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**ONLINE CONTRACTS IN NIGERIA –AN OVERVIEW \*****ABSTRACT**

*Information Communication Technology (ICT) has revolutionalised the world in many areas including commerce and industry. The internet has brought about a brand new way of buying and selling products and services called e-commerce or online trade. Every commercial transaction whether oral, written on paper, or by other exchange of documentation, by conduct or online involves two or more persons who reach an agreement to bind themselves to give up something in exchange of another. This is contract. This paper examines the basic notions of the law of contract as it applies to online business transactions. It finds that online contracts must be held to the same standards as other written paper documents; and that the basis of every contract which is a mutual agreement between the parties enforceable by law is present in online contracts. It concludes that the essentials of traditional contract such as offer, acceptance, consideration, intention to create legal relations, and terms of contract, should also apply to online contract as they do to traditional contract with little variations peculiar to cyberspace.*

**1. Introduction**

Nigerian trade practice has since advanced from the concept of a physical market place where the buyer arrives to meet the waiting seller from whence after haggling they reach an agreement and then there is physical transfer of the goods in exchange for consideration. Cyberspace is now today's dominant market place and all kinds of goods, applications and services can be acquired at the click of a button. This welcome development is heightened by the increasing availability of sophisticated information communication technology tools. For instance, a great number of persons no longer stop at

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having mobile phones for only making and receiving calls. Smartphones and Blackberries and the like are a common sight and internet access is quite common. Flights and hotel reservations as well as conferences and registrations for all manners of examinations are conducted online. In addition, banking has been revolutionised with automatic teller machines (ATMs) and e-banking. Indeed, the possibilities e-commerce offers appear to be unlimited and only a few instances are mentioned in this work.

According to a learned commentator:

The objectives of e-commerce are legion. They include the facilitation of international co-operation through trade, making goods and services available to consumers all over the world irrespective of distance, the expansion of the consumer base for manufacturers or producers of goods and services, and a reduction in the costs of service delivery by delivering these electronically... . The objectives of e-commerce underscore its importance in the emerging global community. With the effect that today's consumers are able to have access to goods and services in the remotest parts of the world without having to see the sellers. The traditional buying and selling process is being gradually replaced by internet trading, especially in more advanced countries...<sup>1</sup>

This recent phenomenon has revolutionised the law of commerce and trade, more particularly so as contract is at the heart of commerce and trade. Knowledge of online contracting rules is of particular significance to the contract law curriculum. This is because as a result of the nouveau prevalence of online trade transactions in Nigeria, most reputable organizations now require subscriptions, applications, online purchase offers, etc. to be submitted through their websites. Although it seems clear that a valid contract can and does result from online communications, lots of controversies have been generated on this issue. Chiefly, given the borderless coverage of the internet, which courts will

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<sup>1</sup> T. I. Akomolede, "Contemporary Legal Issues in Electronic Commerce in Nigeria," *Potchefstroom Electronic Law Journal*, Vol. 11 No. 3, p. 3.

have jurisdiction in the event of a dispute, and what law(s) will apply? How can the terms of the contract be determined? How is the contract evidenced? Given the instantaneous nature of internet transactions, for instance, a message is sent as soon as a key is pressed or at the click of a button, what happens in situations where a message is garbled or sent in error? How about situations where the message is unauthorized or sent by an impostor? What rules of contract apply to online transactions or electronic commerce? In other words is there a binding contract enforceable by the courts when you access online content, etc.? This article attempts to answer the above questions and goes on to consider various aspects of online contractual obligations.

Although online contract and electronic contract are most often used interchangeably, it should be borne in mind that there is a slight difference between them. While every online contract is also an electronic contract, it is not every electronic contract that is an online contract. A contract wholly concluded through facsimile machines and through telephones not routed over internet is only an electronic contract. On the other hand every online contract is also an electronic contract because it is initiated and concluded through electronic means over the internet. In this article what is intended is online contract whether the phrase electronic contract (e-contract) or electronic commerce (e-commerce) or online contract is used.

## 2. The Concept of Online Contracts

It is primary knowledge that there is generally no specific form in which a contract may be entered into. The court succinctly puts it this way: "It is elementary law that a contract may be demonstrated by the conduct of the parties as well as by their words and deeds or by the documents that have passed between them."<sup>2</sup> Thus a contract may be entered into either orally, in writing or indeed by conduct. By extension, a contract may also be brought into existence electronically by online communications, a process which we call online contract.

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<sup>2</sup> *U.B.N. Plc. v. Ogunsiji* [2013] 1 NWLR (Pt. 1334) 1 at p. 13 para. F.

An online contract has been defined as “... a contract created wholly or in part through communications over computer networks.”<sup>3</sup> Examples are contracts entered into by email, through websites, via electronic data interchange etc.<sup>4</sup>

### 3. Formation of Online Contracts

Contracts may be formed online where the parties exchange emails which consist of an offer and acceptance.<sup>5</sup> It is also possible for the ingredients of the contract to be partly by exchange of emails or other forms of electronic communications, paper documents, faxes and oral discussions, phone calls and text messages etc. Contracts may also be formed via websites and similar online services.<sup>6</sup> An example is where a website advertises goods or services for sale and the customer completes and transmits an order form which is displayed on the website. A contract then ensues as soon as the vendor accepts the order, which is the offer.<sup>7</sup> The same rules that apply in cases of display of goods for sale equally apply.<sup>8</sup> This means that the display of goods on websites constitute an invitation to treat.<sup>9</sup> It is not an offer and cannot create a contract when accepted. In *BFI Group Corp. v. B.P.E.*<sup>10</sup> the Supreme Court clearly stated that:

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<sup>3</sup> E. S. Perdue, “Creating Contracts Online” in T. J. Smedinghoff (ed.) *Online Law*, (New York: Addison-Wesley Developers Press, 1996), p. 79.

<sup>4</sup> *Ibid.*

<sup>5</sup> See *Metibaye v. Narelli Int’l Ltd.* [2009] 16 NWLR (Pt. 1167) 326 at p. 348 where Aboki, JCA said that acceptance must be manifested in a positive way either by words, in writing or by electronic means such as email or by conduct.

<sup>6</sup> See Perdue, above note 3 at p. 80.

<sup>7</sup> *Ibid.*

<sup>8</sup> See *Pharmaceutical Society of Great Britain v. Boots Cash Chemists (Southern Ltd)* [1953] 1 QB 401; *Fisher v. Bell* [1960] 3 All ER 731, (1961) QB 394 and *Sencho Lopez v. Fedor Food Corp.* (1961)211 NYS (2nd) 953 (New York) US.

<sup>9</sup> UN Convention on the Use of Electronic Communications in International Contracts 2005, Art. 11.

<sup>10</sup> [2012] 18 NWLR (Pt. 1332) 209.

An offer must be distinguished from an invitation to treat. Invitation to treat is the first step in negotiations between the parties to a contract. It may or may not lead to a definite offer being made by one of the parties to the negotiation. An invitation to treat is not an offer that can be accepted to lead to an agreement or contract.<sup>11</sup>

The goods which are the subject of the contract will then be physically delivered, or for electronically distributed products like softwares or other digital contents directly to the purchaser's computer from the vendor's computer. In the latter case, there is usually a user licence which governs the customer's right to use the content.

It is trite that a contract can be formed by conduct.<sup>12</sup> This is also possible in online contract. An example is where an electronic content is offered online and a user downloads such content, a contract then comes into being without a formal agreement.<sup>13</sup>

#### ***(a) Offer and Acceptance in Online Contracts***

Basically, online contracts like most other contracts may be either unilateral (contract of adhesion) or bilateral.<sup>14</sup> The contract is unilateral when it is a non-negotiated agreement entered into electronically and is actually a proposed contract

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<sup>11</sup> *Ibid.*, at p. 246 para. G – H per Adekeye, JSC.

<sup>12</sup> A contract may come into existence by conduct where the parties have by consistent course of previous dealings understood themselves that in the present situation a contract is presumed to exist by tacit understanding of the parties and is valid in the eyes of the law – *Brogden v. Metropolitan Railway Co* (1877) 2 AC 666. See also *Attorney General of Kaduna State v. Victor Bassey Atta & Ors.*(1986) 4 NWLR (Pt. 38) 785.

<sup>13</sup> See Perdue, above note 3 at p. 80.

<sup>14</sup> The basic attribute is that in unilateral contract there is no negotiation between the parties. Only one party initiates the action and leaves any member of the public to accept or not. This is clearly illustrated by *Carlill v. Carbolic Smoke Ball Coy* (1893) 1 QB 256. See also *Agoma v. Guinness (Nig.) Ltd* [1995] 2 NWLR (Pt. 580) 672 and *Amana Suites Hotels Ltd v. PDP* (2007) 6 NWLR (Pt. 1031) 453 at 480 – 481. However in bilateral contract the parties start by negotiating and finally arrive at *consensus ad idem* and bind themselves by their agreement. See *Attorney-General Nasarawa State v. Attorney-General Plateau State* [2012] 10 NWLR (Pt. 1309) 419.



that becomes binding if assent is obtained.<sup>15</sup> Majority of online contracts are of this nature and are therefore contracts of adhesion as the buyer often does not possess any bargaining power over the terms and conditions put up by the seller and the former is caged into a situation of take-it-or-leave-it. A bilateral contract is one where the parties negotiate and may be entered into either online or offline.<sup>16</sup>

In the context of online contracts, where a website or other online service displays a product, the same rules that apply to advertisement of goods apply. The purchaser's order therefore, is the offer and only upon acceptance by the website owner would a contract result.<sup>17</sup>

Similarly, acceptance in an online contract may be in any form which shows that the offeree has clearly and unequivocally accepted the terms of the offer. This may be done or effected offline by written and oral communications as well as by conduct. Acceptance is also effective online by email, or other form of electronic message, and by conduct such as clicking on a button or downloading content. It must be understood, however, that the general rule where there is no stated method in an offer of communicating acceptance of the offer is that the means adopted must be reasonable in the circumstance.<sup>18</sup>

It seems that the postal communication rule with regard to acceptance of offer in offline contracts will be inapplicable in online contracts. In traditional contract, acceptance of an offer, where the medium of communication between the parties is by post or telegram, becomes effective the moment the letter or telegram of acceptance is posted.<sup>19</sup> One of the reasons for the rule is that the parties have freely chosen the option<sup>20</sup> of postal

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<sup>15</sup> See I. C. Ballon, *E-Commerce and Internet Law*, 2nd edn., (USA: Thomson Reuters/West, 2009), para. 14.02 [1].

<sup>16</sup> *Ibid.*

<sup>17</sup> See Perdue, above note 3 at pp. 81 – 82.

<sup>18</sup> *Quenerduaine v. Cole* (1883) 32 WR 185.

<sup>19</sup> This is governed by the rule in *Adams v. Lindsell* (1818) 1 B&A 681.

<sup>20</sup> The parties have the option either to contract face-to-face (*inter praesentes*) or to contract by post (*inter absentes*). If they choose the latter they must abide by its consequences.

communication as their medium of transaction. They must therefore abide by it even if the letter gets lost in transit provided the offeree has correctly posted his letter of acceptance and thus has completely fulfilled his part of the transaction.<sup>21</sup>

In online contracts there is no other option to contract except by communication through the internet. That being the case, the buyer will not be bound if the product sent to him by the seller for some unexplained reasons fails to get to him. The seller cannot be heard to say that the contract is complete and effective the moment he 'posted' his acceptance.<sup>22</sup> This may not be the case however where the terms and conditions of the seller stipulate otherwise. But these terms and conditions, whether in click-wrap or browse-wrap contracts must be conspicuously brought to the notice of the buyer in order to be enforceable;<sup>23</sup> and even at that, the courts may still strike down some provisions of the agreement for being unconscionable.<sup>24</sup>

There is some controversy as to the validity of some offers and acceptance by computers in situations where there is no human involvement because of the issue of the existence of contractual intention which is raised.<sup>25</sup> In *State Farm Mutual Auto. Ins. Co. v. Bockhurst*,<sup>26</sup> the court upheld the validity of a computer-generated insurance renewal. The court held that the computer operates only in accordance with the

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<sup>21</sup> The rule of postal acceptance applies even where the letter of acceptance is delayed in the post and even where it is totally lost. See *Household Fire Insurance Co. v. Grant* (1879) 4 E&D 216.

<sup>22</sup> In many online contracts as explained earlier, transactions are initiated by display of products on the websites which is an invitation to treat. A buyer clicks a button or sends an email to make an offer, and the seller accepts by sending the product to the buyer.

<sup>23</sup> See *PDC Laboratories Inc. v. Hach Co.* No. 09-1110, 2009 US Dist. where the terms were held enforceable and *Hines v. Overstock.com Inc.* 668 F.Supp. 2d 362 (2009) where the terms were held unenforceable.

<sup>24</sup> See *Combe v. Paypal, Inc.*, 218 F. Supp. 2d 1165 (N.D. Cal. 2002).

<sup>25</sup> See F. Ukwueze & U. Obuka, "Legal Framework for the Regulation of Electronic Frauds in Nigeria", *Law and Policy Review*, Vol. 2 (2011), p. 75 at p. 90.

<sup>26</sup> 453 F. 2d 533 (10th Cir. 1972).

information and directions supplied by its programmers. This means that there is human intention to create legal relations in the computer transactions.

The provision of section 153(2) of the Evidence Act 2011 is worth noting to the effect that an email is presumed correct as fed into the sender's computer for transmission but there is no presumption that it has been received or that its contents were exactly as fed into the computer by the sender. Thus, where an offer or acceptance is sent by email, actual receipt in exact form sent is required for a contract to result. The UN Convention on the Use of Electronic Communications in International Contracts provides a guide to ensure that legal requirements of authenticity, integrity, writing and signature, confidentiality and non-repudiation of electronic documents are met.<sup>27</sup> These are achieved by employing system security - for computer systems within one's control and information security - for systems outside one's control.<sup>28</sup> Technology has advanced so much that it is now possible to ensure, for instance, that the recipient received the exact email sent. An example is the Domain Keys Identified Mail (DKIM) which is an authentication method to prove that an email originated from a specific domain and has not been changed during delivery.<sup>29</sup>

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<sup>27</sup>Art. 9. See also UNCITRAL Model Law on Electronic Signature, Art. 6. The Nigerian Evidence Act 2011 has similar provision in s. 84 but not as detailed as the Convention and the Model Law.

<sup>28</sup>System security measures include passwords, biometric tokens, hand scan, firewall and use of value-added networks. For information security measures include digital signatures, date/time stamping, trusted third parties, encryption, etc. – see L. G. Oei, "The Legal Role of Information Security," in T. J. Smedinghoff (ed.) *Online Law*, (New York: Addison-Wesley Developers Press, 1996), pp. 34 – 35.

<sup>29</sup>See, "Email Delivery for IT Professionals," *The Rocket Science Group*, available at <http://mailchimp.com/resources/guides/email-delivery-for-it-professionals/html/> and also, "What is Email Authentication and How Do I set It Up?" available at <http://help.campaignmonitor.com/topic.aspx?t=88> (last accessed 1 November 2013).

#### 4.0. Challenges of Online Contracts

##### *(a) Contracts which must be in Writing: The Statute of Frauds*

While the general rule is that contracts may be made in writing, orally or even by conduct, there are species of contracts which are required to be evidenced in writing. Often, there is a need to execute these contracts accordingly, by signing or making a mark. Thus, contracts for hire-purchase,<sup>30</sup> agreements between master and seamen,<sup>31</sup> marine insurance policies,<sup>32</sup> bills of sales, bills of exchange,<sup>33</sup> money-lender's contracts, legal practitioner's agreement with his client for remuneration, pawn-broker's agreement for a pledge, arbitration agreements,<sup>34</sup> declaration of trusts respecting land and dispositions of interests in land<sup>35</sup> must be made in writing and executed accordingly. The Statute of Frauds in some cases requires the contracts to be evidenced in writing. In order to vary such contracts, further writing is also required. Since the essence of the Statute of Frauds is that the contract should be reduced in tangible form, internet contracts obviously satisfy this requirement. It is therefore necessary that electronic communications such as emails be preserved in printed form or computer log.<sup>36</sup>

A problem is likely to arise with contracts which are required not just to be in writing but to be signed or embodied in a deed or even those required to be authenticated by a notary public or a magistrate – illiterate jurat. This is because for contracts formed online, the traditional form of paper and

<sup>30</sup> Hire-Purchase Act, Cap. H4 LFN 2004, s. 2(1) & (2).

<sup>31</sup> Seamen's Articles of Agreement Convention 1926 (No. 22), Art. 3.

<sup>32</sup> Marine Insurance Act, Cap. M2 LFN 2004, s. 24.

<sup>33</sup> Bills of Exchange Act 1882, s. 3.

<sup>34</sup> Arbitration and Conciliation Act, Cap. A18 LFN 2004, s. 1.

<sup>35</sup> Statute of Frauds 1677, s. 4.

<sup>36</sup> See John S. Foster, "Electronic Contracts and Digital Signatures," available at [http://www.corbinball.com/articles\\_legal/index.cfm?fuseaction=cor\\_av&artID=506](http://www.corbinball.com/articles_legal/index.cfm?fuseaction=cor_av&artID=506) (last accessed 4 November 2013) see also *Victor Chandler International v. Customs & Excise Commissioners* [2000] 1 WLR 1296 where it was held that electronically stored information can in law constitute a document.

handwritten signatures do not exist, to say the least of thumbprints. The issue then, is, how could online contracts meet this requirement? Email exchanges will satisfy the requirement of the Statute of Frauds where an intention to authenticate the communication is evinced.<sup>37</sup> To determine an intention to authenticate the communication, the court will usually consider what manner of email account was used – i.e. whether it is a business or personal email account, (a vital point in this regard would involve an enquiry as to the purpose assigned to the various email accounts by the sender); use of real names or aliases and where the alias is used, knowledge of the recipient of the alias; analysis of the content of the communication to discover the intention of the sender to authenticate it; prior dealings between the parties and usual practices in the business which is the subject of the email contract.<sup>38</sup> There is a strong indication that the sender intends to authenticate the communication where he indicates his name at the bottom of the email, the usual space for signature.<sup>39</sup>

The requirement of signature can be satisfied in the case of electronic documents by a digital signature, by typing a name into an electronic document or even by clicking on a website button. This is buttressed by Section 93(2) of the Evidence Act 2011 which reads: “Where a rule of evidence requires a signature, or provides for certain consequences if document is not signed, an electronic signature satisfies that rule of law or avoids those consequences.” Section 93(3) goes further:

All electronic signatures may be proved in any manner, including by showing that a procedure existed by which it is necessary for a person, in order to proceed further with a transaction to have executed a symbol or security procedure for the purpose of verifying that an electronic record is that of the person.

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<sup>37</sup> See Ballon, above note 15 at para. 14-05 [2] [B] [iv]; p. 14-23.

<sup>38</sup> *Ibid.*

<sup>39</sup> *Rosenfeld v. Zernec*, 776 N.Y. Sup. 2004).

In *Joseph DeNunzio Fruit Co. v. Crane*<sup>40</sup> a federal court in Los Angeles held that an exchange of teletype messages satisfied the California Statute of Frauds, which at that time provided that a contract for the sale of goods or choses in action valued at \$500 or more “shall not be enforceable by action unless... some note or memorandum in writing of the contract, or sale be signed by the party to be charged, or his agent in that behalf.” The court acknowledged that the teletype messages did not bear the signature in writing of the party to be charged “in the sense that they were not literarily signed with pen and ink in the ordinary signature of the sender.”<sup>41</sup> Nevertheless, the court considered that:

- (i) Each of the parties had teletype machines in their respective offices that “would type the message or memorandum simultaneously in the other office...”
- (ii) Each party was readily identifiable and known to the other by the symbols or code letters used.
- (iii) There was no contention that the messages did not originate in the office of the other.

Consequently, the court, per Judge O’Connor stated that the courts:

Must take a realistic view of modern business practices, and can probably take judicial notice of the extensive use to which the teletype machine is being used today among business firms, particularly brokers, in the expeditious transmission of typewritten messages.<sup>42</sup>

In *Hillstrom v. Gosnay*<sup>43</sup> the Montana Supreme Court held that the typewritten name: “JEREMI VILLANO M” at the bottom of a telegram satisfied the requirements of the Montana Statute of Frauds and also satisfied the requirement for authentication by signature. The court emphasised that the requirement for a written memorandum “may consist of any type of writing.”

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<sup>40</sup> 79 F. Supp. 117 (S.D. Cal. 1948); 342 U.S. 820 (1951).

<sup>41</sup> 79 F. Supp. 117 at 128.

<sup>42</sup> *Ibid.*, at pp. 128- 129.

<sup>43</sup> 188 Mont. 388, 614 P.2d 466 (1980).

Again, in *Hessenthaler v. Farzin*<sup>44</sup> a Pennsylvania court held that a mailgram confirming acceptance of a real estate offer satisfied the Statute of Frauds requirement for contracts for sale of land to be signed and in writing. A key consideration upon which the court based its judgment was “whether there is some reliable indication that the person to be charged with performing under the writing intended to authenticate it.”<sup>45</sup> The court stated that “the proper, realistic approach in these cases is to look at the reliability of the memorandum, rather than to insist on a formal signature.”<sup>46</sup> Analysing the mailgram in order to confirm its compatibility with the intent of the Statute of Frauds, the court found that:

The detail contained in this mailgram is such that there can be little question of its reliability. Appellants were careful to begin the mailgram by identifying themselves. They then made certain that their intention would be properly understood by declaring their acceptance, and identifying both the property and the consideration involved. In light of the primary declaration of identity, combined with the inclusion of the precise terms of the agreement, we are satisfied that the mailgram sufficiently reveals appellant’s intention to adopt the writing as their own, and thus is sufficient to constitute a “signed” writing for purposes of the Statute.<sup>47</sup>

The above decision has been approved and followed in *Flight Systems, Inc. v. Electronic Data Systems Corp.*,<sup>48</sup> where it was held that a typewritten name on the stationery of the defendant’s legal affairs department, which was initialled by the sender and transmitted by facsimile, met the requirements of the Statute of Frauds when considered in conjunction with other documents. The court stated that “any mark or symbol – including a typewritten name –will be deemed to constitute a

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<sup>44</sup> 388 Pa. Super.37, 564 A.2d 990 (Pa. 1989).

<sup>45</sup> *Ibid.*, at p. 42.

<sup>46</sup> *Ibid.*, at pp. 43-44.

<sup>47</sup> *Ibid.*, at p. 44.

<sup>48</sup> 112 F. 3d 124 (3d Cir. 1997).

signature for the purposes of the Statute if it is used with the declared or apparent intent to authenticate the memorandum.”<sup>49</sup>

Contrastingly, in *Parma Tile Mosaic & Marble Co. v. Estate of Short*<sup>50</sup> the New York Court of Appeals held that the automatic printing by a fax machine of a sender’s name at the top of each page transmitted was insufficient to satisfy the requirement of the Statute of Frauds. The Court held that the act of identifying and sending a document to a particular destination did not, by itself, constitute a signing authenticating the contents of the communication. Ballon considers that the reason for the Court’s decision was the failure of the plaintiff to demonstrate intent to authenticate the particular communication.<sup>51</sup> He advances that a contrary decision would have resulted in the automatic authentication of all communications by fax, an undesirable consequence which would have placed fax communications over and above traditional written documents which may be signed or unsigned.<sup>52</sup>

### ***(b) Developing an Effective Legal Framework for Online Contracts***

In order to effectively address the challenges posed by online transactions, Nigeria must put in place robust, effective and enforceable legal instruments that will drive the new trend of online transactions. Nigerian legal system is disappointingly backward and empty in this regard. A Bill<sup>53</sup> that seeks to provide for legal

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<sup>49</sup> *Ibid.*, at p. 129. In the United States a federal statute: the Electronic Signatures in Global and National Commerce Act 2000 (ESIGN) and the Uniform Electronics Transactions Act (UETA) adopted by majority of the States provide that “if a law requires a record to be in writing, an electronic record satisfies the law”, and also that “if a law requires a signature, an electronic signature satisfies the law” – ESIGN s. 101(d); UETA s. 7. See also P. Quick and J. A. Rothchild, “Consumer Protection and the Internet,” in *Handbook of Research on International Consumer Law*, G. Howells *et al* eds. (UK: Edward Elgar Publishing Ltd., 2010), p. 344.

<sup>50</sup> 87 N.Y. 2d 524, 663 N.E. 2d 633 (N. Y. 1996).

<sup>51</sup> See Ballon, above note 15 at para.14-05 [2] [B] [iv]; p. 14-23.

<sup>52</sup> Cf. *Bradley v. Dean Witter Realty Inc.* 967 F. Supp. 19 (D. Mass. 1997) and *Birenbaum v. Option Care, Inc.* 971 S. W. 2d 497 (Tex. App. 1997).

<sup>53</sup> Electronic Commerce (Provision of Legal Recognition) Bill 2011.



recognition of commercial transactions through the use of electronic means which is currently before the National Assembly is a step in the right direction. It is hoped that it will soon be passed and not as one writer puts it: “suffer the same fate as the Electronic Messages, Information and Commerce and its Admissibility in Evidence and Related Matters Bill 2004 which was never passed into law.”<sup>54</sup>

Also, Nigeria does not have any law for cybercrime. What is close to this is the Advanced Fee Fraud and Other Fraud Related Offences Act 2006 which in Part II provides for Electronic Telecommunication Offences. It mandates the telecommunication providers to maintain a database of all their subscribers and to make same available to Economic and Financial Crimes Commission on demand. It, thus, falls short of the expectations of combating modern cybercrimes.<sup>55</sup>

Happily the international community is replete with legislation on online transactions and for fighting cybercrimes which can aid Nigeria in drafting appropriate laws for same purpose. Prominent are the United Nations Convention on the Use of Electronic Communications in International Contracts (ECC).<sup>56</sup> Prior to this Convention there were the UNCITRAL Model Law on Electronic Commerce (MLEC) 1996 and the

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<sup>54</sup> H. A. C. Umezuruike, “Electronic Bills of Lading, Rotterdam Rules and the Nigerian Evidence Act,” *The Nigerian Law Journal*, Vol. 16 No. 1 (2013), p. 71.

<sup>55</sup> See M. M. Akanbi *et al*, “An Appraisal of the Nigerian Advance Fee Fraud and Other Fraud Related Offences Act 2006,” *The Nigerian Law Journal*, Vol. 16 No. 1 (2013), p. 126.

<sup>56</sup> This was prepared by the United Nations Commission on International Trade Law (UNCITRAL) and adopted by the UN General Assembly on 23 November 2005. Also called the Electronic Communications Convention (ECC), it is a treaty that aims at facilitating the use of electronic communications in international trade. See [http://www.uncitral.org/pdf/english/texts/electcom/06-57452\\_Ebook.pdf](http://www.uncitral.org/pdf/english/texts/electcom/06-57452_Ebook.pdf) (last accessed 2 November 2013). As at November 2013, the Convention has been signed by 18 States and ratified by three States: Dominican Republic, Honduras and Singapore which are State Parties to the Convention and it came into force for these States on 1 March 2013. Nigeria is neither a signatory nor a party to the Convention. See [http://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=X-18&chapter=10&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=X-18&chapter=10&lang=en) (last accessed 4 November 2013) for a list of signatories.

UNCITRAL Model Law on Electronic Signatures (MLES) 2001. These last two are not treaties but model laws that set out standard legislative texts for e-commerce. The ECC then updated and complemented these model laws in order to increase uniformity and predictability in international trade law. It achieved this by adopting the fundamental principles of the uniform law of electronic commerce entrenched by UNCITRAL, which are non-discrimination, technological neutrality, functional equivalence and irrelevance of place of origin.<sup>57</sup>

The benefits of the UNCITRAL rules are evident in their provisions such as that a record or signature may not be denied legal effect or enforceability solely because it is in electronic form or that a contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation. Again, in the area of international carriage of goods, another contribution of UNCITRAL is the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea 2008, which provides for the use of electronic transport records as alternative to paper documents if the carrier and the shipper agree on this. The UNCITRAL Model Laws are meant to provide guidance to municipal legislation and the Convention is aimed at ensuring some uniformity in international e-commerce trade.

It is worthy of mention here as a way of comparison that Singapore ranks among the first developing countries to promulgate a law on electronic transactions. The Electronic Transactions Act (ETA) 1998 is an adaptation of the ECC and the UNCITRAL Model Laws on Electronic Commerce and Electronic Signature.<sup>58</sup> Specifically, burning issues on electronic transactions such as commercial code for e-

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<sup>57</sup>See L. Castellani, "The United Nations Electronic Communications Convention – Policy Goals and Potential Benefits," *19(1) Korean Journal of International Trade and Business Law*, Vol. 1 (2010), p. 2.

<sup>58</sup>Interestingly, Singapore has amended their ETA five times since 1998 in order to keep abreast with the rapid developments in ICT. The last amendment was in January 2013. See <http://statutes.agc.gov.sg/aol/home.w3p>. See also Umezuruike, above at note 54, p. 70.

commerce, electronic applications for public sector, liability of network providers, security procedures for public key infrastructures and biometrics were addressed in this legislation. It is urged that Nigeria should borrow a leaf from Singapore in order to meet the challenges of ever-changing ICT world. Many other countries of the world<sup>59</sup> have also passed legislation along the lines of the model laws and the Convention, so that some uniformity in the law of ecommerce is in sight and it is hoped that Nigeria will follow suit.

***(c) Infrastructural Challenges***

A major challenge to contracting online in Nigeria is infrastructural inadequacy. At the height of this lack is electricity. Without power, the electronic gadgets cannot work. Where transactions are contracted through emails, for instance, it is possible that one of the contracting parties may not even be able to read his mail, in order to respond appropriately for lack of electricity.

Another major challenge in online contractual transactions in Nigeria is poor internet services. Internet access is hardly available and when available it is very slow, erratic and epileptic. There is also very low internet penetration. As a result, people rarely place reliance on internet services which are the fulcrum upon which online business gravitates. It is common knowledge that whole banking businesses are shut down for hours on end, or worse even for days, on the usual excuse that the server is down.

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<sup>59</sup> See for example the UK Consumer Protection (Distance Selling) Regulations 2000 which implemented the 1997 EU Directive on the protection of consumers in respect of distance contracts; Egypt's E-signature and Establishment of the Information Technology Industry Development Authority Law No. 15 of 2004; Ghana's Electronic Transaction Act 2008; Kenya's Communications (Amendment) Act 2008; Tunisia's Electronic Exchanges and Electronic Commerce Law 2000 and Uganda's Electronic Transactions Act and Electronic Signature Act, both of which were passed in 2011 – see N. Ewelukwa, "Is Africa Ready for Electronic Commerce? A Critical Appraisal of the Legal Framework for Ecommerce in Africa" available at <http://www.acicol.com/temp/Dr N.pdf> (last accessed 2 November 2013).

Common automated registrations via filling of online forms are often unreliable as a result of poor internet services. For unknown reasons, government and other corporate organizations in Nigeria are notorious for lack of consistency in maintaining their websites. It is doubtful that meaningful contractual relations could result or be encouraged under such situations.

### 5. Terms of Online Contract

Where the contract is negotiated by email, the same principles that apply where the contract is on ink and paper would also apply. Thus, the courts will consider the various exchange of emails, the terms stated in these emails that are not in conflict, the current and past conduct of the parties, the terms implied by industry customs and the terms implied by law in order to determine the terms of the contract.<sup>60</sup>

For contracts via websites and other online services, usually, the purchaser completes a pre-set order form and transmits it back to the seller. When the company accepts the order whether by sending an acknowledgment, delivering the goods, or billing the purchaser, a contract ensues. Where the contract is for downloading digital content from the internet,

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<sup>60</sup> In *Central Bank of Nigeria v. Igwilllo* [2007] 14 NWLR (Pt. 1054) 393 at 433, the Supreme Court reiterated that where a contract involved several documents, the trial court can only determine the issues before it on the basis of the documents, including the letters relating to the contract and the conduct of the parties. Also, that in the interpretation of a contract involving several documents, the documents must all be read together. See further *A.G. Kaduna State v. Atta* (1986) 4 NWLR (Pt. 38) 785; *Leyland (Nig.) Ltd v. Dizengoff W.A.* (1990) 2 NWLR (Pt. 134) 610; *Royal Exchange Assurance (Nig.) Ltd v. Aswani Textile Industries (Nig.) Ltd* (1991) 2 NWLR (Pt. 176) 639; *Petroleum Trust Fund v. Western Project Consortium Ltd* (2007) 14 NWLR (Pt. 1055) 478 at p. 495 and *S.F. & P. Ltd. v. NDIC* [2012] 10 NWLR (Pt. 1309) 522. It should also be noted that a contract may be contained in several documents even though one does not expressly refer to the other. See E. Peel (ed.) Treitel, *The Law of Contract*, (12 edn., London: Sweet & Maxwell, 2007), p. 209. See also *Panaroma Developments (Guildford) Ltd v. Fidelis Furnishing Fatorics Ltd* [1971] 2 QB 711; *Edwards v. Aberayron Insurance Society Ltd* [1876] 1 QBD 563; *Jacobs v. Batavia & General Plantations Trust Ltd* [1924] 1 Ch 287.

Elizabeth S. Perdue identifies three ways in which the contractual terms may be deduced viz:

- (a) Using one approach, the vendor can present the licence terms so that the user has an opportunity to review them and must accept them affirmatively before downloading. In this case, the terms would be enforceable if accepted.<sup>61</sup>
- (b) Alternatively, licence terms may scroll across the screen, stating that the customer is deemed to accept them by using or installing the software.<sup>62</sup>
- (c) Where the digital content is made available for downloading without express contract restrictions of any kind, the court will deduce the terms from the prior course of dealings between the parties and/or industry customs and practices. This is possible, where for instance, the user downloads an updated version of software that he or she had previously licensed, the court may then extend the prior licence to the update.

In many online transactions, computers exchange formatted documents such as purchase orders and acknowledgments electronically, often with little or no human intervention through a process known as Electronic Data Interchange. The transaction sets usually contain basic information such as quantity and price but generally do not contain detailed terms such as warranties, limitations of liability, or remedies. It is usual, however, for the parties to agree on such detailed terms in a trading partner agreement entered into at the outset of the relationship. In this case, the terms of the contract are deduced from the trading partner agreement (where there is one) plus those terms on which the electronic data interchange messages agree.

***(a) Shrink-wrap, Click-wrap and Browse-wrap Contracts***

A shrink-wrap licence is a process used in licensing software distributed in physical form such as a diskette or CD-ROM.<sup>63</sup>

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<sup>61</sup> See Perdue, above note 3 at p. 86.

<sup>62</sup> *Ibid.*

<sup>63</sup> *Ibid.*, at p. 87.

Usually, the software is delivered in a package or envelope that contains certain licence terms printed on the outside. The customer is not required to sign an agreement, however, the licence terms state that by opening the package or using the software, the customer accepts the shrink-wrap terms.<sup>64</sup>

Generally, shrink-wrap licences are unenforceable. This is because the licence terms were not presented until after the customer had already entered into the sale contract. In effect, the shrink-wrap terms are considered in law to be post-purchase terms which are unenforceable attempt by the vendor to modify the contract after the facts. Thus, in *Step-Saver Data Systems v. Wyse Technology*,<sup>65</sup> the shrink-wrap licence in package delivered after a telephone contract was held not part of the contract. This merges seamlessly with the traditional contractual reasoning that any act done after the formation of a contract does not form part of that contract. It is very vivid in exemption clauses and thus applies in online contracts as it applies to exemption clauses. In *Olley v. Marlborough Court Ltd.*<sup>66</sup>, it was held that an exemption notice posted inside the room could not avail the hotel management as the contract was concluded at the reception. The exemption clause inside the room and seen by the plaintiffs after they had concluded the contract could not be part of the contract.

In *Arizona Retail Sys. Inc. v. Software Link Inc.*,<sup>67</sup> the court enforced one shrink-wrap licence and declined to enforce the other based on its analysis of the facts. Under the first facts, the buyer received an evaluation copy of the software, along with a separate “Live” copy in a shrink-wrap package. It was entitled to return both copies if it was not satisfied with the demonstration. Once the buyer elected to keep the software and opened the shrink-wrap, the court held a contract had been formed and the shrink-wrap terms were part of the contract. By contrast, in the second case, the sale contract had been formed over the telephone, and the shrink-

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

<sup>65</sup> 939 F. 2d 91 (3d Cir. 1991).

<sup>66</sup> (1949) 1 KB 532.

<sup>67</sup> 831 F. Supp. 759 (D. Ariz. 1993).

wrap package was an unenforceable attempt to modify a pre-existing contract.

In *ProCDInc v. Zeidenberg*,<sup>68</sup> it was held that a shrink-wrap licence in a package containing terms presented to the buyer when software is run is part of the contract. The court reasoned that the purchaser assented to those terms by failing to return the product after receiving it and learning of the terms.<sup>69</sup>

Click-wrap contracts are used when an online publisher of software or other digital content imposes restrictions on its users by displaying terms and conditions on screens along with the content, stating that the user is deemed to accept the terms by using or downloading the content. To this end, a number of websites contain a statement at the bottom of the home page screen, or even a separate screen that is linked to the homepage, setting forth certain restrictions, such as limitations on liability, terms and conditions of access and use of the webpage, and disclaimers of warranties. These terms would be enforceable if they are presented in a manner designed to call the user's attention to them, and the user required to carry out some sort of affirmative conduct to indicate acceptance. For example, licence terms or warranty disclaimers should not be hidden away behind obscure hypertext links or file names. They should rather be conspicuously reflected on the webpage and the user should be conspicuously notified that a specific action (such as hitting a return key) constitute assent to the terms. If a webpage has multiple pages, the licence or other terms should be referenced on every page. Ideally, a user should be required to view the terms and click on an "Accept" button before proceeding.<sup>70</sup> In fact, online contracts are more likely to be considered binding if express assent has been obtained, such as when a user clicks on a button to signify

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<sup>68</sup> 1996 WL 10068 (W. D. Wis – 1996).

<sup>69</sup> See also *Yault Corp. v. Quaid Software Ltd.*, 847 F. 2d 255 (5th Cir. 1988).

<sup>70</sup> See Perdue, above note 3 at p. 88.

agreement to particular terms, usually referred to as click-wrap agreement.<sup>71</sup>

Whether the defendant read the terms of the contract prior to expressing assent is usually immaterial as the court's consideration is mainly whether the defendant had the opportunity to read the terms. Thus, in *Barnett v. NSI*<sup>72</sup> the nature of the electronic format of the contract required Barnett to scroll through the portion of the contract containing the forum selection clause before he accepted its terms. The court held that it was Barnett's responsibility to read the contract and that he could not be heard to complain that he did not in fact read it.<sup>73</sup> An important difference between shrink-wrap and click-wrap contracts is that in the latter the user has an opportunity to read the terms of the contract before using or installing the programme or downloading the content which is not the case in the former.<sup>74</sup>

Browse-wrap contract is where the user is presumed to be bound by merely visiting or using a website. The terms of use are listed on the web page or through a link at the bottom of the page and manufacturers claim to bind the user who visits the page or downloads content from the site. The courts generally are reluctant to enforce browse-wrap contracts because there is lack of an affirmative action on the part of the user to signify his assent to these terms and conditions.<sup>75</sup>

In *Specht v. Netscape Communication Corp.*<sup>76</sup> the court held that the Netscape's browse-wrap agreement did not create an enforceable contract between Netscape and its users.

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<sup>71</sup> See *American Eyewear Inc. v. Peeper's Sunglasses & Accessories Inc.* 106 F. Supp. 2d 895, 905 nis (N.O. Tex. 2000). See further Ballon, above note 15 at para. 21:01.

<sup>72</sup> 38 S. W. 3d 200, 203-04 (Tex. Ct. App. 2001).

<sup>73</sup> See further, *DeJohn v. The TV Corp. Int'l*, 245 F. Supp. 2d 913, 919 (N.D. 111. 2003).

<sup>74</sup> See "What are Shrink-wrap, Click-wrap and Browse-wrap Licenses?" *Samuelson Law, Technology and Public Policy Clinic*, available at <http://www.chillingeffects.org/question.cgi?QuestionID=207> (last accessed 13 August 2013).

<sup>75</sup> See *ibid.*

<sup>76</sup> 306 F.3d 17 (2d Cir. 2002).



This is because the terms and conditions were not displayed on the page from which users downloaded content but could only be accessed by a small hyperlink at the bottom of the page. More importantly, Netscape did not require its users to agree to or even view their terms and conditions by clicking on the hyperlink at the bottom of the page.<sup>77</sup>

***(b) Guidelines for Ensuring Enforcement of Online Contracts of Adhesion***<sup>78</sup>

A number of guidelines have been proffered for the effective and efficient enforcement of online contracts especially for contracts of adhesion. They include the following:

- (i) A provision of clear and prominent notice that access to a site or service is subject to terms.
- (ii) Ensuring that online contracts of adhesion are printable and viewable by users before they are required to assent to the terms.<sup>79</sup>
- (iii) The use of click-to-accept contracts is highly recommended as against mere reliance on implied assent to posted terms.<sup>80</sup>

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<sup>77</sup> Contrast with *Hubbert v. Dell Corp.* 359 Ill.App.3d 976 835, N.E.2d 113 (5th Dist. 2005), where the Illinois Appellate Court upheld a browse-wrap agreement. This is because in this case the consumers of Dell products were repeatedly shown the inscription “All sales are subject to Dell’s terms and conditions of sale” in addition to a conspicuous hyperlink on the entire five pages the consumers were required to visit when completing the online purchase. The court held that this repeated exposure and visual effect would put any reasonable person on notice of the terms and conditions.

<sup>78</sup> Adapted from, Ballon, above note 15 at para. 21.05 pp. 21-63 to 21-67.

<sup>79</sup> Ballon advises that “notices about an agreement, and the agreement itself, should be in a readable font size, at least as large as surrounding text (and in a larger font, in bold or otherwise prominent where a conspicuous disclosure is required or appropriate)”. Also, “the contract itself should be presented to a user, rather than merely accessible via a link (even though some courts will enforce a contract presented this way).” Again, “users should be afforded enough time to review the agreement.” In *Hines v. Overstock.com Inc.* 668 F.Supp. 2d 362 (2009) the court held that Hines was not aware of the notice of the Terms and Conditions because the website did not prompt her to review them and because the link to them was not prominently displayed as to provide reasonable notice of these Terms and Conditions.

- (iv) A requirement that users should check a box next to the assent clauses such as “I have read the Terms of Service and agree to be bound by them” or “By clicking on this button, you agree to be bound by our Terms of Use Agreement.”<sup>81</sup>
- (v) Obtaining an express assent (or failing that, providing a notice) before granting a user access to a site or service or providing goods or services.<sup>82</sup>
- (vi) For provisions such as arbitration clauses etc. which require unqualified assent, it is advisable to require a second assenting click.<sup>83</sup>
- (vii) The terms must be clearly expressed.
- (viii) Where the terms on the site change in material respects, notice must be sent to the users and assent to the revised terms should be obtained from them.<sup>84</sup>
- (ix) The use of descriptive section headings to draw attention to salient terms is advisable.<sup>85</sup>
- (x) Choice of law and forum provisions should be clearly indicated.

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<sup>80</sup> It should be made clear to users that they are clicking to accept the terms of a contract, and not just to download software or other content or accessing a site or service. Users who do not click on the “Yes” or “I Agree” button should be prevented from accessing the site or service or obtaining the product offered subject to licence. To ensure that users read all the terms, the “I Accept” button should be placed at the very end of the document so that the user would be bound to scroll through the entire agreement. See generally, Ballon, above note 15 at para. 21.05 p. 21-64.

<sup>81</sup> Users who do not check the box cannot access the site.

<sup>82</sup> See Ballon, above note 15 at para. 21.05, p. 21-65.

<sup>83</sup> *Ibid.*

<sup>84</sup> *Ibid.* Users should have been alerted prior to the revision that the terms are subject to changes and that the email address they provide would be used to notify them of the changes so that they are obligated to ensure that they update the site as to their current emails. It is advisable that express assent to the revised terms be obtained by requiring the user to undergo a new click through process sequel to accessing an account for the first time after the revision. If possible, prior to the coming into effect of the revised terms, notice of the new terms should be pasted on the site, with information as to when it would come into effect.

<sup>85</sup> See Ballon, above note 15 at para. 21.05, p. 21-66.

- (xi) Where applicable, it should be clearly indicated that the transaction is one for licensing the use of intellectual property because of the usual presumption that intellectual property rights are not generally intended to be committed to the public domain.<sup>86</sup>
- (xii) The contract should be straight to the point.<sup>87</sup>
- (xiii) Finally, to avoid confusion and ultimately a finding of unenforceability, the number of separate agreements that users are required to enter into in order to obtain goods, services or access should be minimized.<sup>88</sup>

In some instances it is clear that because of the manner a site operates it is impossible to access the service offered without expressly assenting to the terms of the site. In such situations, online contracts of adhesion will be binding. Thus, in *Burcham v. Expedia, Inc.*<sup>89</sup> the court upheld the forum selection clause in Expedia's User Agreement despite the defendant having denied that he had provided express assent because there was evidence which showed that it was impossible for users to access their Expedia accounts without providing express assent. There was a link to the user agreement provided on the page for the listing at issue in the site, and the defendant offered no evidence to support the argument that he somehow did not provide express assent or that perhaps someone else had done so without his authority.<sup>90</sup> It is clear from this case that the courts are inclined to enforce online terms and

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<sup>86</sup>*Ibid.*

<sup>87</sup>*Ibid.* In *Comb v. Paypal, Inc.*, 218 F. Supp. 2d 1165 (N.D. Cal. 2002) the court found as a fact that the length of the internet contract made it difficult to read in entirety and the contract was held unconscionable.

<sup>88</sup> See Ballon, above note 15 at para. 21.05, p. 21-66.

<sup>89</sup> No. 407CV1963 CDP, 2009 WL 586513 (E.D. Mo. Mar. 6, 2009).

<sup>90</sup> See J. Neuburger, "Clickwrapped and Browsewrapped – Court Rejects Attorney Plaintiff's Challenge to Travel Site Terms and Conditions", (1 April 2009) available at <http://newmedialaw.proskauer.com/2009/04/01/clickwrapped-and-browsewrapped-court-rejects-attorney-plaintiffs-challenge-to-travel-site-terms-and-conditions> (last accessed 13 August 2013) for fuller discussions on this case.

conditions against consumers provided that the latter have been given adequate notice and opportunity for review before they can assent to these terms and conditions. In *Recursion Software Inc. v. Interactive Intelligence Inc.*,<sup>91</sup> it was impossible to install plaintiff's software without providing express assent to the terms, and the defendant was held bound by those terms.

#### 6. Mistake in Online Contracts<sup>92</sup>

According to Perdue, mistake in electronic transmission can occur because of:

- (a) Physical problems in networks and other communication systems;
- (b) Programming errors; or
- (c) Human errors.<sup>93</sup>

Thus, a flaw in a computer program, or environmental or faulty condition in a network can result in the recipient receiving information that is different from the information the sender sent. On the human side, the person entering information may make a typographical error, or may unintentionally click on the wrong button. Because of the speed of electronic communications, it may be more difficult to catch such errors than it is in traditional paper transactions.<sup>94</sup>

Where, for instance, a buyer intending to purchase 100 computer sets sends off an email ordering 1000 sets, is a contract formed? Who bears the risk of the mistake? Traditionally, the courts identified three major kinds of mistake: common mistake – where both parties make the same mistake; mutual mistake – where both parties make different mistakes and unilateral mistake – where only one party is mistaken. However, most courts recognise the problems

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<sup>91</sup> 425 F. Supp. 2d 756, 783 (N.D. Tex. 2006).

<sup>92</sup> See generally, E. O. Ezike, "Mistaken Identity in the Law of Contract: Whither the Position of the Law?", *Law and Policy Review*, Vol. 4 (2012), pp. 154 – 171.

<sup>93</sup> See Perdue, *loc. cit.*, above note 3 at p. 89.

<sup>94</sup> *Ibid.*

associated with this type of categorization, especially when it is not fair to penalise one party for a mistake when the result would be a windfall for the other.<sup>95</sup>

To this end, the courts are inclined especially with reference to online contracts to treat mistakes by taking into consideration the following conclusions:

- (i) How far along the parties are in the transaction;
- (ii) Whether it would be oppressive to hold the mistaken party to the contract; and
- (iii) Whether the other party would be unduly harmed if the contract were not enforced.<sup>96</sup>

Thus, in the above email mistake example, should the buyer discover his mistake before the seller relies on his order; the court will be likely to cancel the contract rather than give the seller a windfall. However, if the seller, relying on the order has already delivered the computers, the courts will be likely to uphold the contract, provided that the seller had no knowledge of the buyer's mistake. Generally, however, the risk of error is always on the sender unless the receiving party has reason to know of the error/mistake.<sup>97</sup>

***(a) Impostors and Persons without Authority***

A problem with contractual transactions online is the peculiar difficulty in knowing the true identity of the party on the other end of the message. It is possible for someone to send electronic messages and make them appear to come from someone else. Thus, areas of concern remain:

- (a) How to ensure that the person being communicated with is the person he or she claims to be; and
- (b) Whether a person who impersonates another can bind the unsuspecting party to an electronic contract.

In answer to the first problem, there now exist digital signatures which can ensure that the communication was sent by a known party and not an impostor. As a corollary, the

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<sup>95</sup>*Ibid.*

<sup>96</sup>*Ibid.*, pp. 89 – 90.

<sup>97</sup>*Ibid.*, p. 90.

recipient is also assured by a digital signature that what is received was sent without alteration.

As to the second question, for example, the signature of a forger will not bind the impersonated party but will bind only the forger.<sup>98</sup> However, the forged signature will bind the impersonated party where he ratifies the signature or was negligent, thereby contributing to the forgery. Where for instance, the impersonated person had been negligent in maintaining security for his or her automated signature machine, he or she will be bound if the machine is misused.

It often does happen that a contract would be negotiated only for one of the parties later to find out that the person they negotiated with had not the proper authority. This may happen where for instance the other party had been represented by a person who it now claims has exceeded or did not have authority.

In online contracts, the apparent authority of a party to the transaction may reasonably be inferred from the person's corporate email address, corporate title, information on the website or in other company's communications which clothe the person with apparent authority and the use of digital signatures.<sup>99</sup>

In *Motise v. American Online Inc.*,<sup>100</sup> concerning the enforceability of a forum selection clause, the court held that a user was bound by American Online's Terms of Service agreement where he used his step-father's account and the step-father had expressly assented to the Terms of Service.<sup>101</sup> In *Seibert v. Amateur Athletic Union Inc.*,<sup>102</sup> the court enforced an arbitration provision in a click-to-accept membership agreement posted on the website where plaintiffs –a coach and a player–had authorised their agent to assent to the agreement on their behalf.

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<sup>98</sup> *Ibid.*, at p. 91.

<sup>99</sup> *Ibid.*

<sup>100</sup> 346 F. Supp. 2d 563 (S.D. N.Y. 2004).

<sup>101</sup> See further, *Adsit Co. v. Gustin* 874 N.E. 2d 1018 (Ind. App. 2007).

<sup>102</sup> 422 F. Supp. 2d 1033, 1039-40 (D. Minn. 2006).

## 7. Governing Law for Online Contracts

Because of the often cross-border nature of online contracts, it may be the case that a dispute will arise as to the law applicable to the transaction. Generally, the parties can in their contract determine which law will be applicable in the event of a dispute.<sup>103</sup> If the parties have not agreed on a choice of law, it falls on the court to determine the law to apply using the international conflict of law criteria that the law of the jurisdiction that has the most significant relationship to the transaction and the parties with respect to the issue in dispute will control.<sup>104</sup> The jurisdiction of most significant relationship to the parties and the transaction is determined by a variety of factors including:

- (i) The place of the contract;
- (ii) The place the contract was negotiated;
- (iii) The place of performance;
- (iv) The location of the subject matter of the contract; and
- (v) The domicile, residence, nationality, place of incorporation, and place of business of the parties.<sup>105</sup>

In any case, despite doubts as to the ratification of the Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters 1958 in Nigeria,<sup>106</sup> its provisions may be useful in determining choice of law and jurisdiction issues regarding cross-border online contracts. For online contracts for the sale of goods, there is also the Convention on the International Sale of Goods which provides rules that may substantially lessen the risk of conflicts. In any case, it is advisable that parties, where possible, indicate in their contracts, the law that will apply in the event of a dispute.

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<sup>103</sup> See Ukwueze & Obuka, above note 25 at pp. 60 – 61. See also *African Petroleum Ltd v. Owodunni* [1991] NWLR (Pt. 210) 351.

<sup>104</sup> See Perdue, above note 3 at p. 93.

<sup>105</sup> *Ibid.*

<sup>106</sup> See Ukwueze & Obuka, above note 25 at p. 91.

## 8. Conclusion

Online contract is increasingly becoming the preferred mode of driving transactions, especially among the rising elitist and middle class sections of Nigerians. We have examined the rules that apply and come to the conclusion that in most cases, the traditional rules of contract also apply in full force to online contracts. The parties to an online contract must satisfy the basic requirements of ordinary contractual obligations, to wit, mutual agreement between the parties, the existence of which must be unmistakably inferred from all that transpired from start to finish of their transaction. The Supreme Court has beautifully captured it in these words:

The existence of an agreement is not an issue merely of fact, to be found by a psychological investigation of the parties at the time of its alleged origin. The law takes an objective rather than a subjective view of the existence of agreement and so its starting point is the manifestation of mutual assent by two or more persons to one another. Agreement is not a mental state but an act, and as an act, it is a matter of inference from conduct. The parties are to be judged, not by what is in their minds, but by what they have said or written or done.<sup>107</sup>

The above summarises what transpires in online contractual transactions. The vendor posts and advertises his products. The buyer responds to the adverts. The vendor accepts and consideration exchanges hands. These actions are carried out either by conduct, words, deed or by exchange of correspondences.

Despite the infrastructural challenges, Nigerian online trade is vibrant.<sup>108</sup> It is clear that there are now no longer any

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<sup>107</sup> *Ajagbe v. Idowu* [2011] 17 NWLR (Pt. 1276) 422 at p. 442 paras. D – G, per Mukhtar JSC.

<sup>108</sup> See “Innovation Village” (17 June 2013) available at <http://www.innovation-village.com/2013/06/after-1-year-in-nigeria-jumia-nigeria.html> (last accessed 04 August 2013) for the progress made by Jumia as a leading online retail shop in Nigeria within one year of its establishment. See also “Nigeria: Rise of e-Shops” (28 January 2013) *PM News*, available at <http://pmnews.mobi/output.php?id=5673> (last accessed 04 August 2013).



legal impediments to contracting online, even along the lines of some of the contracts regulated by the Statute of Frauds. This, however, has not always been the case as not too long ago, electronically generated evidence was not admissible in the Nigerian courts<sup>109</sup>, and by then digital signature would have been mere wishful thinking or a laughable idea. There is great need, however, to be cautious, as the internet has proven to be a minefield for unwary businessmen.<sup>110</sup> We are also minded of the low reading culture and continued illiteracy of a significant number of Nigerians, when a mere click on the internet binds such persons to a contract, the results may prove to be disastrous. Even with infrastructural inadequacy and low literacy level in Nigeria, online contract is still recommended on account of its obvious benefits though with a serious call for Nigeria to drastically tackle these two problems in order not to be left behind in the modern world of cyberspace.

Although some progress has been made in Nigeria statutorily with regard to online transactions<sup>111</sup>, there is still much to be done in terms of adequate and effective legislation as we have pointed out. It is advised that Nigeria updates its laws and enacts new ones in order to meet the challenges of online transactions and cybercrimes.

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<sup>109</sup> See Y. Osibanjo, “Admissibility of Computer Generated Evidence under Nigerian Law” 1990 Jus. pp. 11 – 20.

<sup>110</sup> See Ukwueze and Obuka, above note 25 at pp. 95 – 96.

<sup>111</sup> The Evidence Act 2011 in ss. 84 and 93 as pointed out, has made electronically generated evidence and digital signatures admissible in the Nigerian courts.