

**E-COMMERCE IN NIGERIA: LIABILITY FOR LOSS OR DAMAGE TO GOODS SUPPLIED BY A SELLER PURSUANT TO AN ELECTRONIC CONTRACT\***

**Abstract**

*This paper examines the concept of risk and transfer of risk in a sale of goods contract where the contract is entered into electronically. To achieve the aim of this paper, the doctrinal method of research was adopted involving the retrieval of primary and secondary materials relevant to the subject matter in question, particularly the Sale of Goods Act (SOGA) 1893. In the course of this study, it was discovered that the principles on transfer of risk, as highlighted in the SOGA 1893, are applicable to electronic contracts and, in the absence of an Electronic Transaction Act in Nigeria, as well as the failure or neglect of the Federal Competition and Consumer Protection Act (FCCP) 2018 making specific provisions for consumers who transact online, consumers may be at a loss as to how to enforce the terms of the contract. Such consumers would have to fall back on common law and equitable principles as embodied in decided cases. Based on the above findings, the paper recommends the amendment of the SOGA, with a section included to incorporate other statutes, including the FCCA 2018, by reference.*

**Keywords:** Electronic Commerce, Liability, Goods, Electronic Contract, Risk

**1. Introduction**

At any stage of the contract, the subject matter of the contract could be damaged, lost or stolen. In some circumstances, this may not be due to the fault of the parties. However, it is imperative that the party to bear the risk for the loss or damage should be determined for the purpose of ascribing liability. Where the parties themselves have expressly made provision for this in their contract, it is not likely that there would be much controversy. Dispute may however arise where the contract is silent on this issue, and where there is no trade usage to rely on for the purpose of determining which party should be liable, recourse would be had to the applicable statute or international convention depending on whether or not the transaction is one in respect of which all its elements occur within one jurisdiction or whether it involves some cross-border elements. Usually, the transfer of risk goes with the transfer of ownership. However, parties to a contract may stipulate, in their agreement, other times for the transfer of risk, and where such is the case, the intention of the parties must be clearly and precisely stated, otherwise the issue of transfer of risk would be determined by the *lex contractus*, law applicable to the agreement<sup>1</sup>. Similarly, the parties themselves may, by the contract, expressly exclude the application of certain statutes or convention and opt for another law as the law applicable to their contract. Liability for loss or damage could be assigned, under the contract, to the seller, buyer or carrier. This of course is in line with the principle of freedom of contract.

A lot of online vendors utilize the services of companies offering courier/delivery services like Fedex, DHL, UPS, etc. in getting goods to their buyers. In some cases, particularly for large quantities across borders, shipping may be involved. Some shipping companies make arrangements to protect themselves from liability by insuring their ship and its cargo. Loss or damage to goods could occur at any time before the goods are handed over to the carrier, after they are handed over or before they are physically handed over to the buyer. The question of which of the foregoing persons should bear the risk depends on the circumstances of each case, particularly the terms of the contract. In the case of the seller and the carrier, a shipping contract or destination contract may be entered to. In the case of a shipping contract, the contract may require that the goods may be picked from the seller's place of business or a place designated by the seller such as a factory or warehouse<sup>2</sup>. For destination contracts, the seller agrees to retain liability until the goods are delivered to the buyer, and until the goods are delivered to the buyer or to a carrier designated by the buyer, the seller bears the risk of loss or damage to the goods. There is also the carrier liability contract where the carrier assumes liability for delay, loss, damage to the goods until they are delivered but the carriers' liability can be excluded or reduced if the shipper, which could be either the seller or the buyer, failed to make available to the carrier all relevant information that would enable the carrier to take appropriate measures to protect the goods being shipped, or if the seller failed to take cognizance of warnings from the carrier about how to package the goods in order to reduce the probability for damage<sup>3</sup> particularly in the

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<sup>1</sup>Berlingher, D. 'The Effects of the International Contract for Sale of Goods' (2017) 19 (33) *Journal of Legal Studies* 98.

<sup>2</sup>Shaw, M 'Who Bears the Risk of Loss or Damage in the Sale of Goods?' (Legal Match, 16 April 2019) F.O.B (Free on Board contracts) <<https://www.legalmatch.com/law-library/article/risk-of-loss-in-the-sale-of-goods.html>>accessed 20 April, 2020

<sup>3</sup>Shaw (n 2)

case of goods that are very fragile<sup>4</sup>. The risk of loss or damage to goods also arises where goods are transported by land<sup>5</sup>.

This paper examines the concept of risk and transfer of risk in a sale of goods where the contract is entered into electronically with a view to ascertaining whether or not the principles on transfer of risk, as highlighted in the Sale of Goods Act 1893, are applicable to such electronic contracts. The advent of the internet has revolutionised the way and manner business is now conducted, particularly with the emergence of online platforms like Amazon, eBay, Jumia, Konga, etc. where goods are bought and sold and which are then shipped to the buyers' destination. The issue raised in this paper is whether the use of the internet as a medium of entering into contracts has, in any way, whittled down the traditional concept of the transfer of risk as stipulated in the Sale of Goods Act 1893, particularly in the absence of any specific electronic transaction law in Nigeria.

## 2. Conceptual Analysis

### The Internet and E-Commerce

The internet today, as pointed out by Emeka and Nyeche is a worldwide entity whose nature cannot be easily or simply defined<sup>6</sup>. Jubrin and Musa have also observed that to many, the internet is a large computer network linking together millions of smaller computers at numerous sites in various countries belonging to thousands of business, government, research, educational and other organisations<sup>7</sup>. *Kahn and Cerf* align with the definition of internet, as proffered by the Federal Networking Council (FNC), as referring to;

- The global information system that;
- (i) Is logically linked together by a globally unique address space based on the Internet Protocol (IP) or its subsequent extensions/follow-ons;
  - (ii) Is able to support communications using the Transmission Control Protocol/Internet Protocol (TCP/IP) suite or its subsequent extensions/follow-ons, and/or other IP-compatible protocols; and
  - (iii) Provides, uses or makes accessible, either publicly or privately, high level services layered on the communications and related infrastructure described herein.<sup>8</sup>

The internet is the medium utilized for e-commerce as can be seen from the various definitions of e-commerce. Kareem, Owomoyela and Oyebamiji, have referred to E-Commerce as the use of communications technology, particularly the internet, to buy, sell and market goods and services to customers<sup>9</sup>, while some other authors like Adedara and Sobowale and Folorunsho<sup>10</sup>, have opined that e-commerce is the employment of computer networks to conduct business; basically the buying and marketing of goods and services, using electronic means, with one's suppliers, customers, and for competitors. While the scope of e-commerce goes beyond merely buying and selling on the internet, as it extends to electronic banking, but for the purpose of this paper, the use of the term e-commerce or electronic transaction or contract, would be narrowed down to sale of goods on the internet

<sup>4</sup>Such as electronic gadgets like flat screen television sets

<sup>5</sup>Clark, B. 'Damage to goods in transit – who is responsible for the loss?' (Rigby Cooke, 12 June, 2018) <<https://www.rigbycooke.com.au/damage-to-goods-in-transit-who-is-responsible-for-the-loss/>>accessed 20 April, 2020

<sup>6</sup>Emeka, U.J. and Nyeche, O.S. 'Impact of Internet Usage on the Academic Performance of Undergraduates Students: A case study of the University of Abuja, Nigeria' *International Journal of Scientific & Engineering Research*. (2016) 7(10), cited in Jubrin, M. A. and Musa, M. N. 'Effects of Internet on the Academic Performance of Tertiary Institutions in Niger State, Nigeria', (2017) 2(2) *International Journal of Education Learning and Training* 58

<sup>7</sup>Jubrin, M. A. and Musa, M. N. 'Effects of Internet on the Academic Performance of Tertiary Institutions in Niger State, Nigeria', (2017) 2(2) *International Journal of Education Learning and Training* 58

<sup>8</sup>Kahn, R. E. and Cerf, V. G. 'What is the Internet and What makes it Work' (1999) <[https://www.cnri.reston.va.us/what\\_is\\_internet.html](https://www.cnri.reston.va.us/what_is_internet.html)> accessed 20 April, 2020

<sup>9</sup>Kareem, T. S., S K. Owomoyela, S. K. and Oyebamiji, F. F. 'Electronic Commerce and Business Performance: An Empirical Investigation of Business Organisations in Nigeria' (2014) 4 No. 8 *International Journal of Academic Research in Business and Social Sciences* 216

<sup>10</sup>Adedara, O. G. and Sobowale, A. A. and Folorunsho, S. 'Promoting Electronic Commerce in Nigeria through Electronic Learning' (2014)5(4) *Computing, Information Systems and Allied Research Journal* 13

### **Sale of Goods, Consumer and Electronic Contract**

Sale of goods is defined under section 2 of the Sale of Goods Act 1893<sup>11</sup> as; ‘A contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration called the price’<sup>12</sup>. This definition, which was adopted by Nwocha<sup>13</sup>, makes it clear that a sale of goods involves a contract, therefore, it would be correct to state that the basic elements of a contract; offer, acceptance, consideration, intention to create legal relationship, contractual capacity and legality of object, are also applicable to sale of goods with the additional element of the subject matter involved being goods and the consideration given in exchange for the goods being money.

‘Goods’ happen to be one of the basic characteristics of a sale of goods contract<sup>14</sup> as gleaned from Section 2 of the Sale of Goods Act 1893<sup>15</sup> wherein sale of goods is defined as ‘A contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration called the price’<sup>16</sup>. A definition of ‘goods’ is also provided in the Sale of Goods Act to be ‘all chattels personal other than things in action and money, emblements, industrial growing crops and things attached to or forming part of the land which are agreed to be severed before sale or under a contract of sale’<sup>17</sup>. A definition of ‘goods’, with a legal twist to it, is provided in the Black’s Law Dictionary, as any ‘tangible or movable personal property other than money especially articles of trade or items of merchandise’<sup>18</sup>. The Definition of goods, as highlighted in Black’s Law Dictionary is a simplified version of the definition in the Sale of Goods Act and the Sale of Goods Law<sup>19</sup> that can be easily understood even by a lay person<sup>20</sup>. In addition, the definitions in Black’s Law Dictionary’s draws attention to the fact that goods are articles of trade and merchandise which, of course, is the essence of sale of goods and form the bulk of commercial activities carried out on the internet, hence more in tandem with the theme of this paper. The Sale of Goods Act also classifies goods into specific goods and unascertained goods. Specific goods are those goods identified and agreed upon at the time a contract of sale is made<sup>21</sup>. A ‘seller’ is a person who sells or agrees to sell goods<sup>22</sup>, while ‘buyer’ means a person who buys or agrees to buy goods<sup>23</sup>.

There appears to be no uniform definition of the expression ‘consumer’. The term is defined in Black’s Law Dictionary as a person who buys goods or services for personal, family, or household use, with no intention of

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<sup>11</sup>SOGA 1893, s 2. This Act is one of the received English laws applicable to Nigeria by virtue of the fact that it is a statute of general application in force in England as at 1<sup>st</sup> January, 1900. Though initially made applicable to the whole of Nigeria, by 1959 it ceased to be applicable to the Western Region of Nigeria after the region enacted their Sale of Goods Law which is practically on all fours with the 1893 Act. Thus, the states that formerly made up the Western Region, such as Edo and Delta States, have their own Sale of Goods Law, while the SOGA of 1893 continue to apply to states that made up the former Northern and Eastern Region of Nigeria

<sup>12</sup>This Act has however been repealed in England where the current SOGA is the one of 1979 as amended by the Supply of Goods and Services Act 1982 and the above highlighted definition is contained in S 2(1) of the 1979 Act

<sup>13</sup>Nwocha (n 14) M. E. ‘Law of Sale of Goods in Nigeria: Interrogating Key Elements of the Sale of Goods Act Relating to the Right of Parties to a Sale of Goods Contract’ (2018) 9 *Beijing Law Review* 202

<sup>14</sup> The other characteristic being the money consideration called the price. See the Sale of Goods Act s 2.

<sup>15</sup> This Act is one of the received English laws applicable to Nigeria by virtue of the fact that it was a statute of general application in force in England as at 1<sup>st</sup> January, 1900. Though initially made applicable to the whole of Nigeria, by 1959 it ceased to be applicable to the Western Region of Nigeria after the region enacted their Sale of Goods Law which is practically on all fours with the 1893 Act. Thus, the states that formerly made up the Western Region, such as Edo and Delta States, have their own Sale of Goods Law, while the Sale of Goods Act of 1893 continue to apply to states that made up the former Northern and Eastern Region of Nigeria

<sup>16</sup> This Act has however been repealed in England where the current Sale of Goods Act is the one of 1979 as amended by the Supply of Goods and Services Act 1982 and the above highlighted definition is contained in the Sale of Goods Act 1979 s 2(1) Act, and the Sale of Goods Law Cap 51 Laws of Delta State Nigeria s 3(1)

<sup>17</sup> Sale of Goods Act 1893 s 62(1), see also the Sale of Goods Law Delta State, s 2(1)

<sup>18</sup> Garner, B. A. *Black’s Law Dictionary* (9th edn, West Publishing 2009) 762

<sup>19</sup> Hereinafter referred to as ‘SOGA’ and ‘SOGL’ respectively

<sup>20</sup> Jessah, J. E. ‘Electronic Commerce: The Validity of Internet Sale of Goods Contract under the Current Nigerian Law’ (2019)1(2) *International Review of Law and Jurisprudence* 68

<sup>21</sup> SOGA 1893 s 62

<sup>22</sup> SOGA 1893 s 62

<sup>23</sup> SOGA 1893 s 62

resale; a natural person who uses products for personal rather than business purposes<sup>24</sup>. A consumer is defined as an individual acting for purposes that are wholly or mainly outside that individual's trade, business, craft, or profession<sup>25</sup>. This definition, however, does not apply to a person so as to confer on him the protection conferred on a consumer under the Act, that is, where the goods are second hand goods and sold at public auction or where individuals have the opportunity of attending the sale in person<sup>26</sup>.

The repealed Nigerian Consumer Protection Council Act 1992 defines a consumer as an individual, who purchases, uses, maintains or disposes of products or services<sup>27</sup>. This definition, as noted by Mmadu, has attracted criticism and has been described as an aberration in so far as it uses such words as 'maintains and disposes' and by that clearly intends purports that even after the purchase and usage of a product or a service, a person can still be described as a consumer<sup>28</sup>. On the other hand, the recently enacted Federal Competition and Consumer Protection Act 2018 defines a consumer as any person who purchases goods otherwise than for the purposes of re-sale but does not include a person who purchases goods for the purpose of using them in the production or manufacture of any other goods or articles for sale; or any person to whom services are rendered<sup>29</sup>. On his part, Mmadu has defined a consumer to mean one who buys goods or services for his domestic or personal or household use, and went on to make it clear that in this sense of a consumer, a product intended for a commercial, business or trade is not within the purview of consumer regulation sense<sup>30</sup>. Therefore, where a seller, in the course of business, sells goods that are ordinarily bought for private use or consumption to a buyer who wants them for his own private purposes, it is regarded as a consumer sale or private sale, the regulations applicable to consumer transaction are different from those of a purely commercial transaction involving two or more commercial entities<sup>31</sup>.

In 2018, the Consumer Protection Council of Nigeria came up with data which revealed that 70% of Nigerians are skeptical about shopping online<sup>32</sup> which further buttressed the fact that the Consumer Protection Council (CPC) Act 1992 was long overdue for amendment<sup>33</sup>. In spite of repealing the CPC Act 1992, as well as some other giant stride provisions, the Federal Competition and Consumer Protection Act 2018 did not make any specific provision for the protection of consumers who enter into contract online.

A contract has been defined by Salmond as an agreement creating and defining obligation between two or more persons by which rights are acquired by one or more to acts or forbearance on the part of others<sup>34</sup>. Another English scholarly definition is to the effect that 'every agreement and promise enforceable at law is a contract'<sup>35</sup> while Anson sees contract as 'a legally binding agreement between two or more persons by which rights are acquired by one or more to acts or forbearance on the parts of others'<sup>36</sup>. Willis, an American scholar, has defined contract as a legal obligation created by law because of a promise or set of promises<sup>37</sup>. In the Black's Law Dictionary<sup>38</sup>, contract is defined as an agreement between two or more parties which creates obligations that are enforceable or otherwise recognizable at law. Another definition, which is not so much different from the one proffered above, is that of Sagay who states that a contract is an agreement which the law will enforce or recognize as affecting the

<sup>24</sup> Garner (n 20)

<sup>25</sup> Chapter 1 Consumer Rights Act 2015 UK

<sup>26</sup> Consumer Rights Act 2015 UK (n 27)

<sup>27</sup> S 32 Consumer Protection Council Act 1992 CAP C25 Laws of the Federation of Nigeria 2004

<sup>28</sup> Mmadu, R. A. 'Application of Implied Terms in the Sales of Goods act to Consumer Transactions in Nigeria: Between Consumers Protection and Safeguarding the Sanctity of Contracts' *Journal of Business Law and Ethics* (2014) 2(2) 88

<sup>29</sup> S. 167(1) Federal Competition and Consumer Protection Act 2018

<sup>30</sup> Mmadu (n 30) 71

<sup>31</sup> Ibid.

<sup>32</sup> Ugwuanyi, S. 'Over 70% of Nigerians are Afraid of Shopping Online' (*Daily Post*, 16 March 2018)

<<https://dailypost.ng/2018/03/16/70-nigerians-afraid-shopping-online-cpc/> accessed on 12 May 2018

<sup>33</sup> Jessah, J. E. 'Electronic Commerce: An Appraisal of the Legal Protection of Online Consumers in Nigeria, Singapore and China' (2019) 1(1) *International Journal of Human Development, Arts, Science and Engineering* 348

<sup>34</sup> Salmond, J. W. and Winfield, J. *Salmond Principles of the Law of Contract* (2<sup>nd</sup> edn, London Sweet and Maxwell 1927) 1

<sup>35</sup> Winfield, H. P. *Pollock's Principles of Contract* (13<sup>th</sup> edn Stevens & Sons 1950)

<sup>36</sup> Beatson, J., Burrows, A. and Cartwright, J. *Anson on Contract* (30<sup>th</sup> edn, Oxford University Press 2016)

<sup>37</sup> Willis, H. E. *Introduction to Anglo-American Law* cited in Willis H. E., *Rational of the Law of Contract*, *Indiana Law Journal* (1936) 11(3) 228

<sup>38</sup> Garner (n 20) 365

legal obligations and rights of the parties<sup>39</sup>. At common law, contracts are usually separated into two classes; simple contracts and formal contracts (i.e. contracts under seal)<sup>40</sup>. In the case of a formal contract, i.e. contracts under seal, it must be in written form and it must be by deed in order for it to be valid. By statute, certain classes of contract must be by deed, such as, contracts involving conveyance of land and contracts made by companies<sup>41</sup>. A major feature of a contract under seal is that it is one of the exceptions to the principle of law that states that only a party who furnished consideration can sue to impose a contract<sup>42</sup>. Thus, even in the absence of consideration, a contract under seal can be enforced. A simple contract, on the other hand, could either be oral<sup>43</sup>, or in writing and requires proof of consideration in order to enforce same<sup>44</sup>. Section 3 SOGA 1893 provides that a contract of sale may be either oral, in writing, irrespective of whether it carries a seal or not, or partly in oral form and partly in writing. A contract may even be implied from the conduct of the parties. From the above provision, it is therefore clear that a contract of sale of goods can take any form recognised in the general law of contract, hence there is no strict format required to be adopted when entering into a contract of sale<sup>45</sup>.

With the advent of the internet, another category of contract has emerged, that is, online or electronic contracts. Electronic contract is any kind of contract formed in the course of e-commerce by the interaction of two or more individuals using electronic means, such as e-mail, the interaction of an individual with an electronic agent, such as a computer programme, or the interaction of at least two electronic agents that are programmed to recognize the existence of a contract<sup>46</sup>. It is the implementation of all or some commercial transactions in goods and services between business and other business or between business and consumer by using information technology and communication<sup>47</sup>. The question arising from the above, against the backdrop of the traditional types of contract, is whether any particular format is required to be followed when it comes to buying and selling on the internet, and whether the contract must be in writing? The nature of the internet makes it obvious that activities or transactions that take place thereon leave are recorded or documented, hence albeit in electronic form which may be reproduced or printed in paper form. Therefore, such contract could be described as written contracts. The question of form of electronic contracts is usually tied to the question of validity.

### **3. The Validity of Electronic Contract**

The question of validity or otherwise, of an electronic contract is determined by law. Most countries have enacted specific Electronic Transaction or Electronic Commerce Laws, in line with the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Electronic Commerce 1996 which member states are supposed to use as a guide when enacting their domestic law on e-commerce<sup>48</sup>. In the various Electronic Transaction Laws of these countries, it is clearly stated that a contract otherwise valid is not to be denied validity and rendered unenforceable, merely because it is in an electronic form<sup>49</sup>. Therefore, if all the requirements of a valid contract are satisfied, such as offer, acceptance, consideration, intention to create legal relationship, legality of object and capacity of the parties, etc, irrespective of its electronic format, the contract would be valid. Unfortunately, Nigeria's Electronic Transaction Bill 2015, after many years in the National Assembly, and after having been passed by the Senate on in 2018 and awaiting presidential assent, appears to have been jettisoned only for the process to start afresh. The new draft Electronic Transaction Bill on 26 February 2020 scaled through

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<sup>39</sup> Sagay, I. *Nigerian Law of Contract* (2nd edn, Spectrum Books Limited 2000) 1

<sup>40</sup> See Adeogun A. A., Agomo, C. K., Akanki, E. O., Fogam, P.K. and Ipaye, A. R. 'Law of Contract' in *Commercial Law in Nigeria*, Akanki E.O. (ed.) (2<sup>nd</sup> edn, University of Lagos Press 2007) 2

<sup>41</sup> See the Real Property Act 1845 s 3 (a Statute of General Application), Property and Conveyancing Law Cap P Laws of Delta State 2006 s 77, and the Companies and Allied Matters Act Cap C24 LFN 2004 s 74

<sup>42</sup> Jessah, (n 22) 70

<sup>43</sup> Also called parol contract

<sup>44</sup> See the case of *Padachabasaya v. Joe Anyasi* [2010] All FWLR (Pt. 528) 839, where the Nigerian Supreme Court held that consideration is a basic necessary element for the existence of a valid contract

<sup>45</sup> Jessah (n 22) 71

<sup>46</sup> 'E-Contract Law and Legal Definition' <<https://definitions.uslegal.com/e/e-contracts/>> cited in B. Ezeigbo, 'E-Contracts. Essentials, Variety and Legal Issues' <<https://www.grin.com/document/427203>> accessed 29 January 2020.

<sup>47</sup> Al –Matlaqah, M. F. 'Electronic Commerce Contracts' (2006) 1 *Dar al Thaqaqa* 28 cited in Shnikat, M., Alzubi, A., Aljaber, M. and Alnsoor, A. 'The Legal; Framework of Electronic Contract in the Jordanian Legislation' (2017) 5(5) *Journal of Politics and Law Research* 48

<sup>48</sup> Articles 5, 6 and 7 UNCITRAL Model Law on Electronic Commerce 1996

<sup>49</sup> See Uniform Electronic Transactions Act United States of America s 7, Electronic Transactions Act 2001 British, Colombia (Canada) s 3, Electronic Transactions Act 2010 Singapore s 6, Electronic Transactions Act 2008 Ghana s 23, Electronic Communications and Transactions Act (ECTA) 2002 South Africa s 11

the second reading in the Nigerian Senate<sup>50</sup>. If the Bill of 2015 had become law, sections 3 and 26(2) would have conferred validity on electronic contracts. In the absence of an extant electronic transaction law in Nigeria, a party seeking to rely on such contract to enforce his right under the contract and ascribe liability to the other party would have to rely on section 84 of the Evidence Act 2011 which allows for the admissibility of electronic evidence/documents. Similarly, Section 93(2) of the Evidence Act 2011 provides that 'where a rule of evidence requires a signature, or provides for certain consequences if a document is not signed, an electronic signature satisfies that rule of law and avoids those consequences'. It has been pointed out that, by this provision, it is clear that an electronic signature is valid under Nigerian Law, but whether or not a contract to which an electronic signature is affixed is valid, would depend on the circumstances of each case<sup>51</sup>. Therefore, where the parties to the contract spell out the terms that govern their contract, including the issue of who to bear the risk of loss or damage to the goods the subject matter of the contract, notwithstanding that the contract was entered into electronically, such terms in the contract are valid and enforceable.

#### **4. The Transfer of Risk in Sale of Goods Contract under the Sale of Goods Act 1893**

The term 'risk' can be understood to mean the uncertainty of a result, happening, or loss, the chance of injury, damage, or loss especially the existence and extent of the possibility of harm<sup>52</sup>. It could also mean liability for injury, damage, or loss if it occurs. It is in this latter sense that the concept of risk, as used in this paper, must be understood<sup>53</sup>. The issue of transfer of risk would be examined in this segment from the perspective of the Sale of Goods Act 1893 and the Convention on International Sale of Goods. Transfer of risk, is usually tied to the transfer of property unless the parties express a contrary intention<sup>54</sup>. Sections 16, 17 and 18 of the SOGA deal with transfer of property as between seller and buyer, while section 20 provides for the transfer of risk. Property in goods would only be transferred where such goods are ascertained, that is to say, identified to the contract. The question of transfer of property depends on the intention of the parties as expressed or implied in their agreement, and in ascertaining such intention, the terms of the contract, the conduct of the parties and the circumstances of the case would be looked into. In the absence of any agreement to the contrary, Section 18 SOGA provides some rules for determining the intention of the parties. From the said rules, where the parties fail to expressly agree on the stage at which property is to be transferred to the buyer, before property would be deemed to have passed, the goods must be specific or ascertained goods, and they must be in a deliverable state, with nothing more left to be done for the purpose of ascertaining their price, while in the case of future or unascertained goods, the goods must have been unconditionally appropriated to the contract. Where the contract requires the seller to deliver the goods to the buyer or to a carrier for the purpose of taking them to the buyer, property is transferred when such delivery is made to either the seller or to the carrier<sup>55</sup>. But where the seller reserves the right of disposal of the goods, the property in the goods remains with him.

Section 20 of the SOGA provides thus;

Unless otherwise agreed, the goods remain at the Risk seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer, the goods are at the buyer's risk whether delivery has been made or not.

Provided that where delivery has been delayed through the fault of either buyer or seller the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault.

Provided also that nothing in this section shall affect the duties or liabilities of either seller or buyer as a bailee or custodian of the goods of the other party.

From the foregoing, it is worth pointing out that transfer of risk is not dependent on the delivery of the goods, rather on transfer of property<sup>56</sup>. Therefore, as long as the goods are in a deliverable state, it is immaterial whether

<sup>50</sup>Urowayino, J. 'Senate Moves to Legalise Electronic Transactions, Criminalise Online Fraud' (Vanguard, 27 February, 2020) <<https://www.vanguardngr.com/2020/02/senate-moves-to-legalize-electronic-transactions-criminalize-online-fraud/>>accessed 10 May 2020

<sup>51</sup>Jessah ( n 22) 72

<sup>52</sup> Garner (n 20) 1442

<sup>53</sup> Garner (n 20) 1442

<sup>54</sup> See SOGA 1893 s 20

<sup>55</sup> Ibid.

<sup>56</sup> SOGA s 29 deals with the time and place of delivery of the goods which could be either by the seller sending them to the buyer or the buyer taking delivery of them. In the absence of any agreement the place of delivery is usually the seller's place of business or residence if he has no place of business. Delivery must be done within a specific time, as agreed by the parties, or within a reasonable time if there is no such agreement, and if the goods are in the possession of a third party at the time of

they have in fact been delivered to the buyer. Thus, once the property in the goods has been transferred to the buyer, the risk is also transferred to him. But where there is delay in the delivery of the goods and such delay was caused by either the buyer or the seller, then the party who caused the delay will bear the risk of loss or damage to the goods for the period of delay.

Another angle worth exploring in electronic contracts of sale of goods, particularly as it relates to the issue of liability for loss or damage to goods, is the issue of exemption clause. Would such a clause exempting the seller from liability, even though property in the goods had not yet passed to the buyer, be valid?

### **5. The Exclusion or Limitation of Liability for Loss or Damage to Goods**

An exemption clause is a contractual provision stipulating that a party would not be liable for damages for which that party would otherwise have ordinarily been liable.<sup>57</sup> As pointed out by Okany, it is a commercial practice for a contract to contain express terms whereby the parties to the contract may limit or exclude liability for breach of contract or negligence arising while performing the contract<sup>58</sup>. Indeed, the liberty of the parties to do so is statutorily recognised under section 55 of the SOGA<sup>59</sup> and it is for this reason Atiyah, Adams and MacQueen expressed the view that at first there was nothing legally objectionable about such exemption clauses in contracts of sale of goods<sup>60</sup>. Interestingly, while many contracts contain exemption clauses, it does appear to be more commonly found in standard-form contracts<sup>61</sup>. One can therefore understand why Kanamugire and Chimuka, defined exemption clauses as terms which are normally incorporated into standard form contracts to exclude a duty or liability which the law would otherwise attach to such a person and they are not a modern creation having been historically used under Roman-Dutch law<sup>62</sup>.

In view of the fact that standard form contracts tend to favour one party, there is always the risk of contract of sale of goods in standard form becoming an adhesion contract.<sup>63</sup> In the light of the one-sided nature, usually in favour of the seller, there is the tendency of a standard form contract being abused in sale of goods. This is even more pertinent, having regard to the fact that a lot of internet-based sales of goods contract are more or less in standard form, with the term pre-drafted by the seller without any input from the buyer, and requiring the buyer to simply indicate his acceptance by clicking on the icon for acceptance. A classic example of such contracts is the so-called 'click-wrap' or 'shrink-wrap' contract commonly found in contracts for the sale of computer software. This practice has gradually been extended to contracts for the sale of other goods on the internet.

In view of the likelihood of gross abuse of the concept of standard form contracts in sale of goods, which provides an avenue for the seller to, in milder cases limit his liability, or in extreme cases completely exempt himself from liability, thus making the buyer to contract out his rights, including the rights implied in his favor by statute, the courts made several attempts, to checkmate these abuses by laying down some rules. One of such rules at common law is to the effect that in order for a seller to successfully rely on an exemption clause, he has the onus of establishing the following to the satisfaction of the court;

1. That the buyer signed the contract containing the exemption clause, or
2. That the clause in the contract containing the exemption of his liability was brought to the attention of the buyer.

Where the seller is able to establish that the seller signed the contract containing the exemption clause, the fact that the buyer did not read the document before signing, or read but did not understand it, would be immaterial. However, this rule is not without its exception for, as rightly pointed out by Atiyah, Adam and MacQueen<sup>64</sup>, an

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sale, until the third party notifies the buyer that he is in possession of the goods on the buyer's behalf, delivery would not be deemed to have taken place.

<sup>57</sup> Garner (n 20) 653

<sup>58</sup> Okany M. C., *Nigerian Commercial Law* (African First Publishers 1992) 367

<sup>59</sup> The SOGA 1979 s 55(1) and the SGL s 65(1)

<sup>60</sup> Atiyah P. S. and Adams, N. and MacQueen H., *The Sale of Goods*, (11<sup>th</sup> edn, Pearson Longman 2005) 224.

<sup>61</sup> A standard form contract is a usually pre-printed contract containing set clauses, used repeatedly by a business or within a particular industry with only slight additions or modifications to meet specific situations. See Garner (n. 20) 373

<sup>62</sup> Kanamugire, J. C. and Chimuka, T. V. 'The Current Status of Exemption Clauses in the South African Law of Contract' *Mediterranean Journal of Social Sciences* (2014) 5(9) 164

<sup>63</sup> An adhesion contract is a standard form contract prepared by one party, to be signed by another party in a weaker position, usually a consumer, who adheres to the contract with little or no choice about the terms. See Garner (n 20) 366.

<sup>64</sup> Atiyah, Adams and MacQueen (n 77) 225

exemption clause would not avail a seller, even where there is evidence that the buyer signed the contract containing same if;

1. The seller misrepresented the effect of the clause<sup>65</sup>,
2. The exemption clause was written on the reverse side of the contract in a foreign language<sup>66</sup>;
3. The buyer's attention was not drawn to the clause<sup>67</sup>,
4. The seller makes an express oral term which overrides the terms of the written agreement<sup>68</sup>.

In a situation where the buyer did not sign the contract containing an exemption clause, the seller may, notwithstanding the absence of the buyer's signature, successfully rely on the exemption clause if the seller is able to show that the buyer had a reasonable notice of the existence of the clause before making the contract in such a way as to show that he, the seller, intended for the clause to form an integral part of the contract<sup>69</sup>. Another rule laid down by the court is that once a contract has been made, an exemption clause cannot thereafter be unilaterally introduced into the contract<sup>70</sup>. In the same vein, where a document is not reasonably expected to have a contractual effect, an exemption clause in such a document, would not be a term of the contract. Thus, a receipt or ticket which is issued after a contract has been made is not reasonably expected to have contractual effect<sup>71</sup>. It is argued here that an exemption clause in such a ticket or receipt cannot be regarded as a term of the contract. It is further argued that this would also be the case in an electronic contract of sale of goods if the exemption clause is included in the computer print-out from a Point-of-Sale (POS) machine.

Another attempt by the court to water down the harsh effects of exemption clauses was the introduction of the doctrine of 'fundamental breach' which is to the effect that a party to a contract cannot rely on an exemption clause in the contract to escape liability for a fundamental breach or breach of a fundamental term.<sup>72</sup>

The doctrine of fundamental breach was distilled from the decision of the House of Lords in the case of *Suisse Atlantique Societe d'Armement Maritime S.A. v. N.W. Rotterdamsche Kolen Centrale*<sup>73</sup> and expanded in subsequent decisions of the English Court of Appeal. However, the potency of this doctrine appears to have been reduced, if not removed, in the subsequent decision of the House of Lords in the case of *Photo Productions Ltd v. Securicor Transport Ltd.*<sup>74</sup> wherein the House of Lords upheld an exemption clause covered both damages caused by negligent, as well as deliberate, acts. Likewise, in the Nigerian case of *Adigun v. Attorney General Oyo State*<sup>75</sup> the clause in question was contained in a receipt issued to and signed by the Respondent, and exempted the Appellant from liability for special and incidental or consequential damages, damages resulting from the carriage of the goods, all warranties express or implied and limited the appellant's liability for any damage to N100<sup>76</sup>. The Court of Appeal, as noted by Sagay<sup>77</sup> was divided on this subject. While one of the justices, Onalaja, was of the opinion that since the receipt containing the clause was considered by the parties as a mere receipt, the Appellant had failed to discharge the burden of establishing that the receipt was a contractual document at the formation of the contract, another justice, Edozien, opined that since the Respondent signed the receipt, he was bound by the freedom clause. Nonetheless, both justices reached the same conclusion that the exemption clause did not avail the appellant, but for different reasons. On the part of Onalaja, he gave his opinion by applying the principle in the case of *Chapelton v. Barry UDC*<sup>78</sup>, which relates to unsigned documents, whereas the receipt was

<sup>65</sup> *L'Estrange v. Graubcob* [1934]2 KB 394, where the purchaser signed a document containing several clauses in small print including an exemption clause, it was held that she was bound by the exemption clause even though she had not read it.

<sup>66</sup> *Curtis v. Chemical Cleaning Co. & Dyeing* [1951] 1 KB 807

<sup>67</sup> *Harvey v. Ventilatoren Fabrik Oelde GmbH* [1988] BTLR 138

<sup>68</sup> *Brikom Investments v. Carr* [1979] QB 467

<sup>69</sup> Atiyah, Adams and MacQueen (n 45) 225

<sup>70</sup> See *Olley v. Marlborough* [1949] 1 K B 532

<sup>71</sup> Dobson P., *Charlesworth's Business Law* (16<sup>th</sup> edn, Sweet & Maxwell 1997) 43

<sup>72</sup> Garner (n 20) 1008

<sup>73</sup> [1967] AC 361

<sup>74</sup> [1980] AC 827

<sup>75</sup> [1987] 1 NWLR (pt. 53) 678

<sup>76</sup> Though this case involved a contract of carriage of goods, i.e. delivery of parcel by courier service, it is nevertheless relevant to the theme of this paper as such services are usually relied on by online vendors to transmit goods to their buyers. Sometime, large corporations engaged in online retail sale even have their own delivery service requiring the sender to pay for the cost of delivery. Such contracts are most times separate from the contract of sale as the cost of delivery is calculated separate from the cost price for the goods.

<sup>77</sup> Sagay (n 41) 170

<sup>78</sup> [1940] 1 KB 532



signed, while Edozien premised his opinion on the fact that the breach in question was a fundamental breach and as such the Appellant could not bank on the exemption clause.

From the foregoing, the issue of exemption clause at common law appears to be nebulous and shrouded in some point of precariousness, as a great deal depends on the interpretation applied by the court, as evidenced in the case of *DHL, International (Nig.) Ltd. v. Mr. Udechukwu Chidi*<sup>79</sup> highlighted above. Statutory intervention has taken place in England with the first step being the enactment of the Supply of Goods (Implied Terms) Act 1973 which introduced the test of reasonableness later incorporated into section 55 of the Sale of Goods Act 1979 (UK). By virtue of the said section 55, a term that exempts a party from all or any of the provisions under sections 13, 14 and 15 dealing with implied conditions and warranties would not be enforceable if it is demonstrated that reliance on such exemption term would not be just and sane.

However, by virtue of the Unfair Contracts Terms Act 1977<sup>80</sup>, the test of reasonableness has now been modified to be that the exemption clause would not be enforceable if it is shown that incorporating the exemption clause into the contract would be unfair and unreasonable. The Unfair Contracts Terms Act 1977 applies to contracts of sale of goods, hire purchase, other contracts involving the transfer of possession or ownership of goods and contracts for the provision of goods and services, but does not apply to contracts of insurance and contracts for the conveyance of interests in solid ground. By the provisions of the Unfair Contract Terms Act, any contract clause which excludes or restricts liability for death or personal injury which results from negligence is absolutely void<sup>81</sup>, while contract terms aimed at excluding liability for other loss or damage arising from negligence, are void except they meet the requirement of reasonableness<sup>82</sup>.

In addition, the Sale of Goods Act 1979(UK), in line with the Unfair Contract Terms Act 1977, draws a distinction between where a buyer is dealing as a consumer and where he is not with regards to the exclusion of liability for implied conditions as to title, description, satisfactory quality, fitness for purpose, so that where the buyer is dealing as a consumer, liability for the above mentioned terms under sections 13-15 Sale of Goods Act cannot be excluded but where he is not dealing as a consumer, they can be excluded provided they meet the requirement of reasonableness. Under the Unfair Contract Terms Act 1977, a buyer is not dealing as a consumer if he purchases at an auction or by competitive tender, only he would be deemed to be buying as a consumer where he buys for private use or consumption and the marketer sells the goods in the course of his business to someone who is not buying or holding himself out as buying in the course of his business<sup>83</sup>.

It is canvassed here, in agreement with Sagay<sup>84</sup> that while the law in England, as regards exemption clauses, has been greatly impacted by statutory intervention, the situation in Nigeria remains strictly regulated by the common law. Therefore, the statutory position in England is clear, especially with regards to the test of reasonableness as well as the acknowledgement that not all buyers are commercial buyers, hence the demand for more protection for consumer buyers, in view of the fact that a large number of buyers of goods on the internet are consumer buyers, and likely to be exploited through the usage of standard form contracts containing exemption clauses. Similarly, in South Africa, there has been legislative intervention in the area of exemption clauses through the enactment of the Consumer Protection Act 2008 to deal with the unfairness which regularly stem from the inclusion of exemption clauses in contracts<sup>85</sup>. Alas, this statutory intervention is lacking in Nigeria. Mmadu has argued, persuasively, that the contractual principle of *consensus ad idem* must be the connecting thread between the seller and the buyer in their dealings in ensuring that terms outside the contemplation of the parties are not smuggled into the contract in interpreting their intentions, and that in the event of a seller or a buyer failing to properly streamline their undertakings; it would be most unjust to impute an intention advantageously to one party at the detriment of the other party under the so-called implied terms of contract<sup>86</sup>. The above argument, with due respect to the author, failed to take cognizance of the fact that the terms implied by statute in favour of one of the parties to the contract is aimed primarily at protecting the party in a weaker bargaining position from exploitation by the stronger party, as would be the case if the parties are left entirely to their own whim and caprice. This

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<sup>79</sup>[1994]2 NWLR (pt. 329) 720

<sup>80</sup>The Unfair Contract Terms Act 1977 s 3 and 11(1)

<sup>81</sup>The Unfair Contract Terms Act s 2(1)

<sup>82</sup>The Unfair Contract Terms Act s 2(2). See also P. Dobson (n 88) 48

<sup>83</sup>Unfair Contract Terms Act 1977 s 12. See also P. Dobson (n 88) 50

<sup>84</sup>Sagay (n 41)

<sup>85</sup>Kanamugire and Chimuka (n 79) 164

<sup>86</sup>Mmadu (n 30) 103

protection is even more pertinent in the case of a consumer buyer as the courts would be reluctant to imply such terms not contemplated where both parties are commercial entities on equal footing.

#### **6. The Draft Electronic Transaction Bill**

The objective of the Electronic Transactions Bill (ETB) is to, *inter alia*, provide a legal and regulatory framework for;

- (a) Conducting transactions using electronic and related media;
- (b) The protection of the rights of consumers and other parties in electronic transactions and services;
- (c) Facilitating electronic commerce in Nigeria<sup>87</sup>.

The Bill also provides that an electronic signature is valid<sup>88</sup>. In the same vein with regard to the validity of electronic contracts, section 26(2) of the Bill provides that the mere fact that an electronic document was used in a contract's formation would not deny such document validity or enforceability<sup>89</sup>. By virtue of this provision, therefore, an electronic contract would be recognized as valid and enforceable. Sections 3(3) and 7 of the Bill permit the admissibility of electronic documents. Unfortunately, the Bill is yet to be passed into law, having not been assented to before the end of tenure of the last administration which ended on 29<sup>th</sup> May 2019<sup>90</sup>. Now there is another Draft Electronic Transaction Bill pending before the National Assembly<sup>91</sup>.

#### **7. Conclusion and Recommendation**

The Electronic Transaction Bill did not provide for the transfer of risk, which presupposes that even if the Bill becomes law, the SOGA 1893 remains applicable for the purpose of determining the issue of who should bear the risk of loss or damage to goods. This implies that, in as much as the SOGA could be regarded as obsolete owing to its age, this may not be sufficient to call for its total removal as part of Nigeria's extant statutes. What is required is an amendment, with a section, included to incorporate other statutes, including the Electronic Transaction Act and the Federal Competition and Consumer Protection Act 2018, by reference. This would, in addition to some of the principles laid down in decided cases, provide some measure of protection for consumers who buy goods online. It is long overdue for Nigeria to have a specific law on Electronic Transaction, hence it has become imperative for the Electronic Transaction Bill to be passed into law. In the absence of an Electronic Transaction Act, there is no specific provision in Nigeria that expressly provide for the validity of electronic contract, though reliance could be placed on section 84 of the Evidence Act 2011, which makes electronic evidence admissible, for the purpose of proving the validity of such contracts. In the absence of an Electronic Transaction Act in Nigeria, as well as the failure or neglect of the Federal Competition and Consumer Protection Act 2018 making specific provisions for consumers who transact online, consumers may be at a loss as to how to enforce the terms of the contract. Such consumers would have to fall back on common law and equitable principles as embodied in decided cases.

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<sup>87</sup>Electronic Transaction Bill 2015 s 1

<sup>88</sup>ETB 2015 s 11

<sup>89</sup>Emphasis supplied

<sup>90</sup>Urowayino (n 52)

<sup>91</sup>Ibid.