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An Over View of the Common Law Framework and Principle for E-Commerce

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Abstract

The emergence of e-commerce has changed the way and manner people conducted their business transactions, this revolutionary way of conducting business has since broken down the geographical boundaries of the market, where people originally visited markets to buy and sell. The common law has laid down many principles on the traditional mode of commerce or contract, hence there is need to determine whether such framework principles apply to e-commerce. Therefore, this paper intend to examine the applicability of the common law framework and principle on e-commerce and proffer solution to some of the problems of implementing e-commerce.

Keywords: emergence of e-commerce, business transactions, principle on e-commerce.

INTRODUCTION

Electronic commerce as an emerging area in business transaction is gradually taking over the traditional or paper based commercial transaction. This has also offered a new opportunities to improve the efficiency of business operators and to reduce costs associated with trade procedures by providing increased competitive advantages to the commercial actors ready to embrace methods of work and trade. It is important to understand that e-commerce has forced so many countries to change the pattern of conducting their business transaction, because for any country to develop and progress among the comity of nations, it must embrace e-commerce. the focal point of this paper is on the common law framework and principle of e-commerce.

MEANING OF E-COMMERCE

Electronic commerce (E-commerce) is now an alternative and convenient way of conducting business both nationally and internationally. This revolutionary way of conducting business has once broken down the geographical boundaries of the market, where people originally visited markets to buy or sell. Internet Technology Driven Business (E-Business) has continued to be a catalyst to accelerate economic growth in many developed countries around the world such as Singapore, Denmark, Switzerland, United States of America, China, just to mention but a few. It is now a form of globalization [1].

Thus, E-commerce or electronic commerce is an emerging concept that describes the process of buying and selling or exchanging of products, services and information through computer networking including the internet. It includes all inter company and intra company functions such as marketing, finance, manufacturing, selling and negotiations that enable commerce and use electronic mail file transfer, EDI, Fax, Video conferencing, work flow or interaction with a remote computer [2]. It is also defined as the use of communications technology particularly the internet to buy, sell and market goods and services to customer [3]. According to another definition, Electronic commerce is the buying and selling of information product and

[1] Akintola, K.G., Akinyede, R.O., and Agbonifo, C.O., *Appraising Nigeria Readiness for E-commerce Towards Achieving Vision 20:2020*. www.arpapress.com//volumes/vol9Issue2/IJRRAS_9_2_18.pdf. Accessed on 29/4/15.

[2] Pandey, U.S. & Shukla, S. *E-commerce and Mobile Commerce Technology*, New Delhi: S Chand Company Ltd, 2011.

[3] Charles, A.K. "The Prospects of E-commerce Implementation in Nigeria", *Journal of internet banking and Commerce*. December 2006, Vol. 11 No. 5, http://www.alkaydev.com/commerce/jibcd

services via the computer network which make up the internet.

From the various definitions given above, it is clear that e-commerce involves buying and selling of products, exchanging information and service through the medium of the internet, which is faster and more effective than the traditional way of conducting commercial transaction. The next segment looks at the historical development of e-commerce.

Types of E-Commerce

E-commerce has given a global platform to the manufacturers, traders, sellers and buyers or consumers. The scope of e-commerce is very wide it connects the management of the enterprises of the various aspects of trading, through supplier, distributions, retailer, consumers and other trades on the global e-commerce infrastructure [4]. There are different kinds of e-commerce, which would be examined under this heading.

BUSINESS TO BUSINESS (B2B)

This refers to e-commerce that takes place between business organizations, the foundation of B2B e-commerce is electronic data interchange (EDI). EDI is the direct computer to computer transfer of transaction information contained in standard business documents such as invoices and purchase orders in a standard form [5]. B2B is also used in the context of communication and collaboration. Many businesses are now using social media to connect with their consumers, however, they also use similar tools within the business so employees can connect with one another [6].

Note that, B2B e-commerce business focuses on selling to other businesses directly or through an intermediary. Many transactions worth huge amounts are carried out between companies through e-commerce channels dealing in all kind of products and services. B2B covers a broad spectrum of application that enable business to form electronic relationship with their distributors, retailers, suppliers, customers and other business partners [7]. It is therefore believed that the B2B is the largest form of e-commerce transaction based on value as both the buyers and also the sellers are business organizations.

[4] Pandey, U.S. and Shukla, E.S. Op. Cit.
[5] Olatokun, W.M. & Ajiferuka, E-commerce Challenges and Policy Consideration in Nigeria.
[6] R. Nemal. Taking a look at different types of e-commerce (World Applied Programme, Vol (1) No (2)) June 2011
[7] Emmanuel, A.O. Adoption of E-Commerce in Nigeria Business: A change for traditional to e-commerce business model in Richbol Environmental, Services Limited., Thesis submitted to Business School, Faculty of Business Administration. SEINAJOKI University

BUSINESS TO CONSUMER (B2C)

This applies to any business or organization that sells its products or services to consumer over the internet for their own use. In other words, it provides a direct sale between the supplier and the individual consumers [8]. B2C involves e-commerce sites that sell products and services or provide information services directly to consumer [9]. It also involves what is known as electronic retailing or e-tailing. Therefore e-tailing makes it easier for a manufacturer to sell directly to a customer, cutting out the need for an intermediary. With B2C transaction there is no need for physical store from which to distribute products an electronic or web store front refers to a single company website where products and services are sold [10].

CONSUMER TO CONSUMER OR PEER TO PEER (C2C)

This involves individuals who buy and sell items among themselves [11]. In other words C2C it is defined as exchanges between/among consumers. These exchanges can involve a third party involvement, which can facilitate and provide the infrastructure, place and governance for the transaction exchanges [12].

C2C can also be seen as an e-transaction that is directly between individuals that is void of any human intermediary. It therefore uses a platform that serves as an invincible intermediary, the platform are often used for sales and auctions of online expertise and also online advertisement of personal services. The most famous and successful example of C2C application is Ebay. Ebay.com is an online auctioning site that facilitates the trade of privately owned items between individuals. Other examples of C2C applications are services and employment websites such as monster.com, seek.com.au and carierone.com.au these websites provide valuable services to consumers looking for jobs.

CONSUMER TO BUSINESS (C2B)

C2B is e-commerce in which the internet makes it possible for money consumers who want to buy the same or similar products to band together in order to obtain volume discount from a business. Examples of this include CTB and speakout.com. These sites provide consumers with market strategies and businesses also use them to gain insight into what the consumer wants. This kind of E-commerce transaction can also be referred to as demand collections. It allows for bidding, in which price for the goods and services available are named by the customer, it also involves a

[8] Pandey and Shukla, Op. Cit.
[9] Olatokun and Ajuferuka, Op. Cit.
[10] Pandey and Shukla, Op. Cit.
[11] Scneider, G.P. *E-business*, (8th Ed.) (USA: Course Technology Centre Learning, 2009).
[12] Pandey & Shukla, Op. Cit.

situation where the customer based on his/her requirements makes an online post with a price or at least a set-budget, and companies makes bids based on this. The customer in turn reviews the bids and makes selections as appropriate [[13]].

Formation of E-Commerce Contracts and Transactions

The question of contract formation across electronic networks is problematic to say the least. This is due not only to the inter jurisdictional issues that arise as a natural result of the borderless nature of the networks, but also to the issues that arise when considering the terms of any contract that might be formed [[14]]. Such issues arise because of the need to consider any overriding legislation which may affect the freedom to contract in the jurisdiction in which the contract was formed or under the law chosen in the contract [[15]]. The ease and flexibility of communicating across electronic networks allows users to enter into agreements with each other with little if any difficulty. Lord Denning highlighted this point in Thornton v. Shoe Lane Parking [[16]]:

> The customer pays his money and gets a ticket. He cannot refuse it. He cannot get his money back. He may protest to the machine, even swear at it. But it will remain unmoved. He is committed beyond recall. He was committed at the very moment when he put his money into the machine.

Electronic commerce or e-commerce is now part of our daily lives. Whatever financial reasons are given for this, whatever 'paradigm shifts' are held responsible, one fact is certain [[17]]. If consumers and businesses did not believe that the commerce they were transacting was enforceable, they would not enter the digital marketplace provided by the internet. The internet, built for and used as a means of communication provides a vast arena for agreements.

It also offers new opportunities to improve the efficiency of business operations and to reduce costs associated with trade procedures, providing increased competitive advantages to the commercial actors ready to embrace new methods of work and trade. Emerging electronic commerce platforms and the use of the Internet provides users with a combination of technologies to communicate data, to contract electronically as well as to manage new business processes leading to new business models [[18]].

A phrase that attempts to signal a cautious approach to treating online contracts as meriting special attention. Consider, for example, the following observation:

> The Cyberspace fallacy states that the Internet is a new jurisdiction, in which none of the existing rules and regulations apply. This jurisdiction has no physical existence; it is a virtual space which expands and contracts as the different networks and computers, which collectively make up the Internet, connect to and disconnect from each other... A moment's thought reveals the fallacy. The actors involved in an Internet transaction have a real-world existence, and are located in one or more legal jurisdictions... It is inconceivable that a real-world jurisdiction would deny that its laws potentially applied to the transaction.

This observation is as interesting as the line of analysis about the interaction between contract doctrine and the communications system:

> [The Internet] is fundamentally no more than a means of communication, and that the new issues of Internet law arise from the differences between Internet and physical world communication methods, particularly communicating via intermediaries.... [T] he contracts themselves are not fundamentally different. What is different is the method by which those contracts are formed, using indirect communications via packet switching hosts [[19]].

A contract is the primary legal mechanism through which businesses interacts with each other and form binding relationship. An electronic contract can be defined as a contract formed in an electronic medium. Therein lies the differences between the two types of contractual arrangements.

Traditional contracts and commercial transactions are guided and regulated by the various contract and commercial legislation in Nigeria such as the Statute of Frauds, Hire Purchase Act, Sales of Goods Act, Value Added Tax Act, Consumer Protection Council Act etc. These pieces of legislation were made when business and commercial transactions were dominated by physical contacts, goods as well as

[15] Ibid.
[16] (1971) 2 Q,B, 163 at 169.
[17] Clive Gringras, *The Laws of the Internet*, 2nd Ed. Lexis Nexis: Butherworths, 2003, p. 14.

[18] "ELECTRONIC COMMERCE AGREEMENT - Welcome to the UNECE - Latest.., http://www.unece.org/cefact/recommendations/rec317rec31 _ecetrd257e.pdf_br (accessed November 26, 2014).
[19] Ibid. pp. 174-175.

services. With the advent and fast spread of the internet as well as the rise of electronic commerce, these pieces of legislation, without doubt, are inadequate to handle some of the novel situations that would arise from the contractual relations between parties, individuals or entities. Electronic commerce is a revolution in the field of trade and commerce. The establishment of electronic commerce has added new dimension in the total scheme of business ensuring smarter and faster service in concerned sectors. In fact, these criteria have established e-commerce as an essential demand of time rather than an additional service.

The determination of the moment when a contract can be said to have come into existence on the internet, giving rise to the existence of rights and duties as between the parties, has been one of the vexed issues in e-commerce. In contrast, traditional commercial transactions do not pose any significant problem because there are elaborate common law and statutory rules that govern such transactions.

Under Nigerian law, the written form is expressly required for certain contracts [20]. To be valid and enforceable, such contracts need to be executed in writing (i.e. duly signed by the parties), otherwise they are null and void. This means that the written form is necessary for the validity of the contract (i.e. *adsubstantiam*).Moreover, under Nigerian Law, there are a number of contracts, such as insurance agreements, that must be in writing to prove their existence against third parties [21] (i.e. *ad probationem*). In other words, if challenged in court, the party who wishes to use a contract must prove that it has been duly executed [22]. Contracts different from those mentioned above do not require any particular form for their conclusion or the proof of their existence. In such case, the standard practice is in any case to execute the agreement in writing; however, this is not expressly required by law [23].

The special nature of internet contracts has made most of the common law rules applicable to commercial contracts inapplicable to such contracts. For example, websites are designed in such a way as to constitute an invitation to make an offer and not situations of real offers by the web owners. However, in sales over the internet, both the display and the actual sale are often fused [24]. Therefore, the seller or website owner must design the web page in such a way that it must clearly indicate that the information contained on the web in respect of a particular product or service is meant to elicit an offer and is not in itself an offer. It is thus important for the owner of a website to err on the side of caution in creating a web invitation, and one method of doing this is to state that he will not be bound by any communication from a third party except if the owner accepts such communication and informs the third party accordingly [25].

In order to support electronic transactions in a similar way as conventional transactions electronic contracts are required, which perform the same function and meet the same requirements as conventional contracts. Out of the basics of the contract law and the contracting process described in the previous sections, the following legal requirements can be summarized upon electronic contracts:

- Clear identification of the contracting parties;
- Clear indication of the subject of the contract;
- Clear indication of the time period of validity;
- The contract has to have valid signatures of the involved parties certifying their acceptance of the liabilities laid down in the contract. The signature should be accompanied by a date indicating the start of the contract validity;
- Non-repudiation, i.e. nobody should be able to change the content of the contract after the contract is signed [26].

The basic function of a contract is to store information about accepted liabilities in a legally binding manner. Thus one function of an electronic contract is to support the storage of contract information. This is very essential in the establishing of the rights, obligations, duties and remedies of each party to an electronic transaction or contract [27].

However, it is important to note that not all electronic transactions or communications result in the formation of a contract. Although a number of attempts have been made to classify electronic messages according to the different legal problems raised [28], In this work it is sufficient to note three broad categories:

[20] Contracts listed under section 7, Statute of Fraud 1885

[21] Section 7, Statute of Fraud 1885

[22] Orient Bank (Nig) Ltd. v. Bilante International Ltd (1997) NWLR (Pt.515) 37

[23] Omega Bank (Nig) Pic vs. O.B.C. Ltd (2005) *8 NWLR (Pt. 928) 14*

[24] *Harvela Investments v Royal Trust Company of Canada* (1986) AC 207.

[25] Koehn, D. 'The Nature of and Conditions for Online Trust', *Journal of Business Ethics* 43(1/2): (2003) 3-19

[26] Ibid.

[27] Choi, S.-Y, Stahl, D.O. and Whinston, A.B. *The Economics of Electronic Commerce.* (Indianapolis: Macmillan Technical Publishing, 1997) p. 8

[28] For instance, R. Goode and E. Bergsten identify five types of communication:

(i) communication having no legal significance,
(ii) communication having legal significance,
(iii) communication operative to transfer ownership, control or contract rights,
(iv) communication required by law, and

The transmission of mere information.

Generally, the sender does not intend a message of this type to have legal consequences. Examples might range from the trivial "Our Chairman will arrive on the 1520 flight") to the vital "Maximum safe operating pressure: 130 O.S.1". The only legal problem arising from this type of message is the potential liability where the sender owes a duty to the recipient to take care to ensure that the information is correct, and as a result of his carelessness the recipient suffers loss [[29]].

The transmission of unilateral notices

This type of communication will be intended to have legal effect and will in most cases be made in performing an existing contract. Typical examples of this category might be invoices, which are often a prerequisite for payment, or a notice under a charter party that a ship is ready to load, thus fixing the longtime and demurrage periods. The sort of legal questions that this type of communication will raise are threefold:

- Is it effective as a notice? This will depend on whether the notice is required to be in writing, or if a signature is needed.
- When (and possibly where) does it take effect, i.e. is the sending or receipt the legally significant point?
- If its sending or contents are disputed, can these facts be proved?

Contract formation messages [[30]]

In cases where goods are ordered using an electronic message, the intended result will be the formation of a contract. In most cases such messages are part of a series including negotiation, ordering and acceptance. This type of communication raises the largest number of legal questions, in particular:

- Can this particular type of contract be formed using electronic messages? There may be requirements such as writing or signature depending on the national legislation. For example in Nigeria, there categories of contracts termed 'unenforceable contracts'. In this respect, reference is made to sections 4 and 17 of the Statute of Frauds 1874 [[31]].

Section 4 of the Statute provides thus:

No action shall be brought whereby to charge any executor or administer upon any special promise to answer damages out of his own estate, or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of any other person; or to charge any person upon any agreement made upon consideration of marriage; or upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them; or upon any agreement that is not to be performed upon the space of one year from the making thereof; unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith or some person there unto by him lawfully authorized.

Section 17 provides that:

No contract for the sale of good, wares or merchandises for the price of £10 or upwards shall be allowed to be good except the buyer shall accept part of the goods so sold and actually receive the same, or give something in earnest to bind the bargain or in part payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract or their agents thereunto lawfully authorized.

The basic reason behind the enactment and sustenance of these laws lies in the attempt of the court to criminate arbitrariness which oral evidence may engender.

- When, and more important, where, was the agreement made? This may decide which national law is to apply to the contract or which court has jurisdiction, if there is no effective choice-of-law or forum clause.
- If the terms of the contract are later disputed, will it be possible to prove what was agreed?

Unless particular formalities such as writing are specifically required (as discussed above), the general rule of Nigerian law and of most other jurisdictions is that a contract is formed when the parties reach an agreement on its terms, and this can be done orally, as our everyday experience in shops demonstrates. There is thus no theoretical objection to using electronic messages for this purpose. In Nigerian law, the process of formation is analysed into two stages: the offer, which are party sets out the terms on which he is prepared to contract, either in one document or by express or implied reference to a preceding course of negotiations; and the acceptance, when the other party agrees to these terms without attempting to amend them in any way. If both parties satisfactorily perform their side of the bargain there is no need to invoice the law. We will now examine in detail the formalities of an electronic contract.

(v) communications requiring legal authority or licence ('Legal Questions and Problems to be Overcome', in H. Thomsen and B. Wheble, *Trading with EDI: The Legal Issues*, IBL, 1989, pp. 131-3.

[29] Hedley Byrne v. Heller & Partners (1963) 2 All ER 575.

[30] Murray, A.D. 'Entering into Contracts Electronically: The Real WWW', in L. Edwards & C. Waelde (eds), *Law and the Internet: A Framework for Electronic Commerce*, 2nd Ed. Hart Publishing, 2000.

[31] This is a statute of general application.

Mode of Entering into an Electronic Contract

There are two main methods of e-contract. The first one which is more common is the electronic mail or e-mail; while the second one is the click wrap method of contracting used on the World Wide Web. However, these two methods would be discussed below:

- E-mail: This is the digital equivalent of a letter. This is done by typing out address and then sending the message to your desired recipient. E-mail can do all the things that real mail can do. It can be used to make an offer or to communicate acceptance. The sender puts it in his outbox, the digital equivalent of a post box, and this is then collected by his mail server who forwards it to the recipient's mail server who then delivers it to the recipient's inbox which may be seen as the equivalent of his letter box.
- Click wrap method: These contracts are formed using the link between server and client machines which is in place during data exchanges on the web. The usual format of such a contract is that the webpage operator places an advert on their page called a webvertisement, offering a product or service for sale. On this web page will be a hyper text order form which the customer will fill out. At the bottom of this form will be a button saying "submit" "I accept" or something similar. When the customer clicks this button, the order is submitted to the website operator. This is like taking the goods to the cash register in a shop, except that the cashier will usually be a computer instead of a person [32].

Formalities of an Electronic Contract

The internet is fundamentally a means of communication. Issues with law that have been arising because of the internet are thus as a result of the differences between communication in the physical world and communication using the internet. Contractual negotiations are the result of a series of communication that create a legally binding agreement. For this reason, there is little difference between contract made online and those formed through face to face communication. The facts surrounding the form of the communication are the primary difficulty.

Offer

The law already recognizes contracts formed using facsimile, telex and other similar technology. An agreement between parties is legally valid if it satisfies the requirement of the law regarding its formation, i.e. that the parties intended to create a contract primarily. This intention is evidenced by their compliance with three classical elements – offer, acceptance and consideration [33].

Note that advertisement on website may or may not constitute an offer, as offer and invitation to treat are two distinct concepts; being an offer to unspecified person, it is probably an invitation to treat, unless a contrary intention is clearly expressed. The test is of intention whether by supplying the information, the person intends to be legally bound or not. When consumers respond through an email or by filling in an online form built into the web page, they make an offer. The seller can accept this offer either by express confirmation or by conduct [34].

One of the fundamentals of e-commerce is that suppliers use Websites to conduct business. Like a billboard, a website advertises products and services but unlike a billboard it can also assist the supplier to complete the sale. In doing so, a website can be designed to advertise the features of a product or services, it can even allow a viewer to examine the product in a restricted form [35]. After examining the product or the advertising, a viewer may then select the part of the website to enter a contract to acquire the product or services. The internet in effect fuses the advertising and the shop. The law, in contrast, has distinguished between advertising and shop displays [36]. This unique commercial situation has legal ramifications.

Advertisement Offers

For purposes of offers, the law distinguishes shop displays form, therefore essential that those who wish to contract over the internet understand their difference. The law assesses advertisements in two categories: those which promote unilateral contracts and those promoting bilateral contracts. A unilateral contract is one in which money, generally, is offered to another party to perform some act without that person promising anything in return. A person accepting the offer does not need to communicate this fact to the offeror or to complete the contract; he simply needs to do what is required of him.

[32] Ibid

[33] Peruma, M.P, e-contract and its validity http://www.lawyerscluindia.com/articles/e-contract-and-itsvelidity-m-pirav,-perumal-665-aspat At 14 Jan 2015

[34] Vashuda, T .& Pal, P. "E-contract and Its Legality" http://www.legalservice.com/article/econtracts.htmlat. Accessed on 16 Jan 2015

[35] Software can be downloaded from a website in a "crippled" form. For example, a word processor may be downloaded but may be prevented from printing, or saving: it provides a 'test drive' if the user is content with the product he may then re-access the website to form a contract to receive the uncrippling key.

[36] Pharmaceutical Society of Great Britain v. Boots Cash Chemists Ltd. (1952) 2 Q.B. 795. cf Carlill v. Carbolic Smoke Ball Co. (1893) 1 Q.B. 256.

The legal notion has been confirmed by the Court of Appeal [37], where a travel agent's physical premises displayed the standard ABTA Scheme of protection notice. This included the statement: "ABTA (a travel agent association) arranges for you to be reimbursed the money that you have paid for your holiday (if there are financial difficulties with the agent". The travel agent became insolvent and the claimant sought to recover the cost of the holiday from ABTA. The Court of Appeal held that this published statement would constitute an offer and, as such, was accepted and formed a contract with the claimant and any customer doing business with the travel agent [38]. A bilateral contract, in contrast, has both parties making a promise. Each offer is usually accepted by a communication of the other's promise.

Web Invitations

The owner of a website has little reason to prefer a unilateral contract to a bilateral contract, and where possible should seek to be viewed by the courts as a shopkeeper. The main point to make is that the law looks not simply at the words used for a contract, but the objective intention behind them. This means that if a website would induce a reasonable person into viewing statements on the pages as offers, so will a court. In Bowerman [39], Hobhouse LJ states this succinctly:

> The document as reasonably read by a member of the public would be taken to be an offer of a legally enforceable promise. It suffices that ABTA intentionally published a document which had that effect. A contracting party cannot escape liability by saying that he had his fingers crossed behind his back.

An owner of a website therefore must be on the side of caution in creating a web invitation.[40] One method is for the owner of the website to state that it will not be bound by any communication from a third party, but the site owner will inform that party if it accepts the communication. This creates three factors in favour of the site owner. First, it goes some way to preventing the reasonable person from thinking the owner has made an offer. The second point relates to the first, it provides evidence to a court that the site owner did not intend to make an offer. Simply using indicative words above a link such as "make an offer" may not be enough [41]. Third, by explaining the stages to conclude the contract, the website will comply with Article 10 of the Electronic Commerce Directive (UK's) and Reg. 9 of the Electronic Commerce Regulations (EC Directive 2002). This legislation states that prior to an order being placed by a consumer or a business not having agreed otherwise, the service provider must clearly, comprehensively and unambiguously provide [42]:

- The different technical steps to follow to conclude the contract,
- Whether or not the concluded contract will be filed by the service provider and whether it will be accessible,
- The technical means for identifying and connecting inputs errors prior to the placing of the order,
- The language offered for the conclusion of the contract [43]

These pre-contractual consumer formalities may not be contracted out of buyer supplier's contract. And, as discussed, the sanctions for ignoring these requirements include not only damages, but rescission of the contract [44].

The argument is that the court should view a shop's shelves as invitations to treat and not offers. A website owner may therefore attempt to argue that the site is more like a shop's shelves than anything else, and that it should be viewed accordingly. While this analogy appears reasonably accurate, it may not withstand the strain of a court's detailed scrutiny [45]. A major justification for not holding shops as making offers is to ensure that, if the shop's stock is depleted, a willing consumer cannot sue the shopkeeper for damages [46]. Thus where a website is offering not physical but digital goods for sale it is difficult to assert

[37] Bowerman v. Association of Travel Agents Ltd. (1995) NLJR 1815.

[38] It should be noted that a website that offers advertising space to vendors runs a promotion. Its site advertises, "If you visit our pages three times this month and don't buy anything from our advertisers, we'll credit £10 to your bank account". This site risks creating a unilateral contract, which the entire internet community may accept. See Clive Gringrass, Op. cit.

[39] Supra.

[40] Clive Gringrass, *The Laws of the Internet*, 2nd Ed. Op. cit. p. 23.

[41] E.g. Harvelg Investments Ltd. v. Royal Trust Co. of Canada (CJ) Ltd. (1986) AC 207.

[42] Article 9(1).

[43] Note that in addition the following information must be made available: - an indication of any relevant codes of conduct to which the (website owner subscribes and information on how these codes can be consulted electronically – Clive Gringrass, Op. cit.

[44] And note: A retailer advertises its products on a website. To process an order, the consumer must provide certain information and then click the button labeled "submit". Before the consumer submits this information the website clearly states that their information is to allow the site owner to decide whether to accept their offer. This allows the site owner to check the product type and cost entered and reject. This method of applying a backstop logic, reduces the cost of mistakes.

[45] Ibid.

[46] See Esso Petroleum v. Customs & Excise Comrs (1976) 1 WLR 1 at 11.

that supplies can be exhausted. One of the features of digital products distributed over the internet is that they are, in effect, in infinite supply. It may therefore be that the primary justification for the rule that shops do not offer but invite to treat is based in part on a commercial factor that is absent from a digitally distributing website [[47]]. Whatever the common law justification, e-commerce is concerned with a consumer 'placing the order'. It follows, therefore, that to have known of the possibility of being able to place an order, the website displayed an invitation to treat [[48]].

Email is more like a posted letter being delivered to a pigeon-hole ready for collection. Emails are not instantaneous, unlike faxes and telephone calls. An email message is sent to an internet service provider (ISP) who like our Nigerian Postal Services (NIPOST), attempts to deliver it as quickly and accurately as possible [[49]]. But as with the NIPOST, mistakes can occur and emails can arrive garbled, late or even not arrive at all. The similarities with the NIPOST go further: NIPOST does not usually deliver post abroad, that is left to the local postal system of that foreign country. The NIPOST delivers the mail to only the 'first shop' outside Nigeria. The same applies to emails they are passed between many different carriers to arrive at their final destination [[50]].

Thus, unlike a telephone call or fax, some emails are delivered not to the recipient's deck, but to an electronic pigeon-hole for collection. This pigeon-hole is called an 'inbox'. Many users of email must dial their ISP to check on the arrival of an email, often users must collect their email, it is not 'delivered' to them. This technical framework serves as a useful backdrop for the discussion which now follows on when an offer is deemed to have been made. It will also be useful when acceptances are considered later.[51] Emails can be misaddressed, delayed by a server or router on the way, and worse than ordinary mail, they may not be 'collected' for some time after delivery. This is a situation comparable to sending an offer to a pigeon-hole abroad. Many parties are involved in the transmission of the message, and even on arrival the recipient must act to retrieve it.[52] However, certain email systems permit a 'read' and a 'receive' receipt to be automatically returned to a sender of an email. The 'receive' receipt usually informs the sender that the email has not been received by the individual, but by his ISP, if analogies are useful, the receipt informs senders when the mail arrives in the pigeon-hole. The 'read' receipt informs when the individual retrieves the email from the ISP. Even there, like a letter in an unopened envelope, the email may not be read for some time [[53]].

Where the sender is a consumer, a sent and received email offer will be deemed received because it is able to be accessed; where the sender is not a consumer, the un-accessed offer is not deemed as being received [[54]]. Consequently, if a consumer improperly addresses the email and it does not arrive, no order has been placed, no offer made. The same is true for a business offer.

If the consumer properly addresses the email, or properly uses the website, but the supplier is unable to access the order, the order is not deemed received. This will be the situation if it is the consumer's ISP that is at fault. It is even the conclusion if it is the supplier's website that is at fault. In short, a problem in transmission outside the consumer's control will affect the consumer's legal position in making an offer before a particular date [[55]].

For businessmen affected by delays outside their control are less certainly treated; they may want to argue that matters out of their control should not affect their ability to contract on time. Therefore, practically, the best practice is to make any electronic offer subject to a date on which the offer will lapse. Specifying this date in relative terms, for instance, five days after receipt, poses problems unless the offeror provides a definition of exactly what is 'receipt'. A simpler and more certain method is to specify an objective date and time [[56]].

Acceptance

It is important to note that the unequivocal and unconditional communication of acceptance is required to be made in terms of the offer to create a valid e-contract. There is a little special about the terms of an acceptance made over the internet, as opposed to one made in any other way. Much has been written about what constitutes such an acceptance. It is useful here to

[47] Of course, a limited licence may have been imposed on the supplier restricting the number of digital products he can supply.
[48] Clive Gringrass, Op. cit.
[49] Clive Gringrass, Op. cit. p. 26.
[50] Ibid.
[51] See the discussion on 'Timing of acceptances', at p.
[52] Clive Gringrass, op. cit.
[53] Ibid.
[54] See The Electronic Committee Directive, Art. 11(1), second indent; Electronic Consumer (EC Directive) Regulation 2002, reg. 11(2).
[55] Clive Gringrass, Op. cit.
[56] If no mention is made of the life span of the offer the courts will imply a lapse after a reasonable time. See Chemco Leasing SPA v. Rediffusion Ltd. (1987) 1 FTLR 201. To assess what is reasonable the courts will take into account many factors including the subject matter of the contract and the method of communicating the offer clearly with an email offer, the expiration will be implied sooner than an offer made by post. See Quenerduaine v. Cole (1883) 32 WR 185.

draw out the special methods of accepting over the internet.

It has been mentioned that an email can have a 'read' and a 'receive' receipt [57]. Thus, receiving one of these will not constitute an acceptance of an emailed offer; also an automatically generated receipt of an offer (or order) is not an acceptance of the terms of an offer. Indeed, even an email sent in reply that states the recipient's intention to reply in due course will not be acceptance [58]. An acceptance needs to assent to an offer. It does not, in general, need to be in writing, or by another means of communication. For this reason, where a website is established to make or complete contracts, its owner should be aware of what conduct may bind him. This point is very important because contract made over the World Wide Web are rarely completed by two humans: a website operates automatically according to a set of instructions, often called a script [59]. In this respect, it is crucial that the owner of a website understands how a contract can be completed because generally, a website operates without supervision. We will discuss two instances:

- One, where, as advised, a website accepts an offer and
- Second, where it makes one.

Website Acceptance and Acknowledgement

The general rule is that an acceptance must be communicated to the person making the offer [60]. An acknowledgement of receipt may well also be the acceptance of the offer. Fortunately, the two may be dealt with separately [61], such that the supplier is entitled first to acknowledge receipt of the offer, and then (potentially later) to accept the offer. If a supplier does not acknowledge receipt of the order, they may be sued for damages for breach of statutory duty [62]. It is therefore imperative that suppliers should take care over the language used in any acknowledgement. They should ensure that it does not act an acceptance and so inadvertently form a contract earlier than intended.

However, any person making any offer may waive the general rule that acceptance must be communicated and can instead permit acceptance by conduct. This general rule is examined in the light of e-commerce transactions. The question is, what are the most exceptional circumstances, when it is appropriate for an acceptance to be silent? These exceptional circumstances stem from the reasons for the rule: to protect both the offeror and offeree [63]. The rule protects the offeror from being bound by a contract without knowing that the offer is accepted. An exception to this may be, therefore, where the offeror expressly or impliedly waives the requirement of communication. For example, an offer to sell goods may be made by sending goods to an offeree who can accept the offer by using them [64]. Here there is not mere silence or inactivity; there is conduct indicating acceptance.

As for the offerees they were also protected by this rule [65]. If they did not wish to accept an offer, it was not felt undesirable that offerors could put them to the trouble of communicating refusal [66]. Indeed, authority from an established precedent, Felthouse v. Bindley [67], indicates that the offeror can waive communication of acceptance so as to bind the offeree. Communication of acceptance may also be deemed 'waived' by the 'custom and practice' of the area of commerce [68]. However, with the arrival of the Electronic Commerce Directive, these common law rules for consumers and businesses who do not agree otherwise; in that now service providers must acknowledge offers/orders, whether they intend to accept them or not.

There is no doubt that the position above is good law especially as it relates on standard practice for electronic commerce. For the most part it is suppliers who draft the offers being made over the internet, particularly on the World Wide Web (WWW). In this situation, it is difficult to see any unfairness in holding an acceptor, is the supplier, bound despite making no contract to that effect and it would appear that the onus is on the owner of a website to state categorically what will constitute acceptance [69]. Thus, contracting over the Internet may reverse the court's assumptions in

[57] See the case of Adams v. Lindsell (Supra).
[58] See OTM Ltd. V. Hydranautics (1981) 2 Lloyd's Rep. 211.
[59] Clive Gringrass, Op. cit. p. 27.
[60] Felthouse v. Bindley, Common Pleas (1982) 11 CB (N.S) 869, 142 E.R. 1039.
[61] Otherwise this would then bind the supplier into accepting the offer since the Electronic Commerce Directive also obliges offerees to acknowledge the receipt of an offer (order) "without undue delay and by electgronic means" – ECD Art. 11(1) first indent: Electronic Commerce Regulations, reg. 11(1) (a).
[62] Ibid, Regulation 13 and see Dan Juma v. Standard Company of Nig. Ltd. (1922) 4 N.L.R. 52.
[63] Clive Gringrass, Op. cit.
[64] Weatherby v. Banham (1832) 5 C & P 338. Interestingly, the Electronic Commerce Directive, recital 34 and the Electronic Commerce Regulations, reg. 11(2) (b), clearly envisage that acknowledgement of the order may only be the provision of the service ordered.
[65] That is before the Electronic Commerce Directive.
[66] See Chilty on Contracts, Vol. 1 at 2-063 (28th Ed,) Sweet & Maxwell, 1999.
[67] Supra.
[68] Minories Finance Ltd. v. Afribank Nigeria Ltd. (1995) 1 Lloyd's Rep. 134 at 140.
[69] See Jonathan Wren & Co. Ltd. v. Microdee Plc. (5) July, 1999 Unreported) Technology and Construction Court (English).

Felthouse v. Bindley [70] because the offeree generally drafts the offer. If that party does not specify the method of acceptance, and also does not reply to a submitted offer it risks the serious possibility of being bound by numerous contracts without having made explicit approval. And even if a stipulation as to the method of acceptance is made in the email or on the website, if the offeree drafted these terms and accepts by another method, the offeree can be viewed as having waived that specified method. A court will look to whether the offeror has been prejudiced the changed method of acceptance [71].

Acceptance by Conduct

The website can accept an offer, 'on behalf' of its owner, by certain conduct. For example, a viewer can click a button on a web page to send a request for some software and the software may then begin to download to the viewer's computer. This positive action can be viewed as an acceptance of the offer made by the viewer without the owner (or offeree) having expressly assented to the offer itself [72]. However, the courts have usually applied an 'objective' test to interpret the actions of the offeree. Such conduct will therefore be regarded only as acceptance if the reasonable person would be induced into believing that the offeree has unequivocally accepted the offer. In this sense completing an order by downloading a file to the consumer is likely to be construed as acceptance by the reasonable person. In Northern Foods Plc. V. Focal Foods Ltd [73] in which Focal supplied goods to Northern and later disputed that such supply deemed their acceptance of the loss-making price for the goods. The Court of Appeal held that a letter sent by Focal to Northern was accepted by the conduct of supplying the goods. Owners must therefore carefully construct their websites [74].

The owner must ensure that the website is able to validate the terms of the offer from the viewer. Generally, this is achieved by the website having a contract page that the viewer is encouraged to submit, or offer, by clicking a link or button. On receiving this notification, it will automatically start the downloading of digital material to the viewer. But the automation of this acknowledgement of receipt and acceptance places a burden on the site owner and he must ensure that the terms of the offer submitted are the terms of the offer expected. It is essential that a viewer cannot submit an offer with an adjustment to the terms, say lowering the price. This would amount to a counter-offer which may, unwittingly, be accepted by downloading the requested material to the viewer [75].

Digital Signatures [76]

In the simplest terms a digital signature is a familiar way of an individual making apparent on paper that he or she is who they say they are and that, often, they agree to be bound by whatever they are signing below. Thus, the purpose of a digital signature is to provide assurance about the origin of the message and the integrity of the message contents. In that way, the signature generally provides 'authentication' of the signatory. It is also an indication of 'acceptance' or 'consent' to a legally binding commitment. Indeed, sometimes individuals decide that for a particular contract, a signature will be their agreed sign of acceptance [77].

Electronic signatures are possible because technology enables the sender of an electronic document to create an electronic signature of that document exists, and is in use. This technology uses the mathematics of cryptography to produce a 'signature' which is functionally equivalent to a handwritten signature. In non-technical terms, electronic signature technologies work by linking the information content of a document to some unique information which only the signatory possess. This information might be the form of:

[70] Supra.

[71] See generally, Robo Phone Facilities v. Blank (1966) 1 WLR 1428.

[72] See Brogden v. Metropolitan Rly (1877) 2 App. Cas. 666.

[73] (2001) EWCA Civ 1262, (2001) All ER (D) 306 (Jul).

[74] This 'objective' test can create difficulties for the operator and designer of a web page. Many digital consumers using the World Wide Web for commerce view it like a shop, only a 'virtual' one. They may therefore be surprised and not aware, that to acquire a product they must not only provide payment but also then consent to a licence. Their more usual tangible purchases involve simply paying in exchange for receiving the product. On this basis it is difficult to fathom how a court could objectively construe as acceptance the clicking of a button that denotes downloading the product rather than accepting the licence.

[75] A counter-offer cancels the original offer. See Orient Bank (Nig) Plc. V. Bilaante International Ltd. (1997) 8 NWLR (Pt. 515) [. 37; Major-General George Innih (RTD) & Ors. V. Ferudo Agro and Consortium Ltd. (1990) 5 NWLR (Pt. 152) 604, but cf. Hyde v. Wrench (1840) 3 Beav. 334.

[76] Electronic Signature is a computer data compilation of any symbol or series of symbols, executed, adopted, or authorized by an individual to be the legally binding equivalent of the individual's handwritten signature.

[77] See generally U.S. Pandey & Saurabh Shukla, *E-Commerce and Mobile Commerce Technologies*, New Delhi-India: S. Chand & Company Ltd. 2011; Chris Reed, *Internet Law: Text and Materials*, (2nd Ed.), New Delhi-India: Universal Law Publishing Co. 2010 and Clive Gringras, Op. cit. p. 38.

An encryption key, a large binary number of 56 or more digits. Because humans cannot easily remember such numbers, nor key them in accurately, the encryption key will normally be stored on an information storage device such as a smart card, a memory stick or the hard disk of the signatory's computer.

Biometric data, such as the signatory's thumbprint, voiceprint, or retina print. Systems also exist which capture the signatory's handwritten signature metrics [78].

In a situation where in order to enforce the signatory's legal obligations, the recipient of the document needs to prove the signature, he will do so by producing extrinsic evidence that as the signature key or biometric data did in fact originate from the purported signature, and (is) that the linking of that information to the document could not have been effected or subsequently altered by a third party. This is the same process as is used to authenticate a handwritten signature where it is disputed [79].

Because the signature key or biometric data needs to be kept secret, to prevent third parties from producing messages which are apparently signed by the signatory, the signature information is attached to the message by means of asymmetric cryptography which uses both a public and a private key messages signed with the private key can be validated with the public key, but the public key cannot be used to create a signature for a new message. Thus, in order to check the validity of an electronic signature, the recipient needs to know both the public key of the signatory and the encryption system used to form the signature [80].

If the parties have not had previous dealings, however, the recipient will have no knowledge whether the public key does in fact correspond to the purported identity of the signatory. This is where the ID Certificate [81] comes in. it contains:

A copy of the public key; and a statement that the issuer of the certificate has checked the identity of the signatory, that the signatory does in fact possess the signature data which corresponds to the public key, and that the issuer has checked that the public key validates the identified person's electronic signature.

Thus, where an electronic signature is made on a document, the accompanying ID certificate provides evidence from an independent third party that the person named in the certificate did in fact have access to the unique signature data, so long as the public key included in the certificate validates the signature. In the absence of evidence from the alleged signatory that some third party 'forged' his signature, a court should be satisfied by this evidence that the purported signatory was responsible for the electronically signed document [82].

Electronic signatures are likely to be used for a wide range of transactions which have legal consequences, including:

The formation of contracts transactions where the recipient of the communication is required to identify its customer, e.g. funds transfers to which money laundering controls apply; and

The provision of legally required information to government agencies where there may be a need to ensure that the information source is correct, or more commonly where there are penalties for supplying incorrect information, e.g. on tax returns.

Electronic signatures are also likely to be required for identification purposes where the user is requesting information which should not be released to third parties, such as information about the user's bank account [83].

When a message with digital signature is transmitted and received, the following parties are involved.

- The signer who signs the document;
- The verifier who receives the signed document and verifies the signature;
- The arbitrator who arbitrates any disputes between the signer and the verifier if there is a disagreement on the validity of the digital signature.

Web-Wrap Consideration

It is common that to enter a website a person must click a link labeled, 'I agree to the terms above'. These terms are generally divided into two sections, while the top section expresses the intellectual property rights that the site owner licenses to viewers; the bottom section attempts to exclude liability for any damage caused by the site. This work will not address the terms of these contracts, but merely whether there is consideration for the licence [84].

[78] Ibid.
[79] Ibid.
[80] For a discussion of electronic signature technologies, including simple explanations of their cryptographic basis – See Reed 'What is a Signature?' *The Journal of Information, Law and Technology (JILT)* 2000 (3).
[81] Digital Certificates is an application in which a certification authority signs a special message, containing the name of user and the users public key in such a way that anyone can verify that the message was signed by no one other than the centralized authority. The certificate also has the algorithms used and their parameters.
[82] Chris Reed, Op. cit.
[83] Ibid.
[84] Ibid.

If a web-wrap contract is properly constructed it seems likely that there is consideration to form a binding contract with the viewer. What the developer of the website must attempt to create is a set of mutual promises that will form the consideration of the contract. One method of achieving this is to actually prevent a viewer who does not click the 'I Agree' link or icon from entering the site itself. Promising the viewer access to the site if the 'I Agree' link is selected then forms one of the promises to bind the contract. The other promise must come from the viewer. This, of course, is to promise to abide by the terms of licence. This prevention can then be classed as a promise to allow the viewer into the website. If he agrees to the terms on the screen such a legally robust suggestion would have no commercial support unless the site was very worried about exposing itself to liability. However, many sites may well decide it is better to run the risk of there being no valid contract than risk losing an annoyed visitor to a competing site [85].

Intention

The fourth and final ingredient to create a binding contract is an intention to create legal relations. The reason that this is a factor in resolving a contractual issue over the Internet is that often only one human involved. When a person makes an agreement with a website, the site accepts or rejects the communication by the person according to a computer programme being run at the time. A human does not sit on the server side of the website. This raises the issue of how the contract can be formed without this direct intention. It is not complicated, nor unique to the Internet, but is a factor which advisers should not overlook since bugs in this programme will not negate the owner's intention [86].

In Thornton v. Shoe Lane Parking [87] Mr. Thornton accepted a contract by driving a car into a car park. In that case, Lord Denning stated that the automatic reaction of the car park turning a light from red to green and thrusting a ticket was enough to create a contract [88]. All the ingredients were present. It is of no legal consequence that the contract was physically completed by a machine. The court looks objectively to whether a contract can be said to have been made or has the user been induced reasonably to believe that a contract has being made or offered? In comparison, it is of no legal consequence that a computer programme completes the contract over the Internet since many contracts are 'made' with machines. However, that a computer programme is being relied upon, however, can be of commercial significance to its owner [89].

[85] Ibid.
[86] Ibid.
[87] (1971) 2 Q.B. 163.
[88] At p. 169.
[89] Clive Gringrass, Op. cit.

It is usual, that web-wrap contracts and automated email contracts use an express agreement. If, as a result of a bug [90] in the contracting programme, the viewer's offer is accepted in error, the court will presume that there was the requisite intention. The offeror has the heavy burden to prove that there was no intention to have a legal consequence [91]. The subjective opinion of, say, the owner of the website is of little consequence to the court [92], unless the viewer knew of the lack of intention. Thus, owners of websites who seek to use them for forming contracts should be aware that an error in their automated programme may be of great financial consequence.

Legal Requirements for E-Contract

In order to gain acceptance within the business circle and for people to embrace and have confidence in e-contract, there are certain legal requirements that must be satisfied. These requirements include.

- **Authenticity:** This is concerned with the sources or origin of a communication. Where is it from? Is it genuine or a forgery? Note that every party to an e-contract must have confidence in the authenticity of the message he received. If a party fails to verify the other party identity; and a fraud is perpetrated, such communication that cannot be authenticated in a tangible form may not be used as evidence in a court room [93].
- **Integrity:** Integrity is concerned with the accuracy and completeness of the communication. Both senders and receivers of electronic communications must be able to tell – is the message sent identical to the message received; is the message complete or has something been lost in transmission; or has the message been altered in anyway either in transmission or in storage? However, messages sent over the internet pass through many routing stations and packet switching nodes. Hence, there are many opportunities for messages to be altered along the way to their final destination [94].

Non-Repudiation

Non repudiation is concerned with holding the sender to the communication he or she sent. The sender should not be able to deny having sent the communication if he or she did, in fact, send it, or to claim that the contents of the communication as received are not the same as what the sender sent. If in fact, they are what was sent when a contract is in dispute, the party relying on it must be able to prove that the other side actually agreed to the deal [95].

[90] Also called 'virus' in some quarters.
[91] See Edwards v. Skyways Ltd. (1964) 1 WLR 349 at 355.
[92] See Smith v. Hughes (1971) LR 6 QB 597.
[93] Electronic contracts and digital signature http://www.corbinball.com/at/ at Dec 25 2014
[94] ibid
[95] Ibid.

CONCLUSION

No doubt e-commerce has brought so many changes in conducting business transaction, though the traditional common law framework and principles of contract may not be directly applicable to e-commerce. The special nature of internet contract has made most of the common law rules applicable to commercial contracts in applicable to such contracts. Therefore the issues and challenges associated with e-commerce is a fresh reality, this challenges should not be seen as a reason not to embrace the trend.