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A CRITICAL ANALYSIS OF THE VALIDITY AND ENFORCEABILITY OF ELECTRONIC CONTRACT IN NIGERIA: NEED FOR REFORMS

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ABSTRACT: *Technology revolution is always an ongoing process that introduces new challenges time to time to traditional means of doing things. One of the revolutions is in the area of commercial and contractual transaction is the rise of electronic contracts. This paper tackles the impact of the technology revolution in the general and the use of the Internet in particular on the formation, validity and enforcement of electronic contracts. It tackles the subject matter on a comparative basis and tries to answer whether or not the traditional contract law rules could handle the challenges, particularly due to the dearth of statutory legislation to clarify some of the issues and challenges. To conclude, almost all transactions and contracts, including first group as mentioned above, can be done in electronic form, but the validity of second group depends on the type of formalities.*
KEYWORDS: law of contract, electronic contract, electronic contract, electronic commerce

INTRODUCTION

Electronic commerce is rapidly becoming an integral part of Nigeria's commercial and economic activities. Many Nigerian businesses and individuals embrace the benefits of electronic commerce and use the Internet and related technology to expand markets, enhance efficiency, increase revenue and build new products and services. Trust in the legal efficacy of electronic communications and faith in the legal rules regulating the validity and enforcement mechanisms of electronic contracts are key to the viability of electronic commerce. Electronic contracts are contracts that take place via e-commerce without meeting the parties to the contract. In general, these contracts are somewhat similar to paper-based contracts.

Generally speaking, Nigerian businesses operate in reasonably defined, statutory and common law legal environments. Contract law rules in connection with the physical premises and paper-based transactions were established over several decades, as agreements were negotiated on paper, documented and validated by handwritten signatures by means of face to face communications. Consequently, the laws governing contracts often express themselves in language and represent principles and procedures which are hard to apply to electronic transactions.

The incorporation of traditional principles of contract law including rules on the formation of contracts, the legal formalities and enforcement is directly undermined by electronic contracts. Consider: Are e-mail and website communications contracts or electronic data exchange legitimate and enforceable? Is a signature valid electronically? Does a click on the "I Agree" icon result in a legitimate contract? Is the use of websites binding on contracts? Do automated computer communication lead to contracts that are valid? Issues relating to the creation or initiation of an electronic contract, what law governs the contract and which courts have jurisdiction over contractual disputes? In legal proceedings, are electronic records of contractual communications admissible?Uncertainty regarding these and other issues can increase transaction costs as well as undermines the confidence in the legal effectiveness of electronic contracts which is essential for the continuing growth of electronic commerce.

This paper explores how Nigerian lawmakers, courts and businesses should resolve the legal challenges faced by electronic contracts, in particular with regard to their enforceability. It is not possible to address both practical and procedural problems in a paper of this nature or to compare and contrast the gaps in the various new laws on electronic commerce around the world. The law is changing rapidly internationally in this region and Nigeria needs to come to terms with the changes taking place. As is now the case, electronic contracts in Nigeria will still be governed and regulated by the traditional common law rules of the contract and some old legislation on contracts, such as the Sales of Goods Act, the Statutes of Fraud, etc.

Basic Elements of a Contract

To understand what e-contracts are, it is much more important to first understand what a normal contract is and how a simple contract is formed. There is no doubt as to the validity of contracts concluded in Nigeria as there are laws regulating contract agreements in Nigeria.[1] Nonetheless, there is no specific form in which a contract may be entered into except in some specific contracts or contractual arrangements[2]. SidiDaudaBage, JCA (as he then was) delivering the leading judgment in *Union Bank of Nigeria Plc v. Ogunsiji*[3]explained that the conduct of the parties as well as their words and actions and documents that passed between them can establish a contract as a matter of fundamental law. A contract can also be concluded electronically via online correspondence, otherwise referred to as an electronic contract, by definition.

Generally, an e-contract, like every other contract, also requires the following necessary elements:

[1]*Obayuwona v. Ede* [1998] 1 NWLR (Pt 535) 670

[2] Such as contracts with infants and persons of unsound mind

[3] [2013] 1 NWLR (Pt 1334) 1 at 13 para. F

(a) ***Offer:*** Like every other cases, an offer is to be made to form an e-contract, where through email communication or a vendor displaying his goods or services on his/her website.
(b) ***Acceptance:*** The offer needs to be accepted and should be made before an offer is revoked by the offeree.
(c) ***Competency of the parties:*** All the parties to the contract must be lawfully competent to enter into contract otherwise such contracts are void.
(d) ***Free Consent:*** there must be free and genuine consent. Consent is said to be "free" when it is not caused by coercion, misrepresentation, undue influence or fraud.
(e) ***Lawful Consideration:*** Just like any other contract, any agreement formed electronically, to be enforceable by law, must have lawful consideration.
(f) ***Lawful Object:*** The object of the contract must be lawful otherwise it is void.
(g) ***Intention to Create Legal Relations:*** There has to be an intention to create legal relations. If there is no intention on the part of parties to create legal relationships, then no contract is likely to take effect between them.
(h) ***Certainty and Possibility of Legal Performance:*** A contract, to be enforceable, should not be vague or uncertain or ambigiuous[4]: and there must be certainty and possibility of performance. A contract, which is impossible to perform, is void.
(i)
We have seen from the above that a contract consists basically of two main elements: an agreement and a legal obligation. Any promise and set of promises is established by an agreement which takes each other into account. An offer and acceptance is thus a product of an agreement.[5]This description means that an agreement must be reached between two or more individuals, because nobody can reach an agreement with themselves. Secondly, in the same way and simultaneously, the two parties to the agreement shall agree on the same object of the contract i.e. *consensus ad idem*.[6]

For an agreement to become a contract it must give rise to legal obligations, i.e. a duty enforceable by law. If an agreement is incapable of creating legal obligation, it is not a contract.[7] Where an agreement is inchoate and has not gone beyond negotiations, it cannot be enforced as a concluded contract.[8] A valid contract thus existed, and once that is in place i.e all the principles governing the making of a valid contract have been met, then the contract becomes enforceable.[9]

Every party who wishes to enforce a contract must necessarily prove, or is prepared and able to fulfill all the terms that it ought to fulfill, that all the conditions preceding such performance have been met.[10]

[4] Elliot, C. & Quinn, F. *Contract Law* (7thedn, Pearson & Longman, 2009) p. 9.
[5]*Baliol (Nig) Ltd v. Navcon (Nig) Ltd* (2010) LPELR-717(SC)
[6]*Imoka&Anor v. United Bank For Africa PLC* (2012) LPELR-19837(CA)
[7] Ibid. p. 14.
[8]*Scammell v. Ouston* (1941) All E. R.14; *Courtney &Fairbaine Ltd. v. Tolaini Brothers Hotels Ltd. &Anor*(1975) 1 WLR. 297
[9]*Kano State Urban Dev. Board v. Fanz Construction Coy Ltd* (1990) LPELR-1659(SC)
[10]*Australian Harwoods Property Ltd. v. Commissioner for Railways* (1961) 1 All E.R. 737; *Anaeze v. Anyaso*(1993) LPELR-480(SC)

A breach of contract is committed when a party to a contract fails, neglects or refuses to fulfill a duty performed in the contract without a valid reason, or otherwise fails to fulfill the obligation or fails to fulfill the contract or wrongfully repudiates the contract.[11] Where a party before the date fixed for the performance evinces an intention, either expressly or impliedly, not to perform his obligation, the breach which results is called 'anticipatory breach'.[12]

Every breach of contract has the effect of entitling the innocent party to make a claim for damages. Moreover the innocent party has the choice in such situations like anticipatory breaches, infringements and non-truth of a contractual representation either to treat a contract as discharged, i.e., as terminated, or to overlook the breach and treat the contract as still continuing. As Per Babalakin, J.S.C in ***Obimiami Brick & Stone (Nig.) Ltd v. African Continental Bank Limited***[13] succinctly puts it:

It must be borne in mind that the simple operation of contract is that where parties voluntarily agree to do an act and one of the parties neglected or defaulted from carrying out or doing what was agreed to be done, then there is a breach of that contract by the party who neglected or defaulted in performing his or her own side of the contract and the person responsible for the breach of the contract will be liable in damages to the other party.

A breach of contract connotes that the party in breach had acted contrary to the terms of the contract either by non-performance, or by performing the contract not in accordance with its terms or by wrongful repudiation of the contract.[14] A party who had performed the contract in consonance with its terms cannot be said to have been in breach thereof.[15]

Thus, to succeed in an action for breach of contract, a claimant must plead facts showing the existence and subsistence of a valid contract as well as its express and implied terms and what or which of the terms was breached and in what manner, i.e. the particulars of breach.[16]
Also, there are various situations that could make some contracts incapable of enforcement, which include where:

(a) Both knew that the performance of the contract necessarily involves the commission of an act, which was to their knowledge criminal;[17]
(b) Both parties knew that the contract is intended to be performed in a manner, which, to their knowledge is legally objectionable in that sense;[18]
(c) The purpose of the contract entered by the parties should be seen to be legally objectionable and that notwithstanding such knowledge of that they still went on with the contract.[19]

[11]*Kemtas Nig. Ltd v. Fab Anieh Nig. Ltd* [2007] ALL FWLR (Pt 384) 320 at 342 Paras B - C.
[12]Ezike, E. O. *Nigerian Contract Law* (London: LexisNexis, 2015), p. 389
[13] [1992] LPELR-SC.186/1990, pp. 93-94, paras E-G.
[14]*Pan Bisbilder Nigeria Ltd v. First Bank of Nigeria PIc* (2000) 1 NWLR (Pt. 642) 684
[15]*Kemtas Nigeria Ltd v. Fab Anieh Nigeria Ltd* (2007) All FWLR (Pt 384) 320
[16]*Obajinmi v. Adedeji* (2008) 3 NWLR (Pt 1073) 1.
[17]*Apthrop v. Neville* (1907) 23 T.L.R. 575
[18]*Stoneleigh Finance Ltd. v. Phillips* (1965) 2 Q.B. 537
[19]*Alexander v. Rayson* (1936) K.B. 169

(d) Both parties participate in performing the contract in a manner, which they know to be legally unacceptable.[20]

The fact that a party can recover under an illegal agreement may depend, however, on whether the party is aware or privileged to illegal activities, since it is an unfair act of equity, on a guilty party keeping an innocent party bound by an act of illegal activities which it is not fully aware of. Generally, money paid or property transferred under illegal contract is irrecoverable where both parties are equally guilty of the fact of illegality. This is also buttressed by the *maxim in pari delicto potiorestconditiodefendantis* and means that where the parties are both at fault, the condition of the Defendant is better.[21]

Electronic Contract Formation Process

Just like traditional contracts, an online or electronic contract is an agreement between two or more parties, which creates reciprocal legal obligation or obligations to do or not to do a particular thing. For a valid electronic contract to be formed there must be mutuality of purpose and intention.[22] The two or more minds must meet at the same point, event or incident.[23] They must not meet at different points, events or incidents. They must be saying the same thing at the same time. They must not be saying different things at different times. Where or when they say a different thing at different times, they are not "ad idem" and therefore no valid contract is formed.[24] The meeting of minds of the contracting parties is the most crucial and overriding factor or determinant in the law of contract. An agreement will not be binding on the parties to it until their minds are at one both upon matters which are cardinal to the species of agreement in question and also upon matters that are part of the particular bargain.[25]

There is no need to overemphasize the value of the study of the making of electronic contracts. The incidental problems arising from e-commerce and its different processes should be discussed in any study of electronic contracts. The query that would naturally follow after an enforceable contract is established is the location and time when the contract was actually concluded. From the point of view of deciding the law that will control the parties and the contract, these issues are of utmost importance. There is also some controversy regarding the implications of the basic components of an enforceable electronic contract and the viability of online tenders. Until an enforceable contract is concluded, either in the brick world or in the cyberspace, no commercial transaction can take place.[26] The distinction of contracts on the internet as compared to contracts in the brick world is that in an electronic contract, it is very likely that parties may be separated by distance when the contract is concluded and the communication of offer and acceptance may also not happen contemporaneously.Electronic contracts may be formed in a number of different ways. Some examples of the different methods that may be used to form electronic contracts include:

[20]*Edler v. Auerbach* (1950) 1 K.B. 359

[21]*Alowonle v. Bello* (1972) 1 SC 20

[22]*Orient Bank (Nig.) Ltd v. Bilante International Ltd* (1997) 8 NWLR (Pt. 515) 37 which provides the general requirements for contracts in Nigeria in the absence of any legislative or statutory provisions.

[23]*Yashe v. Umar* (2003) 13 NWLR (Pt 838) 465 at 483-484

[24]*Dauda v. Lagos building Investment Co. Ltd &Ors* (2010) LPELR-4024(CA)

[25]*Hassan v. Obodoeze&Ors* (2012) LPELR-14355(CA)

[26]

- **Contract formation through electronic communications:** The simplest electronic contract is formed by the exchange of text documents via electronic communications such as email.
- **XML-Contracts:** The text documents that form the basis of an electronic contract may be written in XML. XML is an abbreviation for extensible markup language. It is a markup language for documents containing structured information.[27] Structured information contains both content and some indication of what role that content plays. One advantage of forming contracts using XML is that contracts can be processed using machines and contracts can be imported into contract management and negotiation tools. A further advantage to using XML is achieving better specifications of the contract using industry specific XML vocabularies.
- **'Click to agree' contracts:** An electronic contract may be in the form of a *'click to agree'* contract. The terms and conditions of the contract are displayed on one party's website and the other party (e.g. the customer) agrees to the contract by clicking and *'I agree'* button on the website accepting the relevant terms and conditions. This type of electronic contract is commonly used for the purchase of downloaded software. Once the transaction is completed, the issuer of the contract ordinarily sends an email to the customer (which may be automatically generated) confirming the details of the transaction.

Generally, when parties decide upon a particular method of electronic contract formation, their decision is influenced by the nature and importance of the relevant contract. For contracts of strategic importance or of high economic value, parties may wish to utilize appropriate technology that ensures the security and authenticity of relevant documentation.

Without doubt, the formation of electronic contracts involves the simple communication between two computers.[28] This form of communication involves a direct communication between two computers, which does not attract the mailbox rule. The sole reason is that no third party intervenes or no server is necessary for such a communication. A message is sent from one computer to another on the same network.[29] This being the simplest form of online communication does not pose much of a problem as the offer and the acceptance are generated and communicated between two computers that are located in the same place and in the same jurisdiction. In such a case the contract is concluded at the place where both the offer and the acceptance originated and were communicated.

Secondly, communication between the computers that are linked to a shared server allows for the creation of an online or electronic contract. As any communication that is produced and exchanged between these computers must pass through the common server, this situation falls firmly within the scope of the traditional principle of the postal rule. The server is the mailman's electronic counterpart, and when a message is produced, either offered or accepted, and transmitted through a device, it must pass through the server in order to reach the destination. In such a scenario, the postal rule applies squarely and the acceptance is assumed to have been transmitted to the offeree the moment it leaves his computer.The fact that the acceptance would

[27]Walsh, N., *A Technical Introduction to XML*. 1998. available at http://www.xml.com/pub/a/98/10/guide0.html (accessed 3 December 2020).

[28] Graham, S.J.H., *Internet Law and Regulation* (Sweet & Maxwell, 2nd Ed., 1999)

[29] Davis, L."Contract Formation on the Internet: Shattering a Few Myths" in Lilian Edwards and Charlotte Waelde (eds.), *Law and the Internet: Regulating Cyberspace*, (New York: Hart-Publishing 1998)

not have been transmitted instantaneously and may only have entered the machine or computer system of the offeror would not in any way change the contractual nature of the contract. The acceptance shall be considered to have been transmitted to the offeror as soon as the acceptance leaves beyond the reach of the offeree, even though it may remain on the server until it is finally delivered to the offeror's computer system. Under such a case, the jurisdiction is where the server is located and not where the negotiating parties are located, unless otherwise decided. As a consequence, the issue of jurisdiction does not pose much of a concern. The judgment in *Thornton v. Shoe Lane Parking Ltd.*[30] provides some indication in respect of the conclusion of the contract. The case pertains to a machine auctioning a contract. In that case Lord Denning, MR held:

the offer is made when the proprietor of the machine holds it out as being ready to receive the money. The acceptance takes place when the customer puts his money into the slot.
The principle set out in the *Thronton*case by Lord Denning confers a strong perspective on electronic contracts, i.e. the procurement of goods or services. Many Web-based providers or sales agents or web-based services have a standard format for such transactions. By filling in the necessary details and authenticating the agreement, the customer is bound by the terms of the contract.

Analysing such a scenario from the perspective provided by *Thronton*case, it would appear that the offer originated from the seller, intending that a buyer who intends to buy should accept such offer by filling in the format and thereby manifesting his acceptance. The conclusion of contracts with the aid of "electronic agents"[31] is also well addressed by this legal formula. It is perhaps to get over this legal fiction that Web-based sellers specify in the Web site user agreement that the representation on the Web site is only an invitation to offer and that the offer originates from the buyer who places an order. They further specify that they reserve the right to accept or reject any order.

From the point of view of the seller, those terms are inevitable to cover themselves in the event of a shortage of supplies. Airline tickets, for example, will be sold in a small amount, because if more customers than the number of available tickets submit orders at the same time (which is a risk on the Internet), the seller will be liable to action from an unfulfilled customer. The specification in the User Agreement of the website that all representations made on the website are invitations to tender will secure the rights of the seller. However the validity and enforceability of those words is subject to debate.It is unusual that these clauses are still applicable in Nigeria, since the use of those terms is not prohibited. While the Sale of Goods Act 1893 provides for tacit provisions, assurances and even the rights and obligations of the customer and the seller, section 62 provides the parties with *carte blanche* to exclude implicit terms and conditions.

Thirdly, in the case of multiple server communication, messages are shared between computers which are linked to separate servers. Once a message is produced by a device attached to a

[30] [1971] 1 All ER 685.

[31]Electronic agents are defined legally as a computer program or an electronic or other automated means used independently to initiate an action or respond to electronic records or performances in whole or in part, without review or action by an individual.

specific server and communicated, the message is beyond the control of the person from whom it originates. This does not always mean it is transmitted to the destination instantaneously.[32]It is this intermittent existence of the Internet and correspondence over computer networks that presents difficulties in deciding the precise point at which the contract is concluded. In the event that computers are attached to separate servers, the application of the mailbox rule will not be sufficient. Rather, it really would appear that the general application of the mailbox rule to such a case would be arbitrary and would not fit the intent guiding the classical doctrine of the mailbox rule. The complexities inherent in the transmission of a message through a chain of servers make it almost difficult to set down any simple legal rules to decide the point of conclusion of the agreement.

Technology has made it possible to provide software and operating networks that allow the reception of electronic communications, even though the computer connecting to the server might not be connected to the network at the time the server receives the particular message. If the computer is already attached to the server, the user of that computer will be informed of the reception of these notifications. It is at this stage where the addressee will finally get an opportunity to look into the email.[33] Applications like Microsoft Outlook are examples of this kind. This mode of communication by e-mail is also referred to as POP mail, since it uses a technology known as Post Office Protocol. While a user will have to configure the application, using the Internet Protocol (IP) of his service provider in order to use the application, e-mail that can be accessed from any computer through the World Wide Web is more commonplace, and this is often called *Web mail*.[34]

It is rather difficult to lay down strict rules in order to ascertain whether a contract in fact comes into being irrespective of whether the offeror has read the message.[35] The determination of *consensusad idem* is rather difficult in such situations. The dilemma is further exacerbated by the fact that electronic messages transmitted from one computer to another through a network of separate servers may actually be lost in transit. In such cases, evidentiary problems emerge and call for a robust mechanism to enable proof of dispatch. In such a case, it would indeed be unreasonable to maintain that against the offeree it is binding against him because the acceptance has left his computer system, regardless of whether it has actually reached the computer system or the offeror's server.

There is also a risk that an electronic message while in transit may also be altered or impaired. Such an alteration or impairment can create misunderstandings that may eventually lead to contract avoidance. In order to address such problems, the implementation of a standard communication system over computer networks may be necessary and it may be permissible for the parties to lay down, by contract, the exact rules governing their transactions.

A unique development arising out of the communication revolution over computer networks is the emergence of the virtual market place such as *Aliexpress.com, Jumia.com, Konga.com* etc. It is the virtual market place, which is now the platform of all commercial communication that

[32] Davis, L. *op. cit.* p. 21
[33] Ibid.
[34] Ibid. p. 22
[35] Davis, L. *op. cit*p. 22

is happening over computer networks.[36] The virtual market place may have different connotations. A common illustration would be that of a Web site which offers various products on sale. It does not necessarily mean that all the products on sale on a particular Web site are to be on sale by the host of the Web site.[37]In order to promote the selling of these items to purchasers who access its website via computer networks, the host of the website may only provide the marketplace to various vendors. The intermediary relationship between the seller of the commodity and the website host that provides the virtual marketplace plays an important role in this case. If in fact, the host of the website is himself a seller of the product, the issue of deciding when the sale actually takes place does not pose much of a problem. In the case of a virtual marketplace supplied by the host of the website where the vendor of the commodity is different, the question of contract privacy will also arise. It will be crucial in such a situation to find out whether there is some agency partnership between the product provider and the website host. The contract entered into with the ultimate buyers by the host of the Web site binds the seller of the commodity.

Challenges to the Enforcement of Electronic Contracts in Nigeria

Generally, for any contract, whether oral, paper-based or electronic, to be valid there must be mutuality of purpose and intention and the contracting parties must agree on the terms of the contract.[38] Thus, a contract is an agreement between two or more parties creating obligations that are enforceable or otherwise recognizable by law.[39] A legally enforceable agreement which a contract is, has the following necessary ingredients: offer, acceptance, consideration; intention to create legal relationship and the capacity to contract. It has been repeatedly held that these five necessary requirements must co-exist and a contract cannot, in law, be formed in the absence of any of the five ingredients.[40]

In an electronic world, conventional contractual principles are generally disrupted and insufficient. When contracts were developed by the exchange of letters or through offline contact, conventional contractual principles evolved from business practices. Traditional principles of contract presume that most of the contracts take the form of an offer written to a person who accepts, rejects or extends the terms.

When a contract is formed electronically, there is no requirement that the contract must be in writing. Even under the general law of contract there is no requirement for traditional, conventional or paper-based contracts to be in writing and the same rule applies to electronic contracts.[41]When a document exists in an electronic environment without taking a physical form, the issue is whether such an document could be considered a contract in writing as

[36] Farah, Y. 'Electronic contracts and Information Societies under the E-Commerce Directive' (2009) V.12, no 12, *Journal of Internet Law* 3-15

[37]Hoye, J. C. "Click—Do We Have a Deal?", (2001) 6 *Suffolk Journal of Trial & Appellate Advocacy* p.163 at p. 165 (2001)

[38]*African International Bank Ltd v. Integrated Dimensional System Ltd* (2012) 17 NWLR (Pt 1328) 1

[39]*B.A.T. (Nig.) Ltd v. Ogunseye* (2010) 4 NWLR (Pt. 1194) 343

[40]*Amana suits Hotels Ltd v. PDP* (200) 6 NWLR (Pt. 1031) 453 at 476; *Obaike v. B.C.C. Plc.* (1997) 10 NWLR (Pt. 525) 435

[41]Christensen, S. et al, *Electronic Contract Administration—Legal and Security Issues: Literature Review*, Report No 2005-025-A (2006) [17].

required under the Statute of Frauds.[42] In reality, the electronic document is a series of numbers stored in the memory of the computer. The content of such an electronic document seen on the computer screen is a translation of the numbers by the computer after the application of coding convention and this ultimately appears as a form of words to the reader on the computer screen. These are understandable to a person only after appropriate coding convention translates these numbers into words. Therefore, an electronic contract by nature has a dual form. There are a series of stored numbers and code and the contract takes visible form as a translation of the numeric code when it is transmitted to a computer screen. It is this dual nature of the electronic contract that has led to the uncertainty as to whether it can be regarded as a contract in writing.[43] It is elementary principle of law that where parties have reduced the terms of a contract between them into writing, they are bound by the contract they voluntarily enter into and cannot act outside the terms and conditions contained in the contract and neither of the parties to a contract can alter or read into a written agreement a term which is not embodied in it.[44] The agreement represents the intention of the parties and stipulates the benefits each should derive from the agreement.[45]

In the case of *BFI GROUP CORP. vs. BPE*[46], where the Supreme Court held as follows:
"The Court must treat as sacrosanct the terms of an agreement freely entered into by the parties. This is because parties to a contract enjoy their freedom to contract on their own terms so long as same is lawful. The terms of a contract between parties are clothed with some degree of sanctity and if any question should arise with regard to the contract, the terms in any document, which constitute the contract, are invariably the guide to its interpretation. When parties enter into a contract, they are bound by the terms of the contract as set out by them. It is not the business of the Court to rewrite a contract for the parties. The Court however, has a duty to construe the surrounding circumstances including written or oral statement so as to discover the intention of the parties."

As noted in the above cases, a Court must treat as sacrosanct the terms of an agreement freely entered into by the parties as parties to a contract enjoy their freedom to contract on their own terms so long as same is lawful and if there is any disagreement between the parties to a written agreement on any particular point, the authoritative and legal source of information for the purpose of resolving the disagreement is the written contract executed by the parties.[47] It is not the business of the Court to rewrite a contract for the parties and it should thus not add to or subtract from or import any provision into the contract.[48]

The Court does not have the necessary *vires* to rewrite an agreement for the parties.[49] The Courts have been consistent in holding that it will not rewrite any agreement entered into by

[42]Cunliffe, I. and J McLachlan, J. 'International Transactions Involving Financial Information' (1990) *Current Developments in Intellectual Property and Trade Practices* 19, 19–25
[43]Reed, C. *Digital Information Law: Electronic Documents And Requirements of Form* (1996)
[44]*Union Bank of Nigeria Plc v. Ozigi* (1994) 4 NWLR (Pt. 333) 385
[45]*Lagos State Government v. Toluwase* (2013) 1 NWLR (Pt. 1336) 555.
[46] (2012) 18 NWLR (Pt. 1392) 209
[47]*Union Bank of Nigeria Plc v. Sax (Nig) Ltd* (1994) 8 NWLR (Pt 361) 150
[48]*Omega Bank (Nig) Plc v. O.B.C. Ltd* (2005) 8 NWLR (Pt 928) 547
[49]*Daspan v. Mangu Local Government Council* (2013) 2 NWLR (Pt 1338) 203

the parties.[50] The Court can only interpret terms in line with the express terms of the contract.[51] The general rule is that where the parties have embodied the terms of their agreement or contract in a written document as it was done in this case, extrinsic evidence is not admissible to add to, vary, subtract from or contradict the terms of the written instrument.[52]

If the terms and conditions of the agreement are uncertain or vague as to defy ascertainment with reasonable degree of certainty, there can never be a valid agreement known to law which can be said to offer itself for enforceability.[53]

Just like traditional contracts, parties to electronic contracts are generally bound by the terms of their contract. Generally, the only cases where a court refused to enforce a contract against the consumer were those cases where the user was not required to assent to the terms or was asked to consent to the terms only after he downloaded the product. For example, in *Williams v. America Online, Inc.*[54], AOL subscribers' computers were allegedly damaged after they downloaded Version 5.0 of the AOL software, causing unauthorized changes to the configuration of their computers so they could no longer access non-AOL Internet service providers or access personal information and files.[55] The court denied AOL's motion to dismiss the case based on the forum clause, because AOL required assent to the AOL terms after the subscribers downloaded the software. The court reasoned that since the customers had not had an opportunity to review or accept the electronic contract before starting the download, the contract did not apply. Also in *Specht v. Netscape Commc'ns Corp.*[56], the Court refused to enforce Netscape's contract because a user downloading free software would not see the End User License Agreement covering the SmartDownload software posted on the Netscape site until after already initiating the download.

Nonetheless, there were much litigation regarding AOL's agreement (or lack of one in the *Williams* case), with some courts finding the AOL member agreement enforceable and others finding it unenforceable. In 1998, *in Groff v. America Online, Inc.*[57], the Rhode Island Superior Court held that the general rule was that a party who signs an instrument manifests his assent to it and cannot later complain that he did not read the instrument or that he did not understand its contents. Here, it found that the plaintiff effectively "signed" the agreement by clicking "I agree" button not once, but twice. Under these circumstances, the court held that the plaintiff should not be heard to complain that he did not see, read, etc. and is bound to the terms of his agreement. In effect, the contract found the AOL contract binding because AOL's electronic contract acceptance procedure, required a user to first click on an "I agree" button indicating his assent to be bound by AOL's Terms of Service before he could access AOL's system. The court stated:

[50]*Afrilec Ltd v. Lee* (2013) 6 NWLR (Pt 1349) 1
[51]*Sona Brewery Plc v. Peters* (2005) 1 NWLR (Pt. 908) 20
[52]*Mrs. O. D. Layode v Panalpina World Transport NY Ltd* (1996) 6 NWLR (Pt 456) 544
[53]*Odutola v. Papersack (Nig.) Ltd.* (2006) 18 NWLR (Pt.1012) Pg. 470
[54] No. 00-0962, 2001 WL 135825 (Mass. Super. Ct. Feb. 8, 2001).
[55] Ibid. p. 2
[56] 306 F.3d 17 (2d Cir. 2002)
[57] No. PC 97-0331, 1998 WL 307001 (R.I. Super. Ct. May 27, 1998)

[T]he general rule [is] that a party who signs an instrument manifests his assent to it and cannot later complain that he did not read the instrument or that he did not understand its contents. Here, plaintiff effectively "signed" the agreement by clicking "I agree" not once but twice. Under these circumstances, he should not be heard to complain that he did not see, read, etc. and is bound to the terms of his agreement.[58]

In fact, this position echoes the long-held acknowledgement that consumers generally do not read form contracts, yet are still bound to the terms of the agreement.[59]

E-contracts are generally in the form of a standard form of contract where the terms are one-sided, with the consumer merely given an option to decide the place of delivery of goods, the mode of payment etc. nonetheless, it is important that the terms of the contract must be sufficiently brought to the attention of the customer prior to the contract being completed. The courts, especially in Nigeria, have not given definitive guidance as to how online terms and conditions must be incorporated, but the most effective way is to design the website so that the customer is unable to complete their order until they have scrolled down the full terms and conditions on-screen and clicked an "I accept" button (or similar). This is known as a click-wrap contract, as earlier explained in the preceding chapter. In the context of software licence agreements (known as end user licence agreements) there are two other common forms of contract:

(a) Browse-wrap contracts, where a user is simply notified that by continuing to use the software they will be bound by certain terms and conditions, but without the user having to take a positive action to accept them.
(b) Shrink-wrap contracts, where a user purchases a physical software product and the terms are either included with the packaging or in a file that must be opened during installation. Users of websites and online services have challenged the enforceability of online terms of use over the past two decades, developing a solid body of judge-made law on such issues, notably in developed countries such as the United States and the United Kingdom. However the current case law on online modifications is scarce. In order to determine if the authors of the original contract terms succeeded in successfully changing those terms, the few available opinions depend adequately on off-line contract alteration rules. Unfortunately, the decisions to date do not yet give us predictability as to the enforceability of changes to electronic contracts.

Traditional contract doctrine clearly forbids the unilateral modification of contracts and treats a proposed modification as an offer that is not binding until accepted.[60] Although contract law may vary from jurisdiction to jurisdiction, there generally are three requirements in traditional contract law for modifying contracts. First, the offeree must have proper notice of the proposed modification.[61] It is axiomatic that no offer can be accepted unless the offeree knows that the offer has been made. In addition, the offeree must manifest assent to the proposed modification

[58] Ibid. p. 5
[59] *BFI GROUP CORP. v. BPE*(2012) 18 NWLR (Pt. 1392) 209
[60] *Adams O. Idufueko v. Pfizer Products Limited &Ano*r (2014) LPELR 22999
[61] *Ekwunife v. Wayne* (WA) LTD. (1989) 5 NWLR (Pt. 122) 422

in some manner, either explicitly or implicitly.[62] Last, in order for a modification to be enforceable, it must be supported by consideration.[63]
Nigerian courts have rarely addressed the specific question as to the factors to consider in determining whether an electronic contract is enforceable in Nigeria. The focus of relevant decisions has tended to be more on the question of when such a contract comes into force, not whether one comes into force. If a Nigerian court was required to consider whether an electronic contract was enforceable, the court would likely consider the following factors:

1. whether the user was required to click an "I accept" icon before utilising the product or services;
2. whether the existence of the terms and conditions is prominently displayed, regardless of whether an "I accept" process is involved;
3. whether it is clear to the user what he or she is "accepting";
4. whether or not the online acceptance process is unduly complicated; and
5. whether the terms are expressed in a way which is comprehensible to the average user.

Unfortunately, Nigerian courts cannot consider whether or not the relevant term(s) sought to be enforced is "unfair", since we don't have specific legislations dealing on unfair contractual terms or dealings like other major common law countries like England, Australia (Australian Consumer Law) or New Zealand (Fair Trading Act 1986).

Furthermore, it is settled law in Nigeria that where an agreement has been substantially performed by one of the parties to the agreement, it cannot be rescinded because of failure of that party to fulfill some of its terms unless those unfulfilled terms are fundamental to the agreement.[64] A fundamental term of a contract is a stipulation which the parties have agreed either expressly or by necessary implication or which the general law regards as a condition which goes to the root of the contract so that any breach of that term may at once and without further reference to the fact and circumstances be regarded by the innocent party as a fundamental breach.[65]

A fundamental term of a contract is that term that forms the core of the contract and essential to its performance and a breach of which destroys the basis of the contract and deprives the other party of substantially the whole benefit which the parties intended that party to receive.[66] Again, where parties to a contract have agreed to terms of the contract, performance of the contract by one of the parties in line with what the parties have agreed to, does not become a breach merely because the terms agreed to by the parties had in the first place been illegal.[67]
Generally, the consequence of illegality in relation to the parties' contract is that the Court will come to the assistance of any party to an illegal contract who wishes to enforce it. This position of the law is founded on the principle of public policy and is expressed in the maxim *ex*

[62]*Prospect Textile Mills Ltd. v. Imperial Chemical Industries Plc England* (1996) 6 NWLR (Pt. 457) 668
[63]*Unity Bank Plc. v. KayodeOlatunjiEsq* (2014) LPELR 24027
[64]*Olanrewaju Commercial Services Ltd v. Sogaolu* (2015) 12 NWLR (Pt 1473) 311
[65]*Niger Insurance Co. Ltd v. Abed Brothers Ltd* (1976) 7 SC 20
[66]*Karsales (Harrow) Ltd v. Wallis* (1956) 2 All ER 866; *Hunter Engineering Co v. Syncrude Canada Ltd* (1989) 1 SCR 426; *Tercon Contractors Ltd v. British Columbia* (2010) SCC 4
[67]*Pan Bisbilder (Nigeria) Limited v. First Bank of Nigeria Limited* (2000) 1 NWLR [Pt. 642] 648

turpicausa non orituractio, meaning that an action does not arise from a base cause.[68] Nevertheless, where both parties are equally involved is beyond the face of the law as no person can claim any right or remedy whatsoever under an illegal transaction in which he has participated. No Court will lend its aid to a man who founds his cause of action upon an immoral or illegal act.[69]

Online international contracts, specifically through an Online Store, have a set of particularities from the perspective of its legal regime, which are mainly related with the fact that these are contracts with general terms and conditions. The Client's (or Consumer) click represents the acceptance of the said terms and conditions pre-established by the product or service provider, not being totally clear which legal regime to apply to the general terms and conditions, as it involves an international contract on the one side, and on the other side, inasmuch as each legal system has its own specific regulations for the said conditions and for the criteria or rules of incorporation to the contract.[70]

The general terms and conditions of a contract express a rationalization phenomenon of the contract in economic terms (reduction of costs in the negotiation, speed in the provision of services, etc.) that is present in all sectors of activity. Electronic contracts through an Online Store is carried out under the general terms and conditions, given that the entrepreneur or service provider publishes on the Website any necessary information for the Client (company or consumer) knows the terms under which the specific offer is made.

This way, clicking on the corresponding Website icon (*"OK"* or *"Accept"*) expresses, in principle, acceptance by the Client. This modality of electronic contract through an Online Store is the one where most problems of irreflexive contracting can arise. On the other hand, while it is true that all of the General Terms and Conditions are set by the company that is selling its products online, this does not mean that their nature is necessarily unfair. This environment entails specific horizontal projection regulations (of application to any type of contract), in virtue of which consumers and clients are warned of the existence of these provisions, allowing them to cancel the contract, if they are abusive as well as pre-set.

Various jurists have suggested that there should be legislation to act against extreme duress used by a party which seeks to use its powerful bargaining position by enforcing those conditions on a weaker party (most times the seller in an online transaction). They therefore argued that the general terms and conditions which have not been negotiated by the parties have their own principles and are intended to avoid a higher bargaining position of one of the parties, which would result in damage to the interests of the accepting party.

The law of the contract is not contradictory to the existing modifications in the formation of contracts. Today, in Nigeria and around the world, contracts with banks, contracts with

[68]*Cowan v. Milbourn* (1867) L.R. 2 Ex 230; *Fashina v. Odedina* (1957) WRNLR 45 and *Abesin&Anor v. Iyaegbe* (1958) WRNLR 67

[69]*Holman v. Johnson* (175) 7 Cowp. 341: 98 E.R. 1120: *Gordon v. Metropolitan Commissioner* (1910) 2 K.B. 100 at 1098 and *Onyiuke v. Okeke* (1976) 3 S.C. 1

[70] Christina L. Kunz et al., Browse-Wrap Agreements: Validity of Implied Assent in Electronic Form Agreements, 59 *Business Law* (2003) p. 279

international corporations, corporate and government contracts, fast-moving consumer goods contracts are all carried out in this way very quickly. It can be assumed that at present, the Law of the Contract affects certain forms of contracts in general[71]. It would be difficult for large organizations to draw out a separate contract with every individual. They, therefore, use pre-determined forms of contract containing standardised terms. It may however, be noted that presently, there are no case law in Nigeria in respect of click-wrap, shrink-wrap or browse-wrap agreements.[72] However, they are likely to be upheld if they fulfill the essential ingredients of a traditional contract.

In most cases relating to electronic contracts, the traditional rules of contract apply. Parties must satisfy the basic requirements of ordinary contractual obligation, the existence of such electronic contracts must therefore be inferred from all that transpired between the parties from start to finish of their transaction[73]. The Supreme Court via per MukhtarJSC in ***Ajagbe v. Idowu***[74] states:

The existence of an agreement is not an issue merely of fact… the law take an objective rather than a subjective view of the existence of an agreement and so its starting point is the manifestation of mutual assent by two or more persons to one another.
This dictum explains how the courts in Nigeria will treat cases of electronic contracts. It is important to state that this may not necessarily meet the challenges associated with online transactions. There is need to enact a comprehensive regulation relating to electronic contracts. Although progress have been made with regards to statutory provisions relating to electronic contracts, much are still to be done before the legal and the regulatory environments are ripe for the application of online transactions

CONCLUSION AND RECOMMENDATIONS

Electronic commerce is only another medium through which business is conducted. The premise that it is a different medium is based on the fact that our knowledge and experience have been based on tangible material and visible manifestations. The fact is that it is not the contract that has -been changed rather medium through which the parties are contracting. Therefore, applying the elements and principles of contract formation to electronic contracts requires an understanding of contract-laws and the nature of electronic transactions.

Parties entering into electronic contracts may be left to seek guidance from traditional paper contracting. Although these traditional rules are important and developed over hundreds of years, they may be inadequate to address some unique issues that arise in the field of electronic contracting. There is an increasing demand for clarity in the rules that apply to the participants of electronic commerce and their transactions.

[71] Sharma, G. *Crisis of Standard Form of Contracts*. available at http://drgokuleshsharma.com/pdf/STANDARD%20FORM%20CONTRACTS.pdf (accessed on December 3rd, 2020)
[72] Seth, K. *Computers, Internet And New Technology Laws* (Updated edn. 2013) p. 65
[73]Ezike, E. *Ibid.* p. 463.
[74] [2011] 17 NWLR (Pt. 1276) 422 at 442, para. D-G

Also, the common-law may be able to provide guidelines and solutions to the issues associated with electronic contracts. In the absence of special legislation for electronic contracts, the issues and problems involved in such contracts can only be solved case by case.

There should be confidence about the legal enforceability and validity of transacting electronically. The goal of a legal framework is ensuring certainty and the fulfillment of obligation. It has not been created to be worshipped but rather to serve society and provide solutions where they are needed. Thus, we may need to develop a legal framework appropriate for electronic commerce. Indeed, the UNICTRAL Model Law may provide international commercial principles relating to the effectiveness of electronic messages and the obligations associated with them in an international field. The provisions of the Model Law can provide viable solutions to the problems related to electronic contracts. In fact, the Model Law has been influential in the debate on electronic commerce in a number of jurisdictions, including the United States, Canada, Europe, South Africa, Tanzania, India and New Zealand.

The emergence of Internet transactions requires more certainty in the laws governing a variety of online or software-based transactions, such as *clickwrap contracts*. The legal issues of electronic agreements specifically, and standard form contracts generally, can be dealt with by adopting new legislations or leaving the matter to judicial discretion. In the case of the former, legislatures can regulate the content of standardized forms so as to be flexible and ensure consumers protection without omitting the other party's interests. It is recognized that maintaining such a balance between two contrary interests is a hard task. Also, legislative regulation may result in preventing any attempt to have contracts mirror economic and technological developments that did not take place when the legislation was introduced. In the case of the latter, a court will have a wide authority to choose between enforcing applicable terms and excluding the other ones, or refusing to enforce the contract entirely.

The common view is that the law governing electronic contracting should not differ too much from the law governing traditional contracting. The trend, and also the approach taken by several nations around the world, is that it is important to put in place a regulatory framework that enables electronic contracting. Our humble view remains that, to enhance legal certainty in electronic contracting there are issues that should be regulated further. One such issue being the time of electronic contract formation. However, in doing so, it is important to balance the interest of legal certainty, the desire of technology neutral laws and the risk of excess regulation. Additionally, one should keep in mind that under the *principle of freedom of contract* and the *principle of party autonomy*, parties in B2B e-commerce are free to agree on the terms and conditions of their contract, regardless of any laws. Legislations on electronic transactions and agreements should focus more on the contract content in terms of being reasonable and fair, rather than on the formation of such contracts. This is for the simple reason that the enforceability of such contracts lies on whether their contents are reasonable, fair and expected by the other party.

As noted, the law of contract has been developed over centuries through the practices of traders, court decisions and statutory reform so as to reflect the needs and values of the people whom the law serves. Updating contract law does not necessarily mean that a fundamental overhaul of contract law is needed. What is needed are some changes so as to address only specific issues presented by electronic contracting in order to be on an equal plane with traditional contracting.

The function of Contract law is to facilitate commerce by putting in place a framework for secure dealing.

Therefore, we are recommending the following as means to improve the certainty, validity and enforceability of online/electronic contracts:

1. Enacting a comprehensive legislation for the electronic contract highlighting all requirements and elements needed for valid electronic contracts or transactions, jurisdiction of the courts and parties as well as methods of authentication of the contracts;
2. Review all existing legislations on commercial transactions or ventures to ensure that it reflects existing and contemplated technological developments in trade practice;
3. The intensive of effort should be increased between the legal and technical professionals in order to secure the electronic transaction especially the defense of penetration and the preservation of documents of change or forgery and to increase the confidentiality and safety to increase the confidence on these transactions;
4. Establishing special courts in the field of electronic commerce and holding training courses for the judges in this area to let the judges specialized in this field to keep with the development and the era of technology; and
5. Establishing bilateral agreements or cooperation between the countries to develop a uniform and specific system between the provisions of the law for the ease of application and the implementation of the court judgments that issued in electronic disputes.
6.

Finally, it is imperative that the law remains current with technological and commercial developments and establishes a stable, uniform framework of rules that will provide the needed certainty and predictability for commerce. The advantages of contracting electronically can be achieved where there are adequate and sufficient rules that are appropriate for the nature of such contracts. As technology develops rapidly, it is necessary to ensure that the law is in tune with such development. Keeping the law up to date is essential not only to puffing national companies at a competitive advantage, but it also makes a country a more attractive place to do business and law status more preferable as the choice of law governing international commercial contracts.

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