,

<sup>41</sup> J. Herboczkova, *op. cit.*

<sup>42</sup> G. Kubicova, *op. cit.*, p. 11

<sup>43</sup> 2004, formerly Arbitration and Conciliation Decree No 11 of 1988

<sup>44</sup> P Binder, *International Commercial Arbitration and Conciliation on UNCITRAL Model Law Jurisdictions* (3<sup>rd</sup> edn, London: Sweet & Maxwell, 2010) p. 74

<sup>45</sup> UNCITRAL Model Law on International Commercial Arbitration of 1985, article 7(2)

<sup>46</sup> A. Chakraborty, *op. cit.*

<sup>47</sup> UNCITRAL Model Law 2006, art. 7 (2-6).

<sup>48</sup> A. Chakraborty, *op. cit.*

### 5. International Centre for the Settlement of Investment Disputes (ICSID)<sup>49</sup>

As with other international arbitration instruments, the convention sought to remove bottleneck inherent in the settlement of investment disputes.<sup>50</sup> The Convention regulates the arbitration and conciliation of investment (legal) disputes between states and nationals of other contracting states.<sup>51</sup> Thus only such disputes which have been submitted to ICSID by the mutual consent of the parties will be settled under the Convention. ICSID also regulates its arbitral proceedings through ICSID Arbitration Rules. Nigeria deposited its instruments of ratification on 23<sup>rd</sup> of August 1965, and the Convention entered into force in Nigeria on 14<sup>th</sup> of October 1966 through the process of domestication<sup>52</sup>. Consequently, in 1967, during the military rule, Nigeria domesticated the provisions of the convention. This was through the International Centre for Settlement of Investment Disputes (Enforcement of Awards) Act<sup>53</sup>. The Act provides that an ICSID award shall be enforced in Nigeria as if it were an award contained in a final judgement of the Supreme Court of Nigeria, once the party seeking the enforcement presents a copy of the award duly certified by the Secretary-General of the Centre<sup>54</sup>. With the advent of technology, investment disputes might also be going online. A careful perusal of the provisions of Nigerian ICSID Act shows that it does not provide for online arbitration of investment disputes. It only dealt with arbitration and conciliation of international investment disputes.

### 6. The Foreign Judgement Reciprocal Enforcement Act<sup>55</sup>

This Act makes provision for the enforcement in Nigeria of judgments given in foreign countries which accord reciprocal treatment to judgments given in Nigeria. It therefore, facilitates the enforcement in foreign countries of judgments given in Nigeria. The enforcement of such foreign judgments is to be sought at the High Court of a state or the Federal Capital Territory, Abuja, or the Federal High Court<sup>56</sup>. In as much as the Act refers to judgement, it has in its interpretation section defined judgement to mean thus:

A judgment or order given or made by a court in any civil proceedings and shall *include an award in proceedings on an arbitration*<sup>57</sup> if the award has in pursuance of the law in force in the place where it was made become enforceable in the same manner as a judgment given by a court in that place, or a judgment or order given or made by a court in any criminal proceedings for the payment of a sum of money in respect of compensation or damages to an injured party<sup>58</sup>

The provision above brings arbitral award within the purview of the Act. Under this Act, a party may apply to a superior court in Nigeria at any time within six years after the date of the award, to have the award registered in such court, and when such application is made, the court shall, order the award to be registered<sup>59</sup>. Notably, the courts in Nigeria will only enforce foreign awards made in any other country if that other country accords substantial reciprocity of treatment to awards made in Nigeria. The provisions of the Act may be extended to any foreign country upon the order of the Minister of Justice if, the Minister is satisfied that substantial reciprocity of treatment will be assured as respects the enforcement in that foreign country of judgments given in the superior courts in Nigeria<sup>60</sup>. This Act deals with enforcement of foreign awards in all its sections. It did not state the form of the award before it can be enforced. It can be said that though it did not specifically mention online arbitral awards delivered electronically but having failed to state the form of award, it is inferred that it did not also restrict the enforcement of online arbitral award.

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<sup>49</sup> International Centre for the Settlement of Investment Dispute (Enforcement of Award) Act Cap 120 Laws of Federation of Nigeria 2004

<sup>50</sup> Convention on the Settlement of Investment Disputes between States and Nationals of other states produced at Washington, D.C. 18<sup>th</sup> March 1965. 575 U.N.T.S 159 (No 8359) (1966) <<https://icsid.worldbank.org/ICSID/stTic/files/basicdoc/partAhtm>> accessed 30<sup>th</sup> November 2022

<sup>51</sup> International Centre for Settlement of Investment Disputes Convention, art 1 (2)

<sup>52</sup> Constitution of Nigeria 1999, *op cit*, s. 12(1) provides thus: 'no treaty between the Federation and any other Country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly'

<sup>53</sup> Now updated in the International Centre for Settlement of Investment Disputes (Enforcement of Awards) Act Cap 120 Laws of Federation of Nigeria 2004, formerly, International Centre for Settlement of Investment Disputes (Enforcement of Awards) Act 1967 No. 49

<sup>54</sup> International Centre for the Settlement of Investment Dispute (Enforcement of Awards) Act 2004, *op cit*, s. 3

<sup>55</sup> Cap F 35 Laws of Federation of Nigeria 2004

<sup>56</sup> Foreign Judgment (Reciprocal Enforcement) Act, s. 2 (1) These courts are enumerated in this section as the Superior courts in Nigeria

<sup>57</sup> Emphasis mine

<sup>58</sup> Foreign Judgment (Reciprocal Enforcement) Act, s. 2 (1)

<sup>59</sup> *Ibid*, s. 4(1)

<sup>60</sup> Foreign Judgement Reciprocal Enforcement Act, *op cit*, s. 3 (1)

## 7. Other Significant Model Laws

The United Nations Commission on International Trade Law (UNCITRAL) was one of the first organizations which Governments used as a forum to develop uniform private law standards for Electronic Commerce (e-commerce)<sup>61</sup>. UNCITRAL therefore over the years enacted laws for the regulation of e-commerce e.g., the UNCITRAL Model Law on Electronic Commerce 1996 (Model Law on Electronic Commerce) and the UNCITRAL Model Laws on Electronic Signature with Guide to Enactment 2001 (Model Law on Electronic Signature)<sup>62</sup>. These Model Laws shall be taken *seriatim*.

### *UNCITRAL Model Law on Electronic Commerce 1996*

In 1996, the United Nations Commission on International Trade Law (UNCITRAL) adopted the Model Law on Electronic Commerce<sup>63</sup>. The Model Law was the first step in achieving international harmonization on electronic transactions which focused on the problems associated with the use of computer-to-computer communication<sup>64</sup>. The purpose of the Model Law is to offer national legislators a set of internationally acceptable rules that detail how several legal obstacles to the development of electronic commerce may be removed, and how a more secure legal environment may be created for electronic commerce<sup>65</sup>. It recognizes 'writing' in electronic data form with a view to providing criteria which, once they are met by data messages, enable such data messages to enjoy the same level of legal recognition as corresponding paper documents performing the same function. The UNCITRAL Model Law on E-Commerce ('the Model Law on E-Commerce')<sup>66</sup> is going even further by modernizing the concepts of writing and signatures and thus facilitating the e-commerce. The direct contribution of this Model law on the development of online arbitration is mainly on the validation of arbitration agreement concluded via electronic means. Several provisions of this model law can have direct influence on umpteen numbers of aspects pertaining to that of e-arbitration<sup>67</sup>. On the basic writing requirements, for example, it translates easily to their electronic equivalents. Article 6 defines the basic standard to be met by a data message to satisfy a requirement that information be retained in writing, or that it be contained in a document or other paper-based instrument<sup>68</sup>. It uses the concept of 'data messages', which include electronic data interchange (EDI), email, telegram, telex, and telecopy<sup>69</sup>. All these forms of communication satisfy the requirement of 'in writing' if the information contained therein is accessible to be usable for subsequent reference.

Similarly, where the law requires a document to be signed, the Model Law contemplates the use of electronic signatures<sup>70</sup> rather than setting stringent reliability standards. To satisfy a legal requirement for a signature, article 7 requires not only that a method be used that both identifies the originator and confirms the originator's approval of the content of the message, but also that the method of identification be 'as reliable as was appropriate' for the purpose for which it was used<sup>71</sup>. Thus, the Model Law simply allows electronic signatures where they achieve the same purposes as their pen-and-ink counterparts since the basic function of a signature is simply to link a person with a document<sup>72</sup>. With these provisions, the Model Law on Electronic Commerce has immensely facilitated the transition of the trade from traditional paper-based contracts to e-commerce<sup>73</sup>. This Model Law has been globally accepted and has been successful in enforcing the principles of non-discrimination, technological neutrality, and functional equivalence regarding the data messages. This has helped in furtherance of international trade and helped homogenising various legal perspectives regarding this subject. The Model Law on Electronic Commerce has achieved the following:

- Validation and recognition of contracts formed through electronic means,
- Validating originality and retention of documents in electronic form,
- Provided acceptability to electronic signatures for legal and commercial purposes,
- Support to the admission of computer evidence in courts and arbitration proceedings<sup>74</sup>.

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<sup>61</sup> A. A. Laoye, 'Nigeria Electronic Commerce Act:

<sup>62</sup> A. A. Laoye, *op. cit.*

<sup>63</sup> R. Sorieul *et. al.*, *op. cit.*, p. 108

<sup>64</sup> *Ibid*

<sup>65</sup> *Ibid*

<sup>66</sup> Available on < [http://www.uncitral.org/uncitral/en/uncitral\\_texts/electronic\\_commerce/1996Model.html](http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/1996Model.html)> accessed on 28<sup>th</sup> January, 2023

<sup>67</sup> A, Chakraborty, *op. cit.*

<sup>68</sup> UNCITRAL Model Law on Electronic Commerce 1996, art. 6(1)

<sup>69</sup> Article 2 of UNCITRAL Model Law on Electronic Commerce

<sup>70</sup> *Ibid*, art. 7

<sup>71</sup> *Ibid*, art. 7.

<sup>72</sup> R. Sorieul *et. al.*, *op. cit.*

<sup>73</sup> A. Garg

<sup>74</sup> A. Garg

As a result of the above stated efforts, most online contracts are legally binding. This implies that validity of online arbitration agreements shall be recognized accordingly because online arbitration agreement is also an online contract<sup>75</sup>.

#### **UNCITRAL Model Law on Electronic Signature**

Following the adoption of the UNCITRAL Model Law on Electronic Commerce in 1996, the UNCITRAL Working Group on Electronic Commerce undertook preliminary work on the feasibility of preparing uniform rules on the legal issues of digital signatures and certification authorities<sup>76</sup>. The impetus for work on signatures came not only from the discussions on signature that took place during the preparation of the Model Law, but also reflected the increasing interest among Member States in the methods by which signature functions could be achieved by electronic means. For business and governments to function in the new Internet environment, it was widely recognized that a mechanism to authenticate electronic communication reliably and securely was critical<sup>77</sup>. Hence, the UNCITRAL Model Law on Electronic Signatures (MLES) came in September 2000. The Model Law on Electronic signature addresses legal effect of signatures, rules of conduct, and cross border issues<sup>78</sup>. This Model Law on Electronic Signatures aims to enable and facilitate the use of electronic signatures by establishing criteria of technical reliability for the equivalence between electronic and hand-written signatures.

In respect of successful integration of online arbitration into national legislations the legal framework established by the model law on e-signature has a critical importance. Apparently, the regulation of the model law facilitates not only validation of the arbitration agreements expressed in electronic documents, but also the validation of electronic award and other procedural documentation. For instance, Article 6 Part 1 of the Model Law on Electronic Signatures provides that where the law requires a signature of a person, that requirement is met in relation to a data message if an electronic signature is used that is as reliable as was appropriate for the purpose for which the data message was generated or communicated, in the light of all the circumstances, including any relevant agreement<sup>79</sup>. This provision is also useful as it enables the electronic signing of online arbitration award.

#### **8. Conclusion**

Online arbitration is still a gray area in Nigeria legal arena. This work examined the legislative framework in Nigeria and found that there is no copious provision for the legality of online arbitration agreement it is only by inference. This is because there is no constructive legislative development on substantive legal matters concerning online arbitration. The requirement of 'in writing' under Nigerian law for the legality of arbitral agreements seems too stringent to cover online arbitration agreement as such is in electronic form. This work recommends that the Nigerian Arbitration and Conciliation Act 2004 and other relevant laws should be amended to include provisions that regulate electronic means of communication there by assimilating online arbitration agreement properly.

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<sup>75</sup> R. C. Bordone, 'Electronic Online Dispute Resolution: A Systems Approach: Potential, Problems and a Proposal', 1998, *Harvard Negot. Law Review*, vol. 3(178), p. 192

<sup>76</sup> R. Sorieul *et. al.*, *op.cit.*

<sup>77</sup> *Ibid.*

<sup>78</sup> *Ibid*

<sup>79</sup> UNCITRAL Model Law on Electronic Signatures 2001, art. 6