

**EXAMINING THE LEGAL ISSUES IN ELECTRONICS COMMERCE**

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**BEING A LONG ESSAY IN PARTIAL FULFILMENT OF THE REQUIREMENT FOR  
THE AWARD OF A BACHELOR OF LAWS (LL.B HONS) SUBMITTED TO THE  
FACULTY OF LAW OF THE UNIVERSITY OF BENIN, BENIN CITY, NIGERIA**

**OCTOBER, 2023.**

## **DECLARATION**

I hereby declare that this project **EXAMINING THE LEGAL ISSUES IN ELECTRONICS COMMERCE** is the product of my own research effort undertaken under the supervision of **ODUNAGBON THEODORA OTASOWIE (MRS)** and has not been presented elsewhere for the award of any degree or certificate. All sources have been clearly stated and acknowledged.

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## **CERTIFICATION**

I, **Medevo Louis MILLER** with **Mat No. LAW1407368** hereby certify that apart from references to other people's work which has been duly acknowledged, the entire project is a product of my personal research and that this project has neither in whole or in part been submitted for another degree elsewhere.

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## APPROVAL

We, hereby certify that **Medevo Louis MILLER** with Mat. No. **LAW1407368**, completed this project in partial fulfillment of the requirement for the award of **Bachelor of Laws (LL.B)** degree in the Faculty of Law of the University of Benin, Benin City, Nigeria.

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## **DEDICATION**

I dedicate this work to the Almighty God for supplying all that is needed for the completion of this work.

## **ACKNOWLEDGEMENT**

My profound gratitude to God for His guidance, protection, direction and infinite mercy that accompany me all the way to the completion of this academic work.

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The Electronic Communication and Transactions ACT No.25/2002 of South Africa.

Electronic Transaction Act, 1999 of Singapore

Uniform Electronic Transaction Act (UET)

### **LOCAL LEGISLATIONS**

Cybercrimes (Prohibition, Prevention etc) Act 2015

Hire Purchase Act (CAP H4) LFN 2004

Infants Relief Act 1874

Land Use Act 1979

Sales of Goods Act 1893

## TABLE OF ABBREVIATION

<b>ATMS</b>	-	Automated Teller Machines
<b>B2B</b>	-	Business-to-Business
<b>B2C</b>	-	Business-to-Consumer
<b>C2C</b>	-	Consumer-to-Consumer
<b>C2B</b>	-	Consumer-to-Business
<b>C15G</b>	-	The United Nations Convention on Contracts for International Sales of Goods
<b>E.A</b>	-	Evidence Act
<b>Et al</b>	-	et alia (and others)
<b>Ibid</b>	-	Ibidem (in the same place)
<b>ICT</b>	-	Information Communication Technology
<b>LFN</b>	-	Laws of the Federation of Nigeria
<b>Ltd</b>	-	Limited
<b>Pp</b>	-	Page
<b>SGA/SOGA</b>	-	Sales of Goods Act
<b>SOGL</b>	-	Sale of Goods Law
<b>UNCITRAL</b>	-	United Nations Commission on International Trade
<b>www.</b>	-	Word Wide Wibsite

## **ABSTRACT**

Technology is an essential tool in development of any nation; electronic commerce is currently booming in Nigeria and the rest of the world. There have been dramatic increase in transactions which use or performed electronically. This study examine the concept of e-commerce and presents an assessment on the existing commercial laws in Nigeria particularly the common laws rule of contract and Sales of Goods Act, whether they ensembles with information and Communication Technology (ICT) revolutions. The practicing of electronic commerce in Nigeria today is very common, Nigerians enter into commercial agreements within and outside the county through online transactions via internet. While online commercial transactions are flourishing speedily, still in Nigeria there is no adequate legal framework that support it which pose a major challenge to e-commerce. The Sale of Goods Act Enacted before independence in 1960 and common law rules on contract which are the main law of the country still regulate contract and there is no any amendment of the said laws apart from the technology advancements which changed the modes of contractual arrangements furthermore, the study come-up with a conclusion and recommendation; generally there is a need for a re-examination and revision of the fundamental principles of the commercial laws in Nigeria to accommodate business and contract conducted in electronic form.

# CHAPTER ONE

## THE INTERNET AND ELECTRONIC COMMERCE

### 1.1 INTRODUCTION

Information and Communication Technology (ICT) has revolutionized the way business and commerce are transacted globally and Nigeria in particular. ICT has become enabler in every sector of the economy in simplifying the way business is conducted. Momentous commercial and business transactions are not only made faster, but the volume of goods and services that are transacted have multiplied many times over. The countries' economies grows bigger through the application of ICT as the World Bank Survey reveal that approximately 50 developing countries suggest that "firms using ICT see faster sales growth, higher productivity and faster employment growth".<sup>1</sup>

The business practices are no longer depends on paper based system. Currently business transactions are conducted via online, websites and other electronic modes. Nigeria has become smaller in terms of commercial and business transactions are concern, just like the world has become even smaller. It is the application of ICT that has facilitated that integration and interconnectedness which we now take for granted. Often people are used to electronic transactions in alternative to the traditional transactions. It is very common these days to find people do marketing and buying goods and services online like buying of cars via internet, order of e-books from Amazon. Accessing of bank serices through Automated Teller Machines, Making of elctonic payments through mobile banking. Visa Cards and Master Cards just mention the few. Despite of all these technology advantages still there are

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<sup>1</sup> Khalil et al. *The Next Decade of ICT development: Access, Application and the Forces of Convergence*. Washington, DC: The World Bank Group. Pp.7

legal obstacles and predictability on commercial laws which challenge the validity of these electronic transaction as well as online consumer protection.

Countries all over the world continue to evaluate their existing commercial laws to fit in the current practices of business to ensure the promotion of electronic commerce and consumer protections. The convention of the United Commission on International Trade Law (UNICITRAL) in respect of the electronic communications in International Contracts (CUECIC) established rules which are uniform for the purpose of eliminating those obstacles which could result on the operations of international transactions. Other countries like Singapore have adopted some of the provisions in their domestic laws for the purpose of smooth implementation of electronic transaction.<sup>2</sup>

Nigeria cannot be left behind by this move of evaluating the existing basic commercial laws in examining to what extent the said laws especially the common law rule of contract and the sales of Goods act challenged the application of electronic transactions.

## **CLARIFICATION OF SOME KEY TERMS**

### **1.2 The Internet and E-Commerce**

#### **1.2.1 The Internet:**

The internet today, as pointed out by Emeka and Nyeche is a worldwide entity whose nature cannot be easily or simply defined.<sup>3</sup> Jubrin and Musa have also observed that to many, the

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<sup>2</sup> Eliza Karolina MIL, 'Evaluating the impart of the UN Convention on the use of Electronic Communications in the International Contracts on Domestic Contract Law – The Singapore example, 'International Law Association Chinese' (Taiwan) Branch Yearbook (2012) <http://worksbeepress.com/elizamik/21/>

<sup>3</sup> Emeka U J and Nyeche, O S, 'Impact of Internet Usage on the Academic Performance of Undergraduates Students' A Case Study of the University of Abuja, Nigeria, International Journal of Science of Engineering Research (2016) 7(10) cited in Jubrin- M.A. and Musa M N, 'Effects of Internet on the academic Performance of Tertiary Institutions in Niger State. Nigeria'. (2017) 2(2) International Journal of Education Learning and Training 58.

Internet is a large network linking together millions of smaller computers at numerous sites in various countries belonging to thousands of business, government, research, educational and other organizations.<sup>4</sup> The Nigerian equivalents of Amazon and eBay that started the electronic commerce on the internet, include Jumia<sup>5</sup> and Konga<sup>6</sup> have sprung up on the internet and even local shop owners have established their presence on the internet to the extent that one can find even a local pharmacist, electrician, Mason, carpenter, supermarket owner, confectioner and so on displaying their goods and services for the world to see. The increase in sale of goods on the internet, has given rise to concern over the legal status and validity of electronic contract.

### 1.2.2 Electronic Commerce

The definition of e-Commerce vary considerably.<sup>7</sup> That permit to say that there is no single acceptable definition of e-commerce. E-Commerce has been the act or process of selling and buying goods or services conducted by using electronic means to enable the process of selling and buying to occur; mostly, instantaneously between the seller/producer and the buyer or consumer. According to the concise Oxford English Dictionary, defined e-commerce as “Commercial transactions conducted electronically on the internet.”<sup>8</sup>

The Asia Pacific Economic Co-operation (APEC) has adopted a wider definition of e-commerce to include:

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<sup>4</sup> Jubrin M A and Musa M N, ‘*Effects of Internet on the academic Performance of Tertiary Institutions in Niger State, Nigeria*’. (2017) 2(2) International Journal of education Learning and Training 58.

<sup>5</sup> <https://www.jumia.com.ng>> accessed 10 November, 2018

<sup>6</sup> <https://www.konga.com.ng>> accessed 10 November, 2018

<sup>7</sup> Organization for Economic Co-operation and Development Report on Electronic Commerce: *Opportunities and Challenges for Government* (Searcher Report), August 1997, at p20.

<sup>8</sup> Pearsall J, *Concise Oxford English Dictionary* (10<sup>th</sup> ed.), Oxford University Press Inc., New York (2002) p4 53.

All business activity conducted using a combination of electronic communication and information processing technology.<sup>9</sup>

Kareem, Owomoyela and Oyebamiji have referred to e-commerce as the use of communications technology, particularly the internet, to buy, sell and market goods and services to customer.<sup>10</sup>

Sharing in the same view, Dr. Albdulhadi, sees e-commerce as:

The use of computers and telecommunication to conduct business transactions that encompass all the steps involved in negotiating, confirming and performing commercial transactions electronically.<sup>11</sup>

Therefore, the scope of electronic commerce is wide and includes all electronically mediated transactions between organization and a third party. It is not restricted so to the actual buying and selling of product but includes presale and post-sale activities.<sup>12</sup>

### **Classification of e-Commerce**

There are basically four types of e-commerce but they can be branch into more types. First is co-operation to co-operation as known as business to business (B2B) type of e-commerce. This is the type of e-commerce when buyers and sellers are gathered together into a single on line trading community, reducing search cost even further. Efficiency in trading processes and transactions is also enhanced through the B2B e-market's ability to process sales through online auctions. Furthermore, online processing improves inventory management and logistics.<sup>13</sup> Through B2B e-markets, suppliers are able to interact and transact directly with buyers, thereby eliminating intermediaries and distributors.

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<sup>9</sup> A Dider Singh, "*Electronic Commerce: Issues for the South*" Trade-related Agenda, development and equity, working paper, South Center, October 1999, p4.

<sup>10</sup> Kareem T S and Owomoyela S and Oyebamiji F F '*Electronic Commerce and Business Performance: An Empirical Investigation of Business Organizations in Nigeria* (2014) 4 No 8 International Journal of Academic Research in Business and Social sciences 216.

<sup>11</sup> Abdulhadi M Alghamdi, *The Law of E-commerce: E-contract, E-business*. Authorhouse (2011) page 60.

<sup>12</sup> Kalakota and Whinston, '*Electronic Commerce*' 69.

<sup>13</sup> <http://www.wewantraffice.com/ecommerce/types-of-ecommerce.aspx>

Another type of e-commerce is a trade between companies business to consumer e-commerce is a trade between companies and consumers, involves customers gathering information; purchasing physical goods, information goods, electronic material such as software or e-book. This type is the second largest and the earliest form of e-commerce. B2C e-commerce reduce transactions costs by increasing consumer access to information and allowing consumers to find the most competitive price for a product or service.

The third type is Consumer to Business (C2B) type of e-commerce. This type is where the individual use the internet or render services to organization or individual or individuals seek sellers to bid on product or services they need.

Finally, the fourth type of e-commerce is the consumer to consumer (C2C) is simply commerce between private individuals or consumers. Thus type of e-commerce is characterized by the growth of electronic market places and online auctions, particularly in vertical industries where businesses can bid for what they want from among multiple suppliers. Though, these classification has generated arguments that in Nigeria there are only two major types of e-commerce transactions namely; B2B and B2C.<sup>14</sup> Perhaps it can be added that, e-commerce in Nigeria is still at its nascent stage hence we are not as advanced as the developed countries in terms of ICT advancement and awareness.

### **1.3 General Concept of E-Commerce in Nigeria**

Nigeria is one among the beneficiaries of the deployment of the new technology. Currently the use of ICT is no longer a luxury practice but it has become the enabler of simplifying the way businesses are conducted. E-Commerce, as rightly posited by Chiemeké, Ewwiekpaefe, Okpo and

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<sup>14</sup> Idogbe A A, *Legal and Institutional Framework for e-commerce in Nigeria*, available at <http://www.punaka.com/uploads/cibn> paper on legal and institutional framework for e-commerce in Nigeria, at p. 5.

Irhebude,<sup>15</sup> is still a relatively new concept to delivering countries like Nigeria. In view of its population which, according to the United Nations, stands at 182 million, it can be argued that Nigeria has the most internet penetration and usage in Africa in the light of the report that sale of goods on the internet multiplied between 2011 and 2012 from \$10.5 million to about \$3 billion.<sup>16</sup> Electronic comer currently being practiced in Nigeria through commercial transactions conducted online whereby a number of Nigerian citizens are selling and buying through online transactions domestically and internationally.

A number of institutions such as banks and private companies are improving and qualify their functions and services through the use of electronic modes such as internet, website and other networks for searching of commercial information marketing and buying of products online, buying of electronic air tickets, the payment of bills electronically, transfer of cash money through mobiles services, accessing of bank services such as ATMs and electronic payments through credit cards. Basically all these transactions are commercial in nature involve contractual arrangements but in electronic forms different from the traditional contracts.

Although these electronic transactions are commonly practiced in Nigeria but they have been done in the absence of any clear legal framework. The existing commercial laws enacted a long time ago during the 19<sup>th</sup> century are still regulating commercial transactions in Nigeria based on traditional system of paper work for contracting processes. This is debatable when it comes to e-commerce which based on paperless transaction and raise a doubt whether there is any place for electronic transactions in the existing commercial laws.

#### **1.4 Contract and Electronic Contract**

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<sup>15</sup> Hiemeke S C and others 'Framework for electronic Commerce Adoption: A study in Kaduna State' 2014) 9(3) Science world Journal 20.

<sup>16</sup> Adebayo S 'E-commerce Development in Nigeria' The Herald (Nigeria, 30 June 2014) <https://www.herald.ngle-commerce-development-nigeria/> accessed 23 April 2016.

### 1.4.1 Contract

It is pertinent to draw attention to what in a nutshell a contract entails before delving into some or more of the legal issues a buyer or seller encounter in the case of doing e-commerce transaction. A contract has been defined by Salmond as ‘an agreement creating and defining obligation between two or more persons by which rights are acquired by one or more to acts or forbearance on the part of others’.<sup>17</sup>

While Anson sees contract as: ‘a legally binding agreement between two or more persons by which rights are acquired by one or more to acts or forbearance on the parts of others.’<sup>18</sup>

In the Black’s Law dictionary,<sup>19</sup> contract is defined as: ‘an agreement between two or more parties which creates obligations that are enforceable or otherwise recognizable at law’.

Another definition which is not so much different from the one preferred above is that of Sagay who state that a contract is: ‘an agreement which the law will enforce or recognize as affecting the legal right and duties of the parties’.<sup>20</sup>

Arising from the definitions, it would be observed that a common thread that cuts across them is the fact that a contract involves an agreement as well as legal recognition. Sake of Goods is define under *Section 2 of the Sale of Goods Act 1893*<sup>21</sup> as;

A contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration called the price.<sup>22</sup>

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<sup>17</sup> Salmond J W and Windfield, J *Salmond principles of the Law of Contract* (2<sup>nd</sup> edn, London Sweet and Maxwell 1927) 1.

<sup>18</sup> Beatson J Burrows and Cartwright J, ‘*Anson on Contract*’ (30<sup>th</sup> edn, Oxford University, press 2016).

<sup>19</sup> Garner (n 200) 365.

<sup>20</sup> Sagay I, *Nigerian Law of Contract* (2<sup>nd</sup> edn, Spectrum Books Limited 2001)1.

<sup>21</sup> The Act is one of the received English Laws applicable to Nigeria by virtue of the fact that it was a statute of general application in force in England as at 1<sup>st</sup> January, 1900.

<sup>22</sup> *Sale of Goods Act 1979* Section 2(1) Act, and *the Sale of Goods Laws of Delta State Nigeria s. 3(1)*.

Thus definition makes it clear that sale of goods involves a contract, therefore, it would be correct to state that the basic elements of a contract are applicable to sale of goods with the additional element of the subject matter involved being goods and the consideration for the sale being money consideration. The money consideration is so important to a contract of sale of goods that Dobson emphatically stated that in the absence of it, the contract would be one of exchange.<sup>23</sup> The subject matter of the contract is ‘goods’, which is defined to include, all chattels personal other than things in action and money, emblements, industrial growing crops and things attached to or forming part of the land which are agreed to be severed before sale or under a contract of sale.<sup>24</sup> A literal definition of the term ‘goods’ is to effect that they are ‘things that are produced to be sold, possessions that can be moved.’<sup>25</sup> A definition of ‘goods’, with a legal twist to it, is provided in the Black’s Law Dictionary, as any ‘tangible or movable personal property other than money especially articles of trade or items of merchandise.’<sup>26</sup> It is submitted here that the definition of goods, as put forward in the Black’s Law Dictionary, is more in tandem with the topic of this project work, particularly with regard to the fact that it is a simple version of the definition in the Sale of Goods Act and the sale of Goods Law,<sup>27</sup> that can be easily understood even by a lay person. In addition, the Black’s Law Dictionary’s definition draws attention to the fact that goods are articles of trade and merchandise which, of course, is the essence of sale of goods and form the bulk of commercial activities carried out on the internet (E-Commerce), hence the focus of this work.

### **1.4.2 Electronic Contract**

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<sup>23</sup> Dobson P, ‘*Charlesworth’s Business Law*, (16<sup>th</sup> edn, Sweet & Maxwell London 1997) 337

<sup>24</sup> Sale of Goods act 1893 S.62(1), see also the *Sale of Goods Law*, *Delta State S.* 2(1).

<sup>25</sup> Wehmeier S and Ashby M, (ed.), *Oxford Advanced Learner’s Dictionary of Current English* (6<sup>th</sup> edn, University Press Oxford 2000) 512.

<sup>26</sup> Garner (n. 12) 762.

<sup>27</sup> Hereinafter referred to as “*SOGA*” and “*SOGL*” respectively

With the advent of the internet, another category of contract has emergence, that is, online or electronic contracts. Electronic contract is any kind of contract formed in the course of e-commerce by the interaction of two or more individuals using electronic means such as e-mail, the interaction of an individual with an electronic agent, such as a computer programme, or the interaction of at least two electronic agents that are programmed to recognize the existence of a contract.<sup>28</sup> It is the implementation of all or some commercial transactions in goods and services between business and other business or between business and consumer by using information technology and communication.<sup>29</sup> The question arising from the above, against the backdrop of the traditional types of contract, is whether any particular format is required to be followed when it comes to buying and selling on the internet, and whether the contract must be in writing? The nature of the internet makes it obvious that activities or transactions that take place thereon are rerecorded or documented, hence albeit in electronic form which may be reproduced or printed in paper form. Therefore, such contract could be described as written contracts. The question of form of electronic contract is usually tied to the question of validity.

### **1.4.3 Forms of Electronic Contract**

There are several different forms of electronic contracts, most commonly, “Click-Wrap” or “Web-Wrap” contracts are electronic contracts that require the user to scroll through terms and

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<sup>28</sup> ‘E-Contract Law and Legal Definition’ <https://definitions.uslegal.com/e/-cpontracts/> cited in Ezeigbo B ‘E-Contracts, Essentials, Variety and Legal Issues’ <https://www.grin.com/document/427203> accessed 29 January, 2020.

<sup>29</sup> Al-Matlagah M E, ‘Electronic Commerce Contracts’ (2006)1 Dar al Thagafa 28 cited in Shnikat M Alzubi A Aljaber M. and Alnsoor, A.: The Legal; ‘Framework of Electronic Contract in the Jordanian Legislation’ (2017)5(5) Journal of Politics and Law Research 48.

conditions (or multiple web pages on a web site) and to expressly confirm the user's agreement to the terms and conditions by taking some action, such as clicking on a button that states "I Accept" or "I Agree" or some similar statement prior to being able to complete the transaction. Click-Wrap Contracts are often found in software products or on Web Sites.<sup>30</sup>

The "Browse-Wrap" contracts are terms and conditions of use that do not require the express agreement of a user. They are often located in software or are posted on a Web site and may make some statement that indicate use of the software or web site constitutes the user's agreement to the terms. Often such terms may not have been brought to the attention of the user.<sup>31</sup>

## **1.5 Force Majeure and Frustration**

The execution of contracts may be exposed to risks and difficulties impeding their implementation and sometimes these may make it impossible to fulfill the contract, which leads to a breach of the contractual relationship balance between the parties, due to force majeure.

The doctrine of exemption, under the United Nations Convention on the contract for International Sale of Goods (CISG) is basically predicated on how risk of liability and exemption from damages play out when a party fails to perform any obligations in the contract due to unforeseen circumstances beyond his control. It must be proved that he could not reasonably be expected to have taken the impediment into account at the time the formation of the contract of

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<sup>30</sup> Kunz C L and others "Click-Through Agreements: Strategies for Avoiding Disputes on Validity of Assent". Social Science Research Network, Business Lawyer, Vol. 57. No.1, pp231 – 360, November 2001.

<sup>31</sup> C.L. Kunz, H. Thayer, M.F. Duca, and J. Debrow 'Browse-Wrap Agreements: Validity of Implied Assent in Electronic Form Agreement', Social Science Research Network, Business Lawyer, vol. 59, No.1, pp279-314, November 2003.

the sale of goods up to the actual handover to the buyer.<sup>32</sup> This loss, if it is accidental, will fall within the concept of risk; the incidence of risk according to Bugden and Lamont-Black is relevant in determining any right of suit and/or damages and question of insurable.<sup>33</sup>

In other words, such unexpected or unforeseen events may prevent the implementation of the conditions contained in the contract of sale enter on the internet and may make the contract impossible to implement. This then becomes detrimental to the rights of the parties, leading to a breach of the nodal balance between the parties. Once the contract becomes impossible for any reason, then it can be said that this is a case force majeure or unexpected event, caused by an external power, for instance earthquakes, storm and wars.

The doctrine of majeure exempts a defaulting party from liability of implementation of contractual obligation, including the passing of risk.<sup>34</sup> Art 79 of the CISG State that a party is not liable for a failure to perform any of his obligations, if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it, or its consequences. Namely, the impediment must not fail in the sphere of risk of the obligor, it must have been unforeseeable and it or its consequences must have been unavoidable.<sup>35</sup>

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<sup>32</sup> Bernd vom Hoffmann, *'Passing of Risk in International Sales of Goods'* (1986) Ch. 8, 267. Available at <http://www.cisg.law.pace.edu/biblio/vomhoffmann.html>.

<sup>33</sup> Paul M Bugden and Simone Lamonth-Black, *'Goods in Transit'* (Sweet & Maxwell, 2013) para 25-27. See also Fritz Enderlein & Dietrich Maskow, *International Sales Law* Oceana (1992), 261.

<sup>34</sup> Sylvan Bollee, *'The Theory of Risks in the 1980 Vienna Sale of Goods Convention'* (1999 – 2000) Pace Law School Institute of International Commercial Law 245 – 290.

<sup>35</sup> Stoll and Georg. Gruber in Peter Schlechtriem and Inegeborg Schwenzer (eds) *Commentary on the UN Convention on the International sale of Goods* (2 English ed., Oxford University Press, Oxford, 2005) article 69 Paras 10-24.

The doctrine of frustration regards the contract as terminated.<sup>36</sup> When it is frustrated by some extraordinary and unforeseeable event, which can be considered a reason for exemption from contractual liability.<sup>37</sup> Under the doctrine of frustration provided in the common law and S.7 of the SGA, the contract is avoided and both parties are relieved from all their obligations under the contract subject to the issue of restitution.

In view of the above discussion, it can be seen that e-commerce environment has brought about a 'new wine, old bottle' situation because the existing laws were developed over a long time which physical actors and physical media were the only, at least the primary, mechanisms by which transaction with legal consequences could be affected. Despite all the changes and regulatory reforms made by the country since independence, most of the laws enacted since British colonial rule before 1960 are still in force hence the agitations, calls and demands for new laws that could accommodate electronic commerce transaction in Nigeria.

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<sup>36</sup> John O. Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention* (3<sup>rd</sup> edition Kluwer Law International 1999). 369-1, n. 269-2, discussion infra ch.11, part 1. A.I., A. 2.

<sup>37</sup> Ewan Mc Kendrick, *Force majeure and frustration of Contract* (Lloyd of London Press, 1991). See also G.I. Treitel, *frustration and force majeure* (London, sweet & Maxwell, 1994).



## CHAPTER TWO

### LITERATURE REVIEW

The E-Commerce and law situation in Nigeria is very vital in the development of the economic sector however, in Nigeria unlike to other countries in the world especially developed countries does not have specific law to govern the applicability of e-commerce. E-Commerce is still very new and started gaining momentum only in recent years, even especially during the COVID 19 epidemics in Nigeria. Despite of the limited number of literatures related to electronic commerce on the aspect of contracts and sales of goods. The available literatures. I was able to review enhance much in demonstrating to what extent the existing legal framework do not support the new technological innovations as discussed herein. This should drew attention to the legal systems of Nigeria as far as e-commerce is concerned.

Contract laws is among the areas affected by the implementation of ecommerce in Nigeria.<sup>1</sup> This work, focused on common law principles on application of postal rule on communication of offer and acceptance and how it is affected by e-commerce. To this pursue, this research go further in detail to analyse whether the law of contract in Nigeria applies the postal rule on the communication of offer and acceptance in contracts formation. The said provision seems to depart from the common law principle of postal rule which is also raises a question on whether the provision is suit for electronic contract or not.

The law, of contract Act,<sup>2</sup> the principal law for contracts in Nigeria adopting common law principles. The review of the Acts were particularly on the part contract formation. The elements of valid contract provides for the definition of offer, acceptance, consideration and contract

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<sup>1</sup> The 20<sup>th</sup> Century has witnessed rapid and new innovative, *available at <https://www.irct.go.tz/>wptb-dl=113>*.

<sup>2</sup> The Sale of Goods Act 1893 and Infant Relief Act, 1874.

indicates the similarities with the standards requirement of electronic on contract. However there are dissimilarities on certain points on the issues of electronic environment on the aspect of modes of communications as well as issue of invitation to treat.

The common law principles and doctrine of equity and fairness in contract provides for the time when acceptance becomes effective that is when contract is said to be concluded. The issue comes on time and place of contracts on the aspect of electronic environment. Other crucial element for a contract to emerge, there has to be meeting of the minds or consensus ad idem. In *Tinn. v Hofman & Co.*<sup>3</sup> It was held that there was no contract because there was no consensus ad idem between the parties. For a contract to emerge there must be an offer by one party to the other and the other, reacting to the offer, indicates his acceptance of it. There were merely two simultaneous offers.

This is very crucial when it comes to electronic commerce whereby contract are concluded at a distance where parties have no avenue of face to face meeting. Then the main issue in mind whereby the research is going to look on the principles of consent to see whether they can apply to electronic transaction.

Section 2<sup>4</sup> of the Act also concerns with the competence of a party into contract refers to a person. This drew attention on whether an infant, the insane, drunkard and even the machine like a computer, can be a party to a contract when it comes to the electronic business transactions whereby a party into a contract is not necessarily seen. This research is going to analyse whether the term “person” can include infant, insane, drunkard or even machine like computer and database as competent party into a contract.

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<sup>3</sup> (1873)29 L.T. 271.

<sup>4</sup> Sales of Good Act 1893.

Contract law, commercial law and customer law commented by Alan<sup>5</sup> that are all apply to e-communications generally but the unique and unusual circumstances of internet are not covered by traditional laws satisfactorily. The response of those legal problems arises from the practice of e-commerce can be dealt with by the application of standard legal principles. However, Mr. Alan did not specify the traditional laws he was talking about. This work is going to pick from there whereby traditional common law rule and the sales of Goods Act are the centres of discussion in respect of legal position of electronic communications in Nigeria. Dr. Abdulhadi<sup>6</sup> discusses the traditional contract principles on contract formation and compare with electronic modes of contract formation.

Sarah<sup>7</sup> discussed major issues that should be take into consideration in formulating e-commerce related laws and regulations reference to e-commerce development in Asia provide over view on implementation of e-commerce law. The paper discussed the legal infrastructure of e-Asia as an example of a regional initiative to harmonize the legal basis for e-commerce. It shows that there must be a consistency between national legislative and regulatory framework. The work is going to discussed whether there is a need of formulating new legislation of e-commerce in Nigeria.

Eliza<sup>8</sup> challenging the implication of Model Law<sup>9</sup> to contract law with the reference to Singapore country which adopted some of the convention provisions into her domestic law. She

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<sup>5</sup> Davidson, A (2009). *The Law of Electronic Commerce*, Cambridge University Press, at Pp 1-7.

<sup>6</sup> Abdulhadi M Alghamdi, *The Law of E-Commerce: A-contract, E-Business*, Authorhouse, (2011). Available at <http://books.google.Co.tz/books?>

Id=Jg4KibjwP2cC&Pg=PAI&dq=e+commerce+and+its+challenge+on+law+of+Contract&hl=en&sa=X&ei=OajOueTKIoLptabTw4HoBw&ved=OCEEQ6AEwAw#v=onepage&q&f=false.

<sup>7</sup> Sarah Muller and Annelie Schoenmaker, (2007) *Legal Implications of E-Commerce: Basic Issues, Initiatives and experiences in Asia*. Staff working paper, UNESCAP (2007) available at <http://www.unescap.org/tid/publication/sWp207.pdf>.

<sup>8</sup> MIK Eliza Karolina, *Evaluating the Impact of UN Convention on the use of electronic Communications in International Contracts on Domestic Contract Law – The Singapore Example*” (2012), Research Collection School of Law (Open Access) paper 1070. Available at <http://ink.library.smu.edu.sg/sol-research/1070>.

<sup>9</sup> The United Nations Commission on International Trade Law (UNCITRAL).

emphasized on the complications of implementation of the provisions to contract law for the countries based on common law as Singapore. The work will highlight the cautions to be considered by Nigeria if opting to adopt model law provisions to its domestic laws.

Jane<sup>10</sup> in her paper discussed the strengths and weaknesses of European Union and US law reforms in respect to electronic commerce and highlight how far the reforms approaches raised problems to the substantive principle of contract law.

Nditi N.N.N<sup>11</sup> indicates that in UK consumers can be protected against several risks in e-contracts through offline laws which are same applicable to online law. This work is going to look to what extent the commercial laws<sup>12</sup> of Nigeria do provide consumer protections for electronic comer transactions.

The sales of Good Act which regulate the sales transactions in Nigeria it speaks of itself to govern only offline transactions, it is only apply to tangible goods as per definition under *section 1(1) of the Act*.<sup>13</sup> The above *section (supra)* stipulates very clear that a sale involves transfer of ownership. The Act also does not apply to the service contracts. Another section is *section 4 of the Act* which insists on writing requirement whereby it requires a sale contract to be in writing when the value of subject matter is ten pounds or upwards. The said requirement is an obstacle to e-commerce for the sales of goods through online whereby consumer and supplier exchange communications electronically. This leads to analyse as to whether there is a need to amend or to repeal the entire Act so as to accommodate electronic sale as well.

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<sup>10</sup> Jane Kaufman Winn and Jens Haubold, Electronic Promises; *Contract Law Reformms and E-Commerce in a Comparative Perspective*. Available at <http://www.law.washington.edu/Directory/docs/Winn/electronic-Promises-Reviised.pdf>.

<sup>11</sup> The University of Dar es Salaam, Tanzania. *The Law of Contract* pp.14.

<sup>12</sup> For Instance, our Penal and Criminal Code Laws were enacted to deal with theft of tangibles only and no provisions were made to prosecute electronic or cybercrimes (which hamper e-commerce) such as hacking and cracking, identity theft, phishing, the sale of illegal or stolen goods or articles on the internet.

<sup>13</sup> Sales of Goods act 1893.

Juwana<sup>14</sup> discussed how the new cyber age has affected Indonesia due to the practice of e-commerce activities whereby several industries running their operations via internet. His paper concentrated on the structure of Indonesia and the impact of the existence Dutch colonial laws which is similar situation in Nigeria. The common law principles which are the main source of the law of contract act or law which were not covered by Juwana need to be review.

Aida<sup>15</sup> observe that Africa is in danger of being left behind on a new and growing worldwide of ecommerce, internet and e-business. He contented that companies and the private sectors in African have not been initiatives of e-commerce. This work is going to show how the companies and other sectors in Nigeria are good actors prosper actors of ecommerce practices.

## **2.1 Contract Formation under the Law of Contract Act**

The law of contract as indicated above based on common law principles which provide guidance for contractual arrangements. The said principles are used to determine the validity or inability of a contract.

Contract is defined as an agreement between two or more parties enforceable by law.<sup>16</sup> Agreement is seen as a set of promises forming consideration. The said agreement may be oral or in writing except for the contracts for higher purchase.<sup>17</sup> The contracts under prescribed formal cannot be valid unless the conditions are fulfilled as in *Kirkham v Marter*.<sup>18</sup> The court held that having not invoked the agreement into a written form as the law required, there was no enforceable contract between the parties.

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<sup>14</sup> Juwana H (2003) 'Legal Issues on Ecommerce and e-contract in Indonesia', a paper presented at the 8<sup>th</sup> general assembly of the ASSEN Law Association: ASSEN LAWS in the 21<sup>st</sup> Century, held in Singapore on 29<sup>th</sup> November – 2<sup>nd</sup> December, 2023.

<sup>15</sup> Aida O M et al. (2005). 'Ecommerce Challenges in Africa: Issues, Constraints and Opportunities', Tunis

<sup>16</sup> B A Garner, 'Black's Law Dictionary (9<sup>th</sup> edn, west Publishing Minnesota, 2007) 365.

<sup>17</sup> Section 2(1) *Hire Purchase Act* (CAP H4).

<sup>18</sup> (1819)2 B. & Ald. 613.

Considering the above decision besides the requirements under the other laws.<sup>19</sup> Or wishes of the contracting parties that a contract should be in a certain formal, there is no any formal requirement to create a contract under the existing law of contract Act. Contract may be in oral or writing form<sup>20</sup> and it is binding to the contracting parties so long they intend to create legal relationship between them. The position at common law, provides that all agreements are contracts provided they have been made from free consent of the parties competent to contract for a lawful consideration with a lawful object. Basically free consent of the parties, lawful subject matter and consideration together with the intention to create legal relations are the main requirements of contract under the law of contract.

### **2.1.1 Freedom of Contract**

Freedom of contract is principal requirement of contract formation. This is refers to the theory of consensus and idem that is meeting of minds. The common law rule on contracts requires for the agreement to a contract should be made by free consent of the competent parties over a lawful object. The important issue centered on the freedom or free mind of the parties. If no ad idem between the contracting parties there is no contract. This has been supported by the case of *Star services Co. td. Ltd v Railway Corporation*.<sup>21</sup> The court held that the existence of a valid contract presupposes that the contracting parties were ad idem to the terms of the contract and each of them willingly accept those terms. This requirement can easily be identified under the traditional agreement where there is a direct meeting of minds because of access of face to face transactions between the contracting parties but it is difficult when it comes to electronic environment where parties contracted at a distance and much more sometime one or both of the contracting parties

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<sup>19</sup> Infants Relief act, 1874.

<sup>20</sup> Section 3, *Sales of Goods Act*, 1893.

<sup>21</sup> (1989)1 HC.

are minors and not an adult as the provisions<sup>22</sup> of the law of contract Act refer to a term seller or buyer is regulated by the general law concerning capacity to contract, and to transfer property. Then this raises the issue on the validity of consent on electronic transactions whether there is *ad idem* or not. This is going to be discussed in detail on the coming chapter on the challenges of e-commerce.

### **2.1.2 Intention to Create Legal Relations**

Intention to create legal relationship is another important aspect in determination of a valid contract. Agreement is said to be a contract if it has an invitation to create legal relations and must be distinguished from social and domestic agreements in *Spellman v Spellman*<sup>23</sup> as well as commercial agreement. However, in the aspect of commercial context there is presumption under the law that agreement intend to create legal relationship as decided in the case *Carlill v Carbolic Smoke Ball Co.*,<sup>24</sup> whereby the defendants claimed that the regular use of their product would protect the user from influenza, then the issue was whether the advertisement of their product was an offer intended to create legal relation and they were held bound by this promise.

Going through the above section it is clear that contractual agreement should come out from two limbs of offer and acceptance which communicated from one party to the other and an agreement to become a contract there must be a legal relationship created between offeror and offeree.<sup>25</sup>

### **2.1.3 Offer and Acceptance**

An offer includes any statement express to do or abstain from doing something with a view to obtain an assent of the other to do or abstain. This means any statement can be termed as an offer

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<sup>22</sup> Section 2 *Sales of Goods Act* and section 1 *Infants Relief Act* 1874.

<sup>23</sup> (1961)1 W.L.R. 921.

<sup>24</sup> (1893)1 Q.B. 256.

<sup>25</sup> *Carlill v Carbolic Smoke Ball Co.* (1893)1 QB 256 Court of Appeal.

if it entails terms which intend to establish legal obligation against the person who made it. This is celebrated in the case of *Carlill v Carbolic Smoke Ball. Co.*<sup>26</sup> where the court held that plaintiff sued defendant for his advertisement that anyone who will still succumb to influenza after using defendant medicine according to instruction for a fixed period would be offered 1000 pounds.

Therefore an offer depends on particular case provided it expresses a reasonable term which intends to establish legal relationship. However, offer should be distinguished from invitation to treat such as advertisement for sale or display of goods in shop shelves. In the case of *Pharmaceutical Society of Great Britain v Boots Cash Chemists*<sup>27</sup> where it was held that the display of goods did not constitute an offer. On the other hand the law requires offer to be in clear terms.<sup>28</sup> There must be an intention to be bound by the parties. An offer should also be distinguished from an invitation to treat<sup>29</sup> and advertisement although some of the advertisement can be treated as offer as it was decided in *Carbolill case (supra)*.<sup>30</sup>

Therefore regardless of the mode which an offer can be made it is only essential that it entails the reasonable man believed in it and act on that belief. Then the person who made another person to believe cannot deny the obligations arise from the acts of the believed person as decided in Carbolill case as stated above. From that point of observation since the Law of Contract act is silent on the mode of communicating an offer, I do not see any misunderstanding when it comes to electronic transactions where the exchanges of promises are made electronically. In my view since it does not contravene with the principles of an offer than an offer communicated electronically can still has the same legal value as an ordinary offer communicated offline.

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<sup>26</sup> (1893)1 QB 256.

<sup>27</sup> (1953)1 QB 401.

<sup>28</sup> Sagay, *Nigerian Law of Contract* (2<sup>nd</sup> ed., 2000), p10.

<sup>29</sup> *Lasky v Economy Grocery Stores* (1946)163 A.L.R. 235. Held goods on display in shops are not offers but an invitation to treat.

<sup>30</sup> Ct supra

Coming on the second limb of agreement: acceptance it is defined as a final and unqualified expression of assent to the terms of the offer<sup>31</sup> meaning that offerees' assent must be communicated to the offeror according to the terms of the offer. It should be unconditionally and when acceptance indicates new terms to an offer it should be taken as a counter offer subject to acceptance as it rebuff the original proposal. Additionally, silence will not mean acceptance as decided in the case of *Felthouse v Bindley*<sup>32</sup>. However, sometimes an offer can be by performance as in the case of *Carlill v Carbolic Smoke Ball Co.*<sup>33</sup> whereby an offer was made to the public and its acceptance was by the way of performance.

Observing the above position acceptance to an offer must strictly comply with the terms of the offer. In *Major-General George Innih (RED) & Ors. v Ferudo Agro and Consortium Ltd.*<sup>34</sup> Whereby the court held that in order for an acceptance to constitute an agreement, it must in every respect meet and correspond with the terms and conditions of the offer.

#### **2.1.4 Time when a Contract is Made**

It is a general rule that once acceptance has been made a contract is said to be formed. Therefore, there is no contract if acceptance is not communicated to the offeree. However, the acceptance is not communicated to the offeree. However, the acceptance is not necessarily be in expressed form t the person who made it... sometimes acceptance can be implied made as in the Carbolic's case. Time is a crucial element for the determination of competency of acceptance. Time is also determine when the obligations of the contracting parties became effective as well as when risks passes from one party to the other.

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<sup>31</sup> See Sagay, *Nigerian Law of Contract* (2<sup>nd</sup> ed, 2000) p. 20

<sup>32</sup> (1862)7 L.T. 835; 142 E.R. 1037.

<sup>33</sup> Ibid

<sup>34</sup> (1990)5 NWLR (0t. 152) 604.

At what point in time does acceptance occur in a contract? Much light has been thrown this issue by *Lord Dennin in Entores v Miles Far East Corporation*.<sup>35</sup> The court identified the moment of acceptance in a variety of situations. In the case of telex, it is when the reply is received by the offeror. Where two parties contracted inter praesentes, i.e., face to face, acceptance occurs when the offeror hears the reply of the offeree. In a contract by telephone, it is only when the offeror hears the offeree's acceptance. With regard to telegrams, it is when the offeror receives the telegram. In other words, generally, acceptance becomes effective not merely when communicated, but when actually received by the offeror. This situations however are not based on postal rule as in the celebrated case of *Adams v Lindsell*<sup>36</sup> where the court held that a contract came into existence at the moment a letter of acceptance was placed in the post box. According to the above proposition, acceptance become binding against offeree at the time it comes to the knowledge of offeror the same way can be revoked at the time revocation is known to the offeror.

Analysis the above discussed legal positions for contract formation based on traditional system and compared with electronic contracts, I do not see much of differences between the two concepts except for the modes of contracting processes. Electronic agreements look similar to traditional agreements in terms of requirements and they can become valid contracts so long there are offer and acceptance made through free consent of competent parties for a lawful object. The common misunderstanding that traditional paper based system hinders the electronic commerce to me has no direct justification on the view that the electronic modes of contracting do not change the validity of the agreements contracting electronically as argued by *Eliza*.<sup>37</sup> It is my strong observation that as far as the law of contract is concern, the principles under traditional law can apply to electronic environment as well.

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<sup>35</sup> (1955) 2 Q.B. 327, C.A.

<sup>36</sup> Ibid.

<sup>37</sup> Eliza Milk at pp8.

## 2.2 Legal Framework for Sales of Goods in Nigeria.

The Sale of Goods Act is the one dealing with the sales transactions in Nigeria, however, it is only dealing with offline transactions and no sufficient legal effect for buying and selling of goods on distance transaction. Currently the ones who transacted online are at risk of their business in case of any disputes arise from the transactions conducted online because the existing law was enacted before the innovations of new technological era. The main purpose during that time was to facilitate commercial exchange of goods and considerations.

Sale includes bargaining and with inclusion of delivery<sup>38</sup> derive from that provision sale involves the exchange of property with money. Therefore it entails agreement between the seller and the buyer, a contract of sale has been defined under 1(3) of the Act as contract whereby a property in goods is transferred from a seller to the buyer. From that definition, a sale has two scenarios. One is the transfer of property in goods from the seller to the buyer and another scenario is exchange of money with property in goods.

Going by the above definition the midpoint of sale is the transfer of the full property ownership in goods from the seller to the buyer. This is very challenging when it comes to electronic commerce which includes e-agent as intermediaries between the seller and the buyer. The question is whether the transfer of property in goods between the seller and agent or a buyer or seller.

Another question is the subject matter of the sale when it comes to e-commerce. *Section 62 of the Act*<sup>39</sup> stipulates very clear in defining the term “goods” as a personal chattels with exclusion of money. This includes an article or commodity in a tangible form. The basic substance in sales of

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<sup>38</sup> Section 1 of *Sales of Good Act*

<sup>39</sup> Section 62(1) *supra*.

goods in tangible goods and not intangible. Electronic commerce sometimes dealing with the digital goods such as software whereby only license to exchange between the owner of software and license. Does digital goods amount to a sale under the existing law?

The sales of Goods Act also requires the descriptions of goods to be clearly stipulated which on online transactions the details of transactions such as descriptions of goods can become difficulty due to the nature of websites displays. Under the performance of the sale contract the law also under *section 34 of the Act*<sup>40</sup> requires the seller to provide the right to examine the goods bought. This is also critical angle to digital goods like software licenses for instance shrink-wrap whereby the software license covered by shrink-wrap cover indicating the breaking of it, constitute an acceptance to the software license terms.

The issue is whether the said requirement can fit for electronic environment where the acceptance is equivalent to just a clicking of button. From the above analysis the sales of Good Act do require some amendments to accommodate the e-commerce as Germany has done instead of enacting a separate sales law it decided to completely revised its contract law.<sup>41</sup>

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<sup>40</sup> Ibid

<sup>41</sup> Ibid at pp13.

## CHAPTER THREE

### LEGAL AND INSTITUTIONAL CHALLENGES FACING ELECTRONIC COMMERCE IN NIGERIA

#### 3.0 INTRODUCTION

It has been a discussion for a long time all over the world that the new innovations which lead to the simplifying the ways and means of conducting business transactions through the internet faced a challenge from the existing commercial laws which seem to be obstacle to the application of e-commerce. However, it had not been discussed to what extent the said laws provide a room for electronic transactions. This chapter is going to analyse how and to what extent the existing laws challenge the application of e-commerce.

#### 3.1 Challenges Facing E-Commerce in Nigeria

Electronic contracting processes as discussed above seems not to be different from the traditional contracting processes. The uniqueness and unusual circumstances of internet are said not adequately covered under the traditional laws.<sup>1</sup> I am strongly opposed to the above statement on the fact that before jumping to that conclusion it is better to analyse the existing technological situation vis-à-vis the existing principles of law to see whether the provisions of the laws accommodate technological advancement or not. My finding on that is focused on the interpretation of the existing laws which I am strongly defending that, there is a need of a wider interpretation of the existing principles of law in respect to e-commerce is concerned as discussed hereunder.

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<sup>1</sup> See Davidson A (2009), *The Law of Electronic Commerce, Cambridge University Press*, at Pp 3-7.

This could answer the question whether the practice of e-commerce could real need interaction of new legislation of electronic transactions or the existing principles and law structure should remain intact.<sup>2</sup>

### **3.1.1 Freedom of Contract on Electronic Transactions**

As discussed earlier that the requirement of a contract is free consent that is consensus ad Idem. The principle. The principle of contract under the common law usually is that the involvement of human decision in making offer and acceptance is used to determine the intention or a will of the parties into a contract that is called “meeting of minds”. The provisions of common law rule on formation of contract provides for the essential requirements to a contract including agreement made by free consent of the competent parties over a lawful object. The important issue of the above provision is pointed on the free mind of the parties.

Nditi N. N.<sup>3</sup> in his book asserts that consensus ad idem is an essential requirement for an agreement to become a contract. This has been supported by the case of *Star Services Co. Ltd v railways Corporation*.<sup>4</sup> The Court held that the existence of a valid contract presupposes that the contracting parties were ad idem to the terms of the contract and each of them willingly accept those terms. Basing on the above authority if no ad idem between the contracting parties there is no contract. Under the electronic transactions “meeting of minds” for parties into agreement cannot easily be identified as a result that such transactions are questionable if they do fall under the traditional doctrine of free contract.

The question of legal values arises into three scenarios, one is when it comes to electronic agreements contracted at a distance where there is no room for face to face interaction and

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<sup>2</sup> Jane, Ibid at pp 24.

<sup>3</sup> *General Principles of Contract Law in East African* at 174.

<sup>4</sup> (1989)1 HC

second is where an offer and acceptance made by a programmed computer systems with no involvement of human interactions to make a decision and third is where an offer and acceptance made by a minor can constitutes a valid contract on the internet.

In the first scenario, this is not a novel situation telegraph was used for commercial agreement and it was rated a valid contract<sup>5</sup> besides there was no face to face interactions but instantaneous communications amount to face to face interaction to suffice the consent of the parties as decided in *Entores v Miles Far East Corporation*<sup>6</sup>. It was held that, telex to be analogous to contracting face to face or over the telephone. This can also be applied to agreements through emails and website transactions provided there are sufficient and clear terms of agreements understood by the contracting parties especially for shrink-wrap and browse-wrap agreements are the kind of contracts exclude the room of meeting of minds and electronic contractual process can bind the other party before the said party is well understood the terms of the contract due to the manner and conditions of acceptance set for online contract.

Furthermore, it is not only human interactions can determined the meeting of minds of the parties into a contract. There are other factors to determine the consensus ad idem as said in *Boulder Consolidated Ltd v Tangaere*<sup>7</sup> held that the basis of a contract is not subjective intent of the parties alone but their objective and apparently manifested intent.

Therefore, besides the “meeting of minds” the objective theory can be used to determine the validity of contract in case of distance contracts provided there is intention to create legal relationship. It is my considered opinion that this should be extended to electronic contracts as

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<sup>5</sup> Davidson, Alan, Ibid, at pp 20 – 28.

<sup>6</sup> (1955)2 QB 327 (CA).

<sup>7</sup> (1980)1 NZLR 560, 567 (CA).

well as in *Gurney Consulting Engineers v Pearson Pension Property Fund*.<sup>8</sup> It was stated that general English law adopts an objective theory of contract formation, i.e. the governing criterion is the reasonable expectations of honest or reasonable man.

Another scenario of “meeting of minds” is concerned with the involvement of e-agents such as Websites or database searches as the parties into a contract. A term “buyer”, or “seller” as stipulated under *section 62* of the Sales of Goods Act<sup>9</sup> means a person who buys or agrees to buy good; seller means a person who sells or agrees to sell goods with the exclusion of machine like programmed computers or robot ad other e-agents.

This has been discussed under the two consent theories to see whether they can apply to electronic transactions amount to *ad idem* in electronic contract that are subjective theory and objective theory. Under the subjective theory the inner will of a person is the crucial point to be determine. Therefore, apparently this theory cannot be applied to electronic agents since it is impossible to determine inner will of a machine.

Then, comes to the objective theory where the consent can be determined by the party statement or conduct so long reasonably understood by the other party. On that premise since the e-agents have been instructed to make an offer or acceptance through programmed computer, a party should be presumed to be bound by the of e-agent acting on that behalf. This is also apply to traditional principles when a person is bound by terms of contract which he signed without reading it.<sup>10</sup> This is equivalent to strict rule that a person decide to use e-agents should bear risks of using such a device.

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<sup>8</sup> [2004] App. L.R. 09/02

<sup>9</sup> *Ibid*

<sup>10</sup> *United Dominion's Trust v Western* [1976]q.B. 513; [1976]2 W.L.R 64.

Therefore, taking into consideration the fact that the use of programmed computer, website or database assigned to do a certain task on behalf of either a party in contracting processes. It is the finding that the said machine is considered to be an agent of the principal party like in traditional contracts provided it performs exactly what was tasked for. A mere assumption that there was no meeting of the minds for electronic agreement since there was no human involvement into electronic contract has nothing that there is no difference between a normal agent and e-agent on the nature of tasked performed.

Therefore, basing on the above discussed views the involvement of e-agents on the formation of contract electronically cannot simply be invalidated because of indirect involvement of human decision. What should be the focus is the will of the parties to direct the e-agent to act on their behalf.

### **3.1.2 Ascertain of Offer and Acceptance on Electronic Transactions**

As discussed earlier that E-commerce involves commercial transactions executed through internet which are basically contracts in nature. On electronic transactions offer and acceptance are transmitted via online either by pressing an offer to the website or sent to a particular recipient. Therefore commercial contract can be concluded online although performance of contract can be channeled through normal ways like delivery of goods or supply of services. Sometimes both stages of formation and performance of a contract can be executed online for example in case of software goods.

According to M/S Sarah and her fellow colleague observed that contract under traditional law is usually concluded by either shake of hands or signatures. Then the question is offer and acceptance communicated electronically. Whether an electronic contract is legally binding and to

what extent can be used as evidence of dispute. The Evidence Act<sup>11</sup> under *section 86(1)* provide for the definition of original document. Since the computer generated documents are created under a certain uniform still can meet the requirement of original documents and there is no harm to use them as original documents as decided in the case of *Oghoyone v Oghoyone*<sup>12</sup>. Computer printout of bank statement was admitted in evidence in Court. Similarly in the United States case of *King v State Ex Rel Murdock Acceptance Corporation*,<sup>13</sup> the court admitted in evidence a computer printout tendered by the plaintiffs which showed the amount owed to them by the defendant. The clerk who accepted the payments were neither called, nor were the original records in the branch offices of the corporation produced. The court nevertheless admitted the documents and extended the exception to the hearsay evidence to cover computer records.

Considering the above position of the law there is no doubt that an offer and acceptance communicated electronically cannot invalidate any contract form electronically simply because of the mode used. This is also discussed above in the case of Entores (*supra*). What is to be consider is that there is an offer made by one party and it is accepted by another party contain therein intention to create legal relationship.

### **3.1.3 Time When a Contract Became Effective**

As a general rule acceptance is said to be communicated when it comes to the knowledge of the offeror. Under the law of contract, acceptance is said to become effective not merely when communicated, but when actually received by the offeror.<sup>14</sup> Exception comes when offeror waive the need for communication then applies the postal rule that acceptance is effective once it has been put in a post mail.

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<sup>11</sup> *Evidence Act*, 2011

<sup>12</sup> (2010)3 N.W.L.R (Pt 1182)564 at p. 585.

<sup>13</sup> [1996]22 F2d. 39

<sup>14</sup> Sagay, Op. cit at pp 41.

The communication of acceptance is still arguable on e-commerce. It is argued that since the transmission of communications between the parties are go-between internet provider as snail mail, then the postal rule should be applied and on the contrary it has been as well argued that the general rule should apply<sup>15</sup> so long there is possibility to trace whether an email has been sent or not. The case law suggests that time communication depends on a number of factors affects the communication such as customary business practices, projections of the parties and other court assessments should be considered.<sup>16</sup>

Considering the above arguments stated above the rooted point is that the determination of the time in which an acceptance is become effective is only when the need arise. I therefore of the view that this is not a threat to e-commerce since the important point is no hard and fast rule when the issue arise, the court will way out based on a number of factors in its determination.

### **3.1.4 The Best Evidence Rule**

The best evidence under the common law is primary evidence<sup>17</sup> that is production of original documents for court inspection. *Section 17(1)* of the cybercrimes (Prohibition, prevention etc) Act 2015 provides for with reference to electronic signature as follows:

- (a) electronic signature in respect of purchase of goods, and any other transactions shall be binding.

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<sup>15</sup> Bradgate R et al (2009), 'Commercial Law: Legal Practice Course Guide' at pp11.

<sup>16</sup> *Brinkbon Ltd v Stahag GmbH* [1983], 2 AC 34.

<sup>17</sup> *Section 86(1) Evidence Act*, 2011.

(b) Whenever the genuineness or otherwise of such signature is in question, the burden of proof, that the signature does not belong to the purported originator of such electronic signature, shall be on the contender.<sup>18</sup>

From the above highlighted *section 17(1)(a) (b) of this Act* there appears to be a presumption of genuineness in favour of electronic signature and the burden is on the party who alleges otherwise to prove same. Then the issue comes on online transactions when the dispute arises whether the document or signature made through electronic modes retrieved from its source could be considered as primary or secondary evidence.

In Nigeria, the judicial system now do recognize the electronic evidence as decided in the case of *Oghoyone* (supra) whereby court admitted computer printout processed through bank computer program as evidence. Therefore since electronic documents can be retrieved from its source could suffice the requirement of original form so long its authenticity is not disputed.

### **3.1.5 Jurisdiction Boundaries**

Under the common law principles geographical boundaries could determine the place of contract. This is different on e-commerce where contractual transactions via internet is borderless. Parties from different countries can contract through internet. This posed a challenge on where the contract is said to be concluded and which law should be applied especially in Nigeria where the law is silent on this. Unlike Nigeria in USA and Canada looking on the issue of Jurisdiction on electronic commerce reasonableness depending on circumstances is the test to that effect.<sup>19</sup>

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<sup>18</sup> Cybercrimes (*Prohibition, Prevention, etc*) Act 2015 s.17(1)(a)(b).

<sup>19</sup> Geist M (2001), '*is there a There There? Towards Greater Certainty for internet Jurisdiction*'. Berkeley Technology Law Journal 1345, 1406 available at <http://aix1.ottawa.ca/-geistjurisdictionus>.

Circumstances such as the location of content provider, the host server, intermediaries, end user, minimum contact or purposeful availment test are factors to be considered to determine the issue of Jurisdiction. Recently the principle was set out in internet case of *Calder v Jone*<sup>20</sup> Jurisdiction has determined on the basis of actual impact of the action in locality. In case of Nigeria since the law is silent or no existing law regulating e-commerce and take into consideration each jurisdiction differ in terms of national laws. I think the substantial connection test<sup>21</sup> should apply to the situation where issue of jurisdiction arose. However, this is not a permanent solution there should be a harmonized laws across jurisdictions to solve problems of jurisdiction diversity.

### **3.1.6 Consumer Protections**

Consumer protection on online transactions is a serious challenge to e-commerce in Nigeria. People are currently practice commercial transaction online at their own risk since the existing laws do not provide any kind or form protection for online businesses. It is obvious that when you talk about sales of goods you must touch the aspect of consumer protection. Consumer protection is subject to a number of laws depending the nature of transactions. For the purpose of this research consumer protection is particularly concerns the commercial context. Under the contract of sale a general principle is that the buyer and seller presumed to be on the same page of common intentions in bargaining transaction.

However, sometimes it happens when a buyer or seller due to ignorance, haste or inferior bargaining enters into a transaction with insufficient knowledge of the terms of contract or unsatisfactory to the goods descriptions. All these indicate for the need of protection which are covered under the right to the buyer as a general rule should be treated as an offer to the buyer

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<sup>20</sup> 465. U.S. 783 (1984).

<sup>21</sup> Society of composers. Authors and Music publishers of Canada Assa of Internet Providers [2004]2 S.C.R. 427 2004. SCC 45.

where he may examine them and accept upon satisfaction of goods, however, he is not bound to return the goods.

Under the common law in respect to the sale of defective goods the principal liable is the seller but manufacture liability comes under strict liability on the goods via a retailer.<sup>22</sup> More the issue of guarantee which is always between manufacturer and retailer or in a separate document attached to the goods which sometimes contains elimination of manufacturer's common law liability and sometimes purport to exclude seller's liability as well.

The issues at what time the risk passes from the seller to the buyer is still critical, the right for the buyer to examine and reject the goods sold through online is still undermined. Moreover *section 4(1) of sales of Good Act* requires a sale of product valued at ten pounds or upwards to be in writing and signed. In case of sales online wherever dispute arise the place of case of action, the law to be applied is still critical. All these scenarios gave challenges to electronic commerce.

### **3.1.7 Signature and Writing Requirements**

As discussed in the previous chapter, the law of contract does not require any format of contract. A contract can be in any manner provided it complies with the requirement<sup>23</sup> provided in the law of contract. It can be oral contract, written or contract by performance. Therefore nonexistence of writing and signature on electronic transactions cannot invalidate the agreement. However, the requirements of signature and writing vary according to the requirements of the particular law depending on the nature of transactions such the disposition of land and hire purchase transactions<sup>24</sup> requires the transaction to be in writing and signed by the respective parties. A sale

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<sup>22</sup> *Donoghue v Stevenson* (1932) A.C. 562.

<sup>23</sup> See Sagay I E (2000) Nigeria Law of Contract, Spectrum Books Limited, at pp2 – 4.

<sup>24</sup> Land Use Act, 1979 and *Hire Purchase Act* (CAP H4) LFN 2004.

of goods valued at ten pounds or upwards to be enforceable should be in writing and signed by principal or his agent.<sup>25</sup>

On that basis it is clear that authentication of transactions required to be in writing will be by a personal signature affixed on the piece of document. All these are for the purpose of authentic of a particular document, an evidence that the signer is the one responsible for the document signed and legal consequences will be against him<sup>26</sup> as well as the way of finalizing a commercial transaction. These scenarios however, become difficult on the online transactions where parties have no chance for exchange signed documents hand to hand. On e-environment electronic signature is used to assure the parties into agreement true identify of the party contracted with taking into cognizance the possibility of frauds and hackers on electronic environment. Parties into commercial agreements request assurance of data exchange to be authentic.

Considering the above statement the issue is not a signature but the authenticity of the signature. Therefore from the point of the observation so long, the law of contract does not insist signature as essential document any sign used to identify the owner of his sign can be suffice to validate the electronic transaction as far as signature is concern.

### **3.1.8 Competence of the e-Agent as a Party into Contract**

The involvement of e-Agent into ecommerce is a controversial since the provision of law refers a party into contract to be a person and not a machine. A term person (buyer) or (seller) as stipulated under *section 62 of the Sales of Goods. Act* with the exclusion of machine like programmed computers or robot and other e-agent. The term agency as defined by Freidman, in his one of his Book entitle “The Law of Agency, he defined agency as:

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<sup>25</sup> Ibid

<sup>26</sup> *Section 92(1)(2) and (3) of the Law of Evidence* 2011.

“The relationship that exist between two persons when one called the “agent” is consider in law to represent the other called the ‘principal’ in such a way as to be able to affect the principal legal position in respect of strangers (third party) to the relationship by the making of contract or disposition of the principal property”.

As well refers to human being and not a data base, website or a machine like programmed computer. On ecommerce, computer can accept offer on internet contracts. This is contrary to *section 62 of the Sales of Goods Act*<sup>27</sup> whereby a competent party under that section refers to a person “buyer” or “seller” and not a machine. However, this was argued differently by Nimmer that in ecommerce a computer programmed can make an offer or acceptance and the intention of a contract analyses in respect of e-agents which is full automated with contract process.<sup>28</sup>

This was supported by the old case *State Farm Auto Ins. v, Brockhurs*<sup>29</sup>the court held the company bound by the contract concluded through the computer programmed by the company. Then with the extension of the principle on the decision above, I am of the considered view that the issue whether the exchange of offer and acceptance through computers made without the intervention of human decisions cannot invalidate the agreement. This is due to the fact that even if the principle of contract under common law requires for involvement of human decision is making offer and acceptance tis does not mean only inner will can be used to determine the “meeting of minds”. There are numbers of factors to determine the consensus ad idem as said in Boulder consolidated Ltd case<sup>30</sup> whereby the objective theory can be used to determine the validity of contract in case of distance contracts provided there is intention to create legal relationship.

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<sup>27</sup> Ibid

<sup>28</sup> Nimmer R (1996) ‘*Electronic Contracts*’: Part 1, Computer & Law, 7(1): 36 at pp. 36

<sup>29</sup> Cir (1972)453 F.2d 533, 10<sup>th</sup>.

<sup>30</sup> Ibid

The e-agents has been instructed to make an offer or acceptance through programmed computer, a party should be presumed to be bound by the act of e-agent acting on that behalf. This is the same as tradition principles when a person is bound by the terms of contract which he signed even without reading it. Therefore, taking into consideration the fact that the use of programmed computer, website or data base assigned to do a certain task on behalf of either party in contracting processes should be considered as an agent of the principal party like traditional contracts provided it performs exactly what was tasked for since there is no difference between a normal agent and e-agent on the nature off tasked performed. Therefore basing on the above discussed views the involvement of e-agent on the formation of contract electronically cannot simply invalidated because of the use of e-agent. There should be a wider interpretation of an agent to include e-agents.

### **3.2 Institutional Challenges Facing E-commerce in Nigeria**

A number of institutions in Nigeria are now using electronic systems for the running of institutional transactions. The use of credit cards for payments in supermarkets payment and accessing of bills in private companies and other government companies like Remita, buying of e-air tickets and so on, are very common. A number of people in Nigeria are using Mobile Money Service to access financial service in their transactions such as paying bills, buying pre-paid services and cash transfer.

The use of Master Card, Credit and visa card for payments and transfer of money domestically and internationally as alternative to traditional modes of payments is very common today. Companies providing communication services such as GLO, MTN, Airtel provide as well the service of money transfer through mobile phones such as First monie, Palmpay, Opay in replace

of banking transfer. Great or large number of people with no formal financial accounts are accessing their needs through electronic mobile services.

All these involves contractual agreements between the client (customer) and supplier (institutions). Although the mode of payments of goods and services as well as money transfers is done electronically, still there are some challenges faced by the institutions in order to secure the legal security and protections of clients, the users of those transactions. There is no legislation to operate electronic, which is explicit of consent of the Card owner prior transaction to be considered valid. This is critical issue when it comes to the need of proof of dispute arise on the authenticating signature in dispute. However, it is said electronic signature is challenge. In my view that signature is not a challenge itself. The challenge is the authenticity of the signature which is critical on the issues of fraud determination and all other stealing associated with credit cards.

The practice of cash transfers through electronics mobile phones such as Palmpay, First Monie, Opay the companies providing that service still facing the challenge on security on whether the transactions are real done by proper or authourised persons so that to make the default party liable for any breach occurred on transaction process. This is however uniform process can be used to determine and identify the authorized person. This is not a problem of law but is it a problem of the system.

Consumer protection against frauds, privacy and safe transactions and data keeping as among the areas need a legislations to regulate institution to adhere with the principles of data protections need only the clear statement of the laws as we have seen the Sales of Good Act was tailed to accommodate offline transaction but there is no problems on contract law. Unreliable net-work

and unstable electronic payments lead to lack of trust and breach of contracts between the customers and institutions for not providing services they agreed.

In view of the above discussed challenges facing institution on ecommerce most of them are due to the systems deficiencies and not the laws as exposed. However, to avoid doubts the law should specifically states the positions of electronic payments to reduce or eliminate all risks involved on those transactions. The courts should use modern approach in interpreting the laws sufficiently enough to provide for protections for electronic transactions currently till the time need arises.

### **3.3 Lessons from Developed Countries**

International, the UNCITRAL model law had been introduced to provide guidance to national legislations to enact provisions which remove encumbrances of the paper based requirements to the electronic transactions. Other countries looking for the ways of encouraging electronic commerce into their jurisdictions by having comprehensive legal system some of them adopt provisions of UNICTRAL and others used it as guidance for reviewing their laws, just mention the few nations including the European Union implemented the directive on Electronic Commerce into their national laws. Singapore enacted Electronic Transaction Act<sup>31</sup> to regulate electronic transactions. US enacted the Uniform Electronic Transaction Act for similar state laws. Australia enacted Electronic Transactions Act 1999 and Malaysia are among the countries adopted model law fully or partially to their laws for electronic commerce.

The model law discusses the issue of writing as a legal requirement. Whereby Article 6<sup>32</sup> provides that this electronic document will suffice the requirement provided its contents will be

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<sup>31</sup> 1999.

<sup>32</sup> UNICITRAL Model Law on Electronic Commerce (1996).

accessible when required. It is also contains guidance on electronic standards on the aspects of contract formation through the use of automated system, time and place of contract, signature requirement and issues of originality. Ideal the UNICITRAL model law is neutral in technology aspect and do not recommend the countries to go away with the traditional paper based system. It's only analyses is the basic functional of both paper based system and electronic transactions.

*Article 11*<sup>33</sup> does not change the modes of offer and acceptance as they are under the national law. It is only expand the duty for online parties to transaction to make sure that they send acknowledgement upon the receipt of communications. Looking the Article there are no much difference with traditional principles found in the common law rule/principles of contract. What more need required under article 11 is double affirmation from the parties into a contract. In Germany this has been covered under *section 130(1)*<sup>34</sup> whereby the general principle is that a contractual declaration deemed to be received when it reach the sphere of addressee and he is expected to read it. From the guidance a number of jurisdictions though the provisions of UNICITRAL drafted their national laws to determine the use of contract arises from the application of e-commerce.

On consent and enforceability of electronic agreements such as of browse wrap agreement in US the courts consider the primary issue on whether consent can be implied by the conduct of the browser. In this, court looks on sufficient notice and reasonability of consent involve on the basis of conduct. In *Register Com. v Verio Inc.*<sup>35</sup>The court notice that terms and conditions of use of a WHO is Web Service were clearly posted to plaintiff's website and the defendant act of

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<sup>33</sup> Article 11(1) 'member states shall ensure..... That in cases where the recipient of the services places his order through technological means, the following principals apply. The service provider has to acknowledge the recipient's order without undue delay and by electronic means the order and the acknowledgement of recipient are deemed to be received when the parties to whom they are addressed are able to access them.

<sup>34</sup> German Civic Code.

<sup>35</sup> 126 F. Supp. 2d 238(S.D.N.Y. 2000) aff.d 2004 WL 103400 (2<sup>nd</sup> Cir. 2004).

performing a search inquiry following the statement “by submitting this query, you agree to abide these terms” constitute consent to the terms. The court therefore upheld enforceability of those terms and conditions.

In *Specht v Netscape Communication Corp*<sup>36</sup> in this case, the end user license agreement contain arbitration clause terms of agreement available to the defendant website via hypertext link and users were asked to review and agree to the terms before downloading or using the software but they could proceed without providing express agreement. The issue in this case was whether the terms of license on Netscape’s website were binding the user download the software. The court held that in such circumstances a reasonable internet user would not have known the existence of license before downloading the free software. Therefore defendant’s terms were held unenforceable.

The above discussed cases pointed up how ICT posed a challenge to the current existing laws in many jurisdictions regardless or advances technology. They have such as in US still the traditional principles of commercial laws not tall with electronic commercial practice. On web based contracts and shrink-wrap agreements are similar to the contracts of adhesion which are treated as ticket cases in Nigeria.

Common law rule on contract provides that where a consent to a contract was obtained by undue influence or duress such as a contract become voidable.<sup>37</sup> However, in another countries such as South Africa<sup>38</sup> shrink-wrap agreements have legal force but in Nigeria still is the discretion of the court whether to enforce or not. Therefore there is a need of clear law like U.S.A. the principles contained in the Uniform Electronic Transactions act 1999 that provides a contract enforceability

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<sup>36</sup> 206 F.3d 17 (S.D.N.Y. 2001); aff’d 206 F.3d 17 (2d Cir. 2002).

<sup>37</sup> *William v Bayley*, (1866)L.R. 1 H.L. 200.

<sup>38</sup> Pistorius, T (1993) ‘*The enforceability of Shrink-wrap agreements in South Africa*’s South African Mercantile Law Journal. 1 – 19.

cannot be derived simply it is electronic form or signed electronically, were developed from case laws. As it has been pointed out earlier in previous chapter, the legal position in Nigeria in respect of invitation to treat does not amount to offer. Focusing the style and modes in which terms are displayed in website, it is very difficult for someone to differentiate whether it is an offer or invitation to treat.

On electronic commerce to determine whether advertisement is an offer or an invitation to treat depends on interactive nature of the website. On non-interactive website advertisement may be considered to be an offer. However, sometimes in interactive websites to determine whether the advert is an offer or invitation to treat should depend on nature of goods displayed as sometimes include a click wrap agreement. B. Fitzgerald, et al.<sup>39</sup> pointed that the terms and conditions displayed on website should be specifies whether an offer is being made or an invitation to treat.

Therefore there should be a clear law as in Australia where the legal position on invitation to treat is very clearly that, unless it indicates the intention of the party making the proposal to be bound in case of acceptance, a proposal made on the internet or open network is considered to be invitation to make offers to those who access the network.<sup>40</sup> Term of contract on electronic agreements as discussed above in shrink-wrap agreement should be clear expressed and sufficient to whoever access them as the contractual terms under the traditional agreements. The terms to agreement should be incorporated by reference through hyperlink in standard requirement. In Canada the Supreme Court in *Dell Computer Corp. v Union des Consommateurs*.<sup>41</sup> The court emphasizes that the terms and conditions must be reasonably accessible and opined that hyperlink documents meet the standard.

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<sup>39</sup> Internet and Ecommerce Law. Thomson Law book. Co. 2007. P 489.

<sup>40</sup> See Section 15B of the Electronic Transaction Act 1999.

<sup>41</sup> 2007 SCC 34

In Australia where the electronic business failed to provide for disclosure requirements invite from public authority. In Germany the position is different whereby a web page which don't provide sufficient terms to the customer, the customer at anytime discovered any deficiencies in goods may withdraw from the contract.<sup>42</sup> The requirement of signature and writing for commercial transactions should be reconsidered in existing commercial laws especially *section 4 of the Sale of Good Act*.<sup>43</sup> The law should include electronic signature as well. Moreover writing requirement should be suffice by the retrieve electronic document from original source. The introduction of electronic signature using digital camera, iPhone or any graphic software should be encourage to promote ecommerce in Nigeria so long it is possible to recognize the identity of the person signed it.

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<sup>42</sup> Jane, Ibid at Pp 14.

<sup>43</sup> Ibid

## CHAPTER FOUR

### NEW LEGAL FRAMEWORK TO SUSTAIN E-CONTRACTS AND SALES OF GOODS AND SERVICES IN NIGERIA AND CONSUMER PROTECTION IN THE CONTEXT OF PROPOSED ELECTRONIC COMMERCIAL LAWS

#### 4.0 INTRODUCTION

As discussed above that commercial laws are said to be an obstacle to e-commerce to all most worldwide and a number of jurisdictions are trying to review their national laws to ensure the implementation of e-commerce. The first question to be asked is to what extent the existing commercial laws do affect ecommerce.<sup>1</sup> The answer to it derives from the analysis of the existing laws as done in the previous chapter to see to what extent the e-commerce face challenges due to the principle of the existing laws as well as the lessons from other jurisdiction in addressing the challenges concerned.

As Nigeria being one of the common law countries. In deciding on new legal framework to sustain the e-commerce, it should worn itself from the experiences faced by other countries especially common law countries like Singapore which embarked to the enactment of electronic Transactions act by adopting some of the model law provisions into its national law.

Much more, as discussed in the previous chapter the existing commercial laws are providing a noun for electronic transactions to a large extent except for few others which need the law to be adjusted according as discussed here below;

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<sup>1</sup> Eliza Mik, Ibid at pp.2.

#### **4.1 The Requirement of Writing and Signature as a challenge to Ecommerce**

The requirement of writing and signature as discussed in the above chapter are not challenge to e-commerce since the requirement may come from other laws and not the law of contract, the law of contract by itself. Under the common law allow intention to be manifested in any manner.<sup>2</sup> Looking to the existing law: Sales of Goods Act<sup>3</sup> is silent on the manner of contracting. A contract can be in writing, orally and by performance the long these intention to create legal relations. Therefore the new transacting environment changes nothing in formal and back requirements are exceptional not a rule.

Therefore signature and writing requirement cannot invalidate the electronic agreement done via email or websites as a general rule in English law no formalities are required for the creation of a contract.<sup>4</sup> I therefore agreed with Eliza that the electronic transacting process did not need the new legal position to validate the said transaction because they hast the same value as those protested under the Act. In case of writing and signature requirement are necessary then electronic signatures as well as electronic documents retrieved from its source can have the same value as the traditional one so long their authenticity are not questionable.

#### **4.2 Communication of Offer and Acceptance to Ecommerce**

On the issues of offer and acceptance in respect of e-commerce since an offer can be any statement with an equivocal suggestion intend to create legal relationship, if the terms contained therein are accepted by the other party to form a contract.<sup>5</sup> provided the legal requirements suffice a valid offer therefore statements made through emails request for goods or services

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<sup>2</sup> Eliza Mik, Ibid at pp. 9.

<sup>3</sup> Section 3 Sales of Goods Act, 1893.

<sup>4</sup> Stephen Smith & P.S. Atiyah Atiyahs '*Introduction to the Law of Contract* (6<sup>th</sup> ed. 2006) pp. 96.

<sup>5</sup> Sagay, '*Nigerian Law of Contract*' (2<sup>nd</sup> ed. 2000) p. 10.

should be treated as offer with legal effect.<sup>6</sup> The law of contract act is silent on the mode of communication unless it is prescribed under the terms and condition of acceptance. Uwaifo, J.C.A., put it succinctly when he said:

It is the law that an offeror may prescribe and direct the method by which an acceptance of an offer may be communicated. Whether some particular mode has been proposed, depends upon the inference to be drawn from the circumstances<sup>7</sup>

### **4.3 The Competence of E-agent as a Party into Contract**

The doctrine of contract law on communication between the natural persons. The most important point is to review the definition of the term “person” as a “buyer” or “seller” under *section 62 of the Sales of Goods Act* and to include e-agents as agent of the principal or as principal and agent relationship and this will wash away the possibility of a party to a contract to contend the liability simply because the electronic agent acted without human input. This was not a new scenario, it has been even discussed in the case of *R. v Masquid Ali*<sup>8</sup> that since mechanical means replace human effort the law should bound to take cognizance. This was also held in the case of *McCaughn v American Meter Co*<sup>9</sup> that a slot-vending machine which is fulfilled automatically the functions of selling product delivery and price collection was capable of concluding a contract without ..... human control, agency work, and exercise of will power.

Considered the above authority the electronic agents have the character of human nature such as intelligence pro-activeness and autonomy to act, therefore it can replace human power. It is therefore my proposal that e-agent should not be considered as communication tool but should be

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<sup>6</sup> See Bradgate R Ibid. (2009) ‘*Commercial Law*’ Legal Practice Courses Guide, at P. 11.

<sup>7</sup> *Anon Lodge Hotels v Mercantile Bank*, (1993)3 NWLR (pt. 248) at 730.

<sup>8</sup> (1966)1 QB 688.

<sup>9</sup> 67F 2d. 148, 149 (US Court of Appeals 3<sup>rd</sup> Cir).

treated as normal agent act under the principal directives as the provision of *section 134* requires instead of enacting a separate act for electronic transactions to cover the issues of E-Agents as many jurisdictions did.<sup>10</sup>

#### **4.4 Freedom of Contract on Electronic Transactions**

On the aspect of freedom of contract the concept of “Meeting of Minds” for contracts by e-agents can be determined by consent theory by the application of objective theory as discussed above. As long as under the objective theory a consent to a contract can be determined by the party statement or conduct so long reasonably understood by the other party. There is no any difference when e-agents has been instructed to make an offer or acceptance through programmed computer. A party should be presumed to be bound by the act of e-agents acting on that behalf. This is also apply to traditional principles when a person is bound by the terms of contract which he signed without reading it.<sup>11</sup> This is equivalent to strict rule that a party cannot deny his obligation simply the act was done by someone else on his behalf with his direction or approval. This is the same to a person decide to use e-agents should bear risks of using such a device. There is no need to enact a law contain the provision of status of e-agent as Canada did to eliminate argument that the use of an electronic agent indicate a lack of consent and therefore prevent formation of contract by introducing United states Uniform Electronic Transaction Act.<sup>12</sup> The clear interpretation of the existing law could enough sustain the use of e-commerce by applying a subjective theory to determine the consent of the parties into electronic contract since that an action of e-agent programmed used by people regardless of human review will bind the user of e-agent.

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<sup>10</sup> The Uniform Electronic Transactions Act, 1999 provides in part, that e-agent may enter into binding agreements on behalf of their principals.

<sup>11</sup> *Saunders v Angalia Bidg Soc’y* (1971)1 App. Cas.1004.

<sup>12</sup> UETA. 1999.

#### **4.5 Online Consumer Protections**

The Sale of Goods Act is one which provide consumer in Nigeria in the aspect of commercial transactions. However, the said Act is not much detailed on the protection of consumers. The electronic commerce requires a law which will influence attractive business environment on the accuracy and accessibility of contract information in the aspect of assurance of quality of goods to be supplied, readiness of the buyer and seller to the contract. For the effective and protection of consumer's rights it requires strong legal framework in order to secure legal atmosphere on electronic transactions.

The approach like that of Germany could be adopted by the Nigeria Legislative organ. Germany found that it could be unsatisfactory to have two systems of Sales law and decided to review her existing laws of contract to accommodate electronic concept instead of having implementation of directive on distance selling<sup>13</sup> as separate law to enforce online consumer sales.

The use of pay-pal payments which is equivalent to cheque or money order or the use of escrow agent where the money is holed at the agent hands till the delivery of goods to the buyer can be the solutions for online sales contracts. The issue of frauds is at higher risks for sale contracts online when the seller request payments before the delivery of goods as well as a possibility of a third party to interfere with the transactions processes only requires a strong or rigid law of security.

#### **4.6 Time of Communication on Electronic Transaction**

Acceptance to an offer is said to become effective when it is communicated to the offeror and once it is communicated a contract is said to be established. The major issue arises at this point is

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<sup>13</sup> Directive 97/7/EC. (1997).

concerning with time. It determines the stage where parties' obligations become effective and when the risk passes from one part to the other.

According to postal rule, contract is said to be formed when acceptance put in the course of transmission beyond the control of offeree, this is positing point. In *Bryne v Van Thenhoven case (supra)* and well cemented by Nditi N.N.N that where an offer was made by post and it was expressed that acceptance should be made by the mode, the sending of acceptance by just leaving it at post office for transmission even if never reached to the offeror will create a binding contract.

The only issue is the time of receiving the acceptance which is subject to a number of factors to be determined. The issue is similar to electronic contracting process and it has been recommended that since the contracting processes involved intermediary like in traditional mail the postal rule could suffice the requirement and when the issue arises its determination will be subject to a number of factors like in traditional way.

On the other hand under the reception theory a contract for distance transactions is said to be concluded at the time acceptance reached to the offeror even if it was not read. This applied to international contracts for sales of goods as provided under *Article 15(1) and 18(2) of the Convention* whereby offer and acceptance become effective at the moment it reaches to offeror and offeree. There is no consensus opinion on the time when a contract is said to be concluded. This can be left to the different approach basing on particular factors and nature of the transactions concern as decided in *Brinkbon Ltd v Stahag Stahl GmbH*.<sup>14</sup> The crucial point to be considered is the fact that there is one party makes proposal to another who accept this proposal and these can be considered as meeting minds of the contracting parties.

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<sup>14</sup> Ibid at pp.55.

#### 4.7 Best Judicial Practice towards E-Commerce

One among the source of laws is case laws through decisions of the Courts of the land. Judicial decisions in various case prior to 2011 shows to what extent the judicial system is in support to the existing laws which hinder the growth of ecommerce in Nigeria as discussed hereunder: The decision in *Nuba Commercial Farms Ltd v NAL Bank Ltd*,<sup>15</sup> the Nigeria Court of Appeal agreed with the appellant that the admission of computer generated print-outs of account information, would accession a miscarriage of Justice since the definition of “banker’s book” under the old Act does not contemplate computer printouts. Relying on *S.97(1) of the Old Act*, the court held that to be properly within the ambit of banker’s book as contemplated by the statute, information stored by the respondent cannot be in any medium other than in a book. Further that the appellant cannot be said to have in his possession copies of its content if the information in question is represented in a computer program as opposed to a book as expressly required by law.<sup>16</sup>

Alsi in *UBA Plc v S.A.F.P.U*,<sup>17</sup> the Court of Appeal stated as follows:

Though the appellant’s counsel made reference to using computer in the day to day business of the bank, it is my opinion that the law still remain as it is... *S. 97(1)(h) of the Evidence act* will continue to be applied to exclude the admissibility of statement of account contained in computer printout unless and until it is amended by an act of the National Assembly.

Basing on the above authority there is the need for judiciary to adopt changes caused by technology revolution. From the above judicial experiences it is possible to set in motion reform of the existing commercial laws to promote e-commerce in Nigeria.

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<sup>15</sup> (2001)16 NWLR (pt. 340) at 523; (2002)24 W.R.N. at 163.

<sup>16</sup> Ibid.

<sup>17</sup> (2004)3 NWLR (pt. 861) at 543.

To this effect, the enactment of the Evidence Act 2011 paved the way for the admissibility of computer generated documents by Nigeria courts. This act in turn laid a solid foundation for the legal recognition afforded electronic signature and electronic contract under the cybercrimes (prohibition, prevention etc) Act 2015.

#### **4.8 Minor Contract Online**

As it has been earlier discussed that the age of twenty-one has been fixed at common law as that of which absolute and unlimited legal capacity to contract shall commence. Also, the Infants Relief Act of 1874 being a statute of general application apply to Nigeria with regard to the age of majority stood at twenty-one.

As in the case of *Labinjoh v Abake*<sup>18</sup> a decision by the “full court” of Nigeria, equivalent to the present day Supreme Court. In that case, the plaintiff, an adult and a trader, sued in the Magistrates’ Court in Lagos to recover from the defendant, a girl, the sum of 48 pounds 18 shillings 8 pence being the balance due to the plaintiff for the goods sold and delivered to the defendant. In answer to the claim the defendant pleaded the Infants Relief Act 1874 under which a contract to supply goods for trading purposes to an infant is void as against the infant and the seller is precluded from suing for the price, since they are not necessities to the minor life.

The Magistrate held that the Infants Relief Act of 1874 was a statute of general application and that was in force in Lagos by virtue of *section 14 of the Supreme Court Ordinance of 1914* and that the contract on which the plaintiff sued was void under the *section 1 of the Act*. He dismissed the plaintiff claim.

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<sup>18</sup> (1924) 5 N.L.R. 33.

On further appeal to the Full Court, the court confirmed that the Infants Relief Act was a statute of a general application in force in Lagos. From the decision in *Labinjoh* case one rule is clear, in any contractual transaction governed by English Law, whether statutory, common law, received or local, the age of majority is twenty-one.

*Section* of the Sales of Goods Act<sup>19</sup> defines necessary goods as “goods suitable to the condition in life of such an infant or minor or other person and to his actual requirements at the time of Sale and delivery”.

In the same section, it also provides that:

...where necessaries are sold and delivered to an infant, or minor or to a person who by reason of mental incapability or drunkenness is incompetent to contract, he must pay a reasonable price, thereof.

From the above section it is clear that a contract under which goods are supplied to an infant or minor for the purpose of trading is not a contract for necessaries and the infant is therefore not bound to pay for such goods.

The question is, in the electronic environment where there is no physical contact between parties to determine age as in the traditional mode to know whether one is a minor or not is a challenge to electronic commerce worldwide. And even where there is picture relationship age can fraudulently easily be misrepresented. To this effect I argued that in the electronic environment since electronic contracts are bound to take place between an adult and a fraudulent misrepresentation of age by an infant basically to deceive the other party into contracting with him or her as a result of this, the electronic commerce requires an equitable law which will treat or that will grant relief against an infant in contract by compelling him to restore his or her ill-gotten gain or to release the deceived from obligation in law induced by the fraud.

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<sup>19</sup> S. 3 of Sale of Goods Law, West.

Secondly enacting laws allowing infant contract to be treated as conditional sale whenever he or she attain majority could ratified such contract. which will help to reduce infant fraudulent act on the internet since not only necessary goods will remain absolutely binding on infants.

## CHAPTER FIVE

### CONCLUSION AND RECOMMENDATIONS

#### 5.1 Conclusion

It has been established that the breakthrough in science and technology has made the world a global village whereby commercial transactions are being performed and executed at different geographical locations across the globe without parties being able to see each other physically. The rapid growth of e-commerce has put Nigeria in the position of facing challenges to various commercial laws and other related laws. The legal system is merely based on common law. Regulatory steps to secure electronic transitions such as digital signatures, amendments to contract law, dispute settlement and other legal issues have not yet been given maximum attention.

The basic commercial law in Nigeria are derived from the 19<sup>th</sup> century and these laws were designed to facilitate paper-based transactions. Despite the changes and regulatory reforms made by the country since independence most of the laws were formed since British Colonial rule before 1960 are still in force. Not only the existing laws and legal instruments need to be re-evaluated, but also dispute resolution mechanisms need to be reviewed to determine how they can be adopted to meet the needs of electronic commerce. However, there have been deliberate efforts by the Government and other institutions to increase general e-commerce awareness and to propose legal framework changes to favour the adoption of e-commerce in Nigeria particularly with the enactment of the Evidence Act 2011 to accommodate computer generated printouts as evidence in court.

Nigeria is not an island which can be left behind with the technological advancement, the laws should simultaneously match with current living society of new technology whereby electronic transactions via internet are the channel of doing business transactions in Nigeria. Going through the project work, it is quite clear that the existing commercial laws do not provide a sufficient room for the smooth operation of e-commerce with exception to the few issues which should be considered to extend the interpretation to cover the context of e-commerce. We have also seen how the modes of offer and acceptance do not basically affect the application of e-commerce and the consent theory and objective theories can be used to determine the principle of consensus ad idem which are some of the basic requirement of contract under the common law rule of contract by the extension of interpretation to cover the context of e-commerce.

On the other hand, we have seen how the Sales of Goods Act is critical challenge when it comes to the transfer of property ownership in goods in electronic environment which is the basic principle of the sale or transaction. Therefore in considering whether sustainability of e-commerce need intervention of new legislation. The response to this hypothesis is positive in my perspective. The need of wider amendment of the existing principles of laws to update the existing laws would meet the requirements of electronic environment and sustain the growth of ecommerce in Nigeria.

Courts and legislature have taken serious steps in modernizing and harmonizing e-commerce legal frameworks, much as been done. Prior to 2011 Evidence Act, the initiative taken have a very limited scope and are far from satisfactory for online business, especially in the area of settlement of disputes arising from online trades. One more important challenge to the legal bodies is to ensure that current and future development, in this area are adopted and implemented within nation's legal frameworks for the expansion of e-commerce trading transactions. The

courts is the organ which has a duty of applying rules of evidence and authentication to sift facts presented to its before it arrives at a conclusion. In this respect the rules of evidence determine which fact is relevant and thus admissible in court.

We are aware that The Draft Electronic Bill (ETB) is pending before the National Assembly. The objective of the Electronic Transaction Bill, is to inter alia, provide a legal and regulatory framework for:

- (a) Conducting transaction using electronic and related media
- (b) The protection of the right of consumers and other parties in electronics transactions and services:
- (c) Facilitating electronic commerce in Nigeria.<sup>1</sup>

The bill also provides that electronic signature is valid.<sup>2</sup> May be this is because of the limited knowledge exists in this field. It is my humble recommendation that instead of having experience challenge as Singapore did, before rushing to the enactment of the new laws, sufficient analysis should be done as it have been done in this work which shows there is still a room for electronic transactions law to be included into the existing commercial laws. Meanwhile the existing contractual principles should be continued to apply in solving the dispute arises from traditional paper based transactions while the electronic transaction laws should concern itself with ICT issues and challenges emanating from internet or online transactions to avoid duality regime of contract laws.

In *Ogolo v IMB*<sup>3</sup>, Onalaja JCA expressed his view that judicial notice should be taken of these electronic transactions. He stated thus:

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<sup>1</sup> Electronic Transaction Bill 2015, S.1

<sup>2</sup> ETB 2015, S. 11

<sup>3</sup> (1995)9 NWLR (pt. 419)324.

The commercial and banking operations in keeping of account of the old system has changed to computer which makes Nigerian business men to be modernized and in keeping with the computer age which system is so notorious that judicial notice of it can be taken under *section 74 of the Evidence Act*.

As it has been observed from the above statement is that the world economy is currently shifting from paper-based to a paperless economy. In the paperless economy, firms, governments and consumers are increasingly using computers to create transmit and store information in the electronic form instead of traditional paper documents.

The advantage of shifting the global information communications technology revolution include productivity, saving of time and costs, speeding up and facilitation of transaction, access to superior and more up-to-date information, easier and cheaper communication both domestically and internationally and in the particular context of e-commerce, access to a wider, and indeed a global economic market at relatively little cost. With regard to the benefits of information communications technology, particularly from the perspective of developing countries such as Nigeria, the United Nations recognizes that information communications technology could be a contributing factor to achieving its Millennium Development goal of the reduction of poverty and of economic development generally. For these reasons, it is very important to address the challenges that the information communication technology revolution poses for national legal system and to consider ways to maximize the opportunities that it opens up at the same time. Another main challenges brought about by electronic transactions revolve around the requirement of writing and signatures on documents and records for legal recognition.

ICT development is an unavoidable necessary change in the way business transactions are currently conducted, the main challenge pose by these developments, in turn, is the necessity of

parallel changes in national legal framework to accommodate the change. The law of evidence and rules of authentication in legal transactions are essential in Nigeria. It was found out that the law evidence governs modes and methods for provision of facts and information to enable a judicial conclusion. It was further revealed that electronic evidence is a new method of presenting evidence in court.

## **5.2 Recommendation**

As earlier discussed for the legislative process two approaches are recommended. The first is to enact a comprehensive piece of legislation on ICT and electronic transaction law to provide for admissibility of electronic evidence: records and documents as well as electronic signature as already provided for by the cybercrime (prohibition, prevention etc) Act 2015. This is because this area is very wide and it needs special attention. A good example is the UNIVITRAL Model Law on electronic signature and electronic transactions. This approach has also been adopted in the United States of America there are a number of statutes specifically regulating electronic transaction and signatures. The law to be enacted could then amend all other laws touching upon and/or requiring electronic records.

The second approach is judicial response. It is recommended without delay judges should continue to play a pivotal role in extending the existing principles of laws governing paper base document and authentication to cover document and signatures in electronic form. It is recommended that the judges should categorically hold that evidence in a computer hard disk, flash disk; compact disk or floppy disk is relevant and admissible to prove or disprove a fact in issue in legal proceedings to combat the legal challenges faces on the internet transactions. The effect of this is to allow parties to present in court not only computer generated printouts but also a piece of information in the above mentioned devices.

With the absence of computer forensic, a person knowledgeable with the operation of the two computer programs could have been called to testify in proof that a computer was reliable could be provided by calling a witness who was familiar with its operation in the sense of knowing what the computer was required to do and who could say that it was doing it properly, and such a witness needs not be someone responsible for the operation of the computer.

Furthermore, the significance of having a legal framework for recognition of electronic evidence and transactions in Nigeria is that it would create a conducive environment of predictability and certify in computer-related transactions, including electronic commerce. By doing so, parties employing computer technologies would be assured that the law will ultimately protect transactions that they engage in. as the law stands now, electronic transaction in Nigeria remain doubtful and uncertain undertakings to fully and freely engage in.

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