

ELECTRONIC COMMERCE: THE VALIDITY OF INTERNET SALE OF GOODS CONTRACT UNDER THE CURRENT NIGERIAN LAW*

Abstract

This paper examines the concept of e-commerce and focuses on finding answers to the question whether an electronic sale of goods contract is valid under current Nigerian Law against the backdrop of the position under the common law, the Sale of Goods Act 1893, and its equivalent in some of the states in Nigeria. Some provisions of the Evidence Act 2011, the recently enacted Cybercrimes (Prohibition, Prevention, etc) Act 2015, as well as the Draft Electronic Transactions Bill, were highlighted with a view to ascertaining whether there is any statutory provision that clearly states that an electronic contract is valid. For the purpose of comparison, a brief reference is made to the Electronic Transactions laws of some African countries. The paper reached the conclusion that the Electronic Transaction Bill is yet to receive presidential assent and as such cannot be considered as a current law in force in Nigeria, the current applicable law in Nigeria on the validity of electronic contract in Nigeria, remains the common law, and it recommends that the Bill should be enacted into law, without further delay as it would give further clarity, and certainty, to the legal status of electronic contracts particularly with reference to sale of goods transactions on the internet.

Keywords: *Electronic Commerce, Internet Sale of Goods, Contract, Current Nigerian Law, Validity of*

1. Introduction

There is no gainsaying the fact that man has evolved from the ice age to the electronic age and, as was rightly pointed out by Abiloye¹, the electronic age is one where everyday transactions are conducted on the platform of electronic devices. The rapid advancement in the field of information and telecommunication technologies in the first decade of the 21st century, has been described as not only remarkable, but also responsible for the amazing transformation of some societies into information-based cultures². The internet is, of course, the driving force, the live wire of the electronic age, and as was opined by Mu'azu and Junaidu³, the integration of the internet into peoples' lives has transformed the way and manner they transact, communicate and even live to the extent that a person may even choose to stay home or indoors for days while communicating and transacting with the outside world. One of the most profound changes brought about by the use of the internet is the introduction of E-Commerce to the world of business.

Thus, one cannot but agree with Bieron and Ahmed⁴, who have put forward the argument that the internet has facilitated a new wave of economic growth and development and that business across the world, both big and small, have taken advantage of the scale, scope and access that the internet provides to reach new markets and consumers. Nigeria, as a country, is not left out of this global phenomenon. Although relative to other countries in the global arena, particularly the western countries, E-Commerce, as rightly posited by Chiemeke, Ewwiekpaefe, Okpo & Irhebude⁵, is still a relatively new concept to developing countries like Nigeria. In view of its population which, according to the United Nations, stands at 182 million, it can be argued that Nigeria has the most internet penetration and usage in Africa in the light of the report that sale of goods on the internet multiplied between 2011

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¹ O Abiloye, 'Impact of Supreme Court's Decision on Development of E-Commerce in Nigeria: Issues and Prospects' *The Guardian* (Nigeria, 5 May 2015) <<http://www.guardian.ng/features/impact-of-supreme-courts-decision-on-development-of-e-commerce>> accessed 23 April 2016

² C Adalikwu, 'Challenges and Opportunities in the Implementation of Electronic Commerce: The Case of Nigeria' (2012) 6 No. 46 *Journal of Business Management* 11495

³ A S Mu'azu and M Junaidu, 'The Relevance of Electronic Signatures in Electronic Transactions: An Analysis of Legal Framework', (2015) *Journal of Law, Policy and Globalisation* 5

⁴ B Bieron and U Ahmed, 'Regulating E-Commerce through International Policy: Understanding the International Trade Law Issues of E-Commerce' (2012) 46 *Journal of World Trade* 545

⁵ S C Chiemeke, A B Ewwiekpaefe, J A Okpo and M E Irhebude, 'Framework for Electronic Commerce Adoption: A Study in Kaduna State' (2014) 9(3) *Science World Journal* 20

and 2012 from \$10.5 million to about \$3 billion⁶. It is therefore not surprising that the internet is seen as a catalyst for economic growth in Nigeria, thereby making e-commerce the country's biggest economy⁷. The above highlighted figure increased to about \$10 billion as at December 2015⁸.

In view of the tremendous growth of E-Commerce over the years, as highlighted above, it is not surprising that it has become the object of research and legislation. The manner of conducting business globally has evolved from the earliest form of trade by barter to the digital epoch referred to as electronic commerce (e-commerce)⁹. Prior to the advent of E-Commerce, people visited physical markets to buy and sell and, of course, these markets had geographical or territorial boundaries. However, this mode of doing business has been revolutionized with the advent of E-Commerce which, as rightly postulated by Akintola, Akinyede and Agbonifo¹⁰, has broken down the geographical boundaries of the market. A lot of sale of goods transactions on the internet involve the exchange of electronic messages and the use of documents. These exchanges and use of documents, which are mostly transmitted via e-mail, have given rise to the following question, particularly as it relates to sale of goods on the internet; whether an electronic contract valid? This paper looks into the above highlighted question against the backdrop of the position under the common law, the Sale of Goods Act 1893¹¹, the recently enacted Cybercrimes (Prohibition, Prevention, etc) Act 2015 of Nigeria as well as the Draft Electronic Transactions Bill. For the purpose of comparison, reference is made to the laws of some jurisdictions as they relate to sale of goods on the internet.

2. Concept of E-Commerce and Sale of Goods

A contract has been defined as an agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law.¹² 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 legal rights and duties of the parties¹³. A very concise definition was put forward by Adeogun, Agomo, Akanki, Fogan and Ipaye to the effect that a contract is an agreement which is enforceable at law¹⁴. Arising from the above definitions, it would be observed that a common thread that cuts across them is the fact that a contract involves an agreement as well as legal recognition. Sale of goods is defined under Section 2 of the Sale of Goods Act 1893¹⁵ 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'¹⁶. This definition makes it clear that sale of goods involves a contract, therefore, it would be correct to state that the basic elements of a contract are applicable to sale of goods with the additional element of the subject matter involved being goods and the consideration for the sale being money consideration. The money consideration is so salient to a contract of sale of goods that Dobson emphatically

⁶ S Adebayo, 'E-Commerce Development in Nigeria' *The Herald* (Nigeria, 30 June 2014) <<https://www.herald.ng/e-commerce-development-nigeria/>> accessed 23 April 2016

⁷Ibid.

⁸A Adepetun, 'E-Commerce Net Widens In Nigeria', *The Guardian* (Nigeria 9 December 2015) <<https://guardian.ng/technology/ecommerce-net-widens-in-nigeria/>> accessed 23/04/2016

⁹ J Ovia, 'The Role of Banks in Promoting E-Commerce in Nigeria' being a paper presented at the Nigeria Internet Group Seminar held on Thursday May 22 2008 at the Golden Gate Restaurant Ikoyi Lagos Nigeria

¹⁰ K G Akintola, R O Akinyede, and C O Agbonifo, 'Appraising Nigeria's Readiness for E-Commerce Towards Achieving Vision 20:20' (2011) 96 IJRRAS 330

¹¹Or Sale of Goods Law

¹² B A Garner, *Black's Law Dictionary* (9th edn, West Publishing Minnesota 2009) 365

¹³ I Sagay, *Nigerian Law of Contract* (2nd edn, Spectrum Books Limited Ibadan 2000) 1

¹⁴ A. A. Adeogun, C. K. Agomo, E. O. Akanki, P. K. Fogan, and A. R. Ipaye, 'Law of Contract' in *Commercial Law in Nigeria*, Akanki E.O. (ed.) (2nd edn, University of Lagos Press Lagos 2007) 97

¹⁵ 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 1st 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

¹⁶ 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)

stated that in the absence of it, the contract would be one of exchange¹⁷. The subject matter of the contract is ‘goods’, which is defined to include ‘all chattels personal other than things in action and money, emblements, industrial growing crops and things attached to or forming part of the land which are agreed to be severed before sale or under a contract of sale’¹⁸. A literal definition of the term ‘goods’ is to the effect that they are ‘things that are produced to be sold, possessions that can be moved’¹⁹. 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’²⁰. It is submitted here that the definition of goods, as put forward in Black’s Law Dictionary, is more in tandem with the theme of this paper, particularly with regard to the fact that it is a simplified version of the definition in the Sale of Goods Act and the Sale of Goods Law²¹ that can be easily understood even by a lay person. In addition, Black’s Law Dictionary’s definition draws attention to the fact that goods are articles of trade and merchandise which, of course, is the essence of sale of goods and form the bulk of commercial activities carried out on the internet (E-Commerce), hence the focus of this paper.

There is no universally accepted definition of E-Commerce and, it is suggested here that this underscores just how fluid and flexible the concept is to the extent that the plethora of definitions put forward by various scholars, both legal and other disciplines, can be justified and supported, by the proponent, with recent trends. Nevertheless, E-Commerce has been touted as encompassing a wide spectrum of technology resources to facilitate how business managers perform their tasks, interact with customers and conduct their businesses²². According to Kareem, Owomoyela and Oyebamiji²³, E-Commerce refers to the use of communications technology, particularly the internet, to buy, sell and market goods and services to customers. Ovia sees E-Commerce as the process of buying, selling, transferring or exchanging products, services and/or information through computer networks, principally the internet²⁴. On their part, Akintola, Akinyede & Agbonifo²⁵ have suggested that E-commerce consists of buying and selling of products and services over electronic systems such as the internet and other computer networks. Some authors, have opined that E-Commerce is the practice of buying and selling goods and services through online consumer services on the internet²⁶. Though in tandem with the focus of this paper, it must nevertheless be pointed out that this definition gives a narrow perception of E-Commerce having regard to the fact that commercial activities on the internet or through the internet, goes beyond just consumer services. Akomolede²⁷ gives a simplified definition of E-Commerce as the buying and selling of goods through the internet. Though commendable, this definition fails to take cognizance of the fact that the scope of E-Commerce, goes beyond just buying and selling goods through the internet.

From the above highlighted definitions, which are just fractions of the numerous available definitions of E-Commerce, some of which are narrow and concise, while others are quite broad, it can be stated that there is no universal or all-encompassing definition of the term E-Commerce, however, in line with the focus of this paper, a keen observation would show a notion frequently projected, which is, that E-Commerce involves buying and

¹⁷ P Dobson, *Charlesworth’s Business Law*, (16th edn, Sweet & Maxwell London 1997) 337

¹⁸ Sale of Goods Act 1893 s. 62(1), see also the Sale of Goods Law Delta State s. 2(1)

¹⁹ S Wehmeier and M Ashby (ed.), *Oxford Advanced Learner’s Dictionary of Current English* (6th edn, University Press Oxford 2000) 512

²⁰ Garner (n. 12) 762

²¹ Hereinafter referred to as “SOGA” and “SOGL” respectively

²² R C MacGregor and M Kartiwi, ‘Perception of Barriers to E-Commerce Adoption in SMEs in A Developed and Developing Country: A Comparison Between Australia and Indonesia’ (2010) 8 No. 1 *Journal of Electronic Commerce in Organisations*, 61-82, cited in Edwin M. Agwu and Peter J. Murray, ‘Empirical Study of Barriers to Electronic Commerce Adoption by Small and Medium Scale Businesses in Nigeria’ (2015) 6 No. 2 *International Journal of Innovation in the Digital Economy* 1

²³ T S. Kareem, S K. Owomoyela and F F Oyebamiji, ‘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* 215, 216

²⁴ J Ovia (n. 9)

²⁵ Akintola, Akinyede and Agbonifo (n. 10) 330

²⁶ Garner (n. 12) 589

²⁷ T I Akomolede, ‘Contemporary Legal Issues in Electronic Commerce in Nigeria’ (2008) 3 Potchefstroom *Electronic Law Journal* 1 gives a simplified definition of E-Commerce as the buying and selling of goods through the internet

selling with the internet as a medium. It is this notion of E-Commerce that would provide a platform for discussing the very concept of E-Commerce as it pertains to the law of sale of goods. Buying and selling has not always involved the use of the internet²⁸, hence people were buying long before the advent of the internet. It therefore brings to the fore the question, how did the internet come to occupy the focal point in commercial transaction today?

3. Brief History of Nigerian Law on Sale of Goods and E-commerce

Buying and selling is not a concept introduced into Africa by the European colonialists. According to Atiyah, Adama and MacQueen²⁹, goods have been traded around the world since prehistoric times. Africans were not exempt from commercial activities, particularly trading even at a time when there was no legal tender and they made do with trade by barter. With time means of paying for goods and services, involved using cowries, and later silver and gold were introduced. Prior to the British colonising Nigeria, transactions between natives were regulated by the various native laws and customs generally accepted as applicable within the particular community where the transaction takes place. Though customs varied from place to place, a common theme that runs across all business transactions is that no party should cheat the other and that parties should uphold their agreement. In the event that there is a dispute, parties usually took advantage of the various dispute resolution mechanisms available, such as by submitting the dispute to the traditional ruler, or in the case of communities that do not operate the monarchical system, by submitting to the elders of the community, for resolution.

The advent of colonialism brought about the incursion of English Law into Nigeria which was applied side by side with customary law, but these customary laws were subjected to the validity tests and thus were considered as manifestly inferior to English Law. This is understandable bearing in mind that most, if not all, the courts in the colonial era, with the exception of native courts, were presided over by English judges. One of the earliest cases on sale of goods contract, which demonstrates the courts' bias in favour of English law, at the expense of customary law, is the case of *Labinjoh v. Abake*³⁰, where the issue was whether the Infants Reliefs Act, a statute of general application, applied to Nigeria with regards to the issue of age of majority. It was canvassed for the Plaintiff (seller) that the Defendant (buyer) was 18 years and the transaction was governed by customary law and under customary law, the age of majority is puberty, and as such, the Defendant should be liable for the goods sold to her. The case was remitted back to the Magistrates' Court to resolve the issue of whether or not customary law was applicable to the transaction. While remitting the case, the Full Court held, *inter alia*, that 'where any matter before the Court is governed by English Law, whether common Law or statute of general application, the question in issue must be decided in accordance with the English Law'³¹.

The Sale of Goods Act 1893 (SOGA) was an attempt by the English Parliament to codify these common law principles as they relate to sale of goods. Since the enactment of the SOGA 1893³², a lot of innovations have taken place in the world of commerce, particularly as it relates to buying and selling of goods. One of such innovations is the advent of the computer and the internet which has created a platform for conducting business over the internet, a departure from the traditional mode of doing business which involved merchants travelling from town to town, country to country, the parties interacting in the same geographical location, seeing each other face to face. These features, commonly found in traditional forms of sale of goods, are gradually being eroded by E-Commerce. The Internet, the basic medium for conducting E-Commerce, is generally agreed to have originated from the United States of America and has received worldwide acceptance³³. While the origin of the Internet is traceable to 1969

²⁸ The use of the internet as a medium buying and selling is a recent development

²⁹ P S Atiyah, J N Adams & H MacQueen, *The Sale of Goods* (11th edn, Pearson Longman London 2005) 54

³⁰ (1924) 5 N.L.R. 33

³¹ *Labinjoh v. Abake* (n. 30) 35

³² The SOGA 1893 was consolidated by the SOGA 1979 (UK) and since 1979, there has been only a number of minor statutory amendments and additions to the Act, see Femi Bamisile, 'What if you Innocently Buy Stolen Goods (2)' *PM News* (Nigeria, 17 March 2015) <https://www.pmnewsnigeria.com/2015/03/17/what-if-you-innocently-buy-stolen-goods-2/> accessed 13May 2016

³³ Agwu and Murray (n. 22) 2

with the introduction of ARPANET³⁴ which established a link between UCLA and SRI, actual buying and selling over the internet did not take place until much later and one of the first big companies to sell goods over the internet is Amazon³⁵. The company started as an online bookstore in 1994 and soon after diversified its operations by including other items such as computer hardware and software, electronic parts, electronic appliances, clothing, furniture, toys, household items e.t.c.³⁶. eBay is another company that has greatly impacted E-Commerce. It was the first to create an online version of person to person trading community on the internet³⁷ by providing a platform where buyers and sellers, who need not be business men and women, are brought together to do business. It was founded by Pierre Omidyar and Jeff Skoll in September 1995³⁸. The Nigerian equivalents of Amazon and eBay include Jumia³⁹ and Konga⁴⁰ have sprung up on the internet and even local shop owners have established their presence on the internet to the extent that one can find even a local pharmacist, electrician, mason, carpenter, supermarket owner, confectioner, e.t.c, displaying their goods and services for the world to see. The increase in sale of goods on the internet, has given rise to concern over the legal status and validity of electronic contract.

4. Validity of Electronic Contract and Electronic Signature

At common Law, contracts are usually classified into two categories; simple contracts and formal contracts (i.e. contracts under seal)⁴¹. In the case of a formal contract, i.e. contracts under seal, it must be in writing and it must be by deed in order for it to be valid. By statute, certain categories of contract must be by deed, such as, contracts involving conveyance of land and contracts made by companies⁴². A major characteristic of a contract under seal is that it is one of the exceptions to the rule of law that states that only a party who furnished consideration can sue to enforce a contract. Thus, even in the absence of consideration, a contract under seal can be enforced. A simple contract, on the other hand, could either be oral⁴³, or in writing and requires proof of consideration in order to enforce same⁴⁴. As rightly noted by Mohammed⁴⁵, a simple contract is the most common type of contract in a developing society like Nigeria. The above observation is pertinent in view of the dual nature of Nigeria's legal system where English law exist side by side with Nigerian legislation and customary law as exemplified by the case of *Labinjoh v. Abake*⁴⁶. There are however instances where the law requires that for a contract to be valid, and as such enforceable, it must be in writing (not necessarily by deed). The earliest provision on this is the Statute of Frauds which provides in Section 4 as follows;

No action shall be brought whereby to charge any executor or administrator upon any special promise or answer damage out of his own estate, or whereby to charge the defendant upon a 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, hereditament, 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, 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 other person thereunto by him lawfully authorized⁴⁷.

³⁴ ARPANET later came to be known as the 'INTERNET'. See Gil Press, 'A Very Short History of the Internet and the Web' (Forbes, January 2 2015) <<https://www.forbes.com/sites/gilpress/2015/01/02/a-very-short-history-of-the-internet-and-the-web-2/>> accessed 1 October, 2018

³⁵ This American company was founded in 1994 by Jeff Bezos and launched in 1995,

³⁶ L Schneider, 'Overview of Amazon.com's History and Workplace Culture' 18 February, 2018 <<https://www.thebalancecareers.com/amazon-com-company-research-2071316>> accessed 20 April 2018

³⁷ M Bjornson, 'The History of eBay' 2001 <<http://www.cs.brandeis.edu/~magnus/ief248a/eBay/history.html>> accessed 30 October, 2018

³⁸ Ibid.

³⁹ <<https://www.jumia.com.ng>> accessed 10 November, 2018

⁴⁰ <<https://www.konga.com>> accessed 10 November, 2018

⁴¹ See Adeogun, Agomo, Akanki, Fogan and Ipaye (n. 14) 191

⁴² See the Real Property Act 1845 s. 3 (a statute of General Application), Section 77 Property and Conveyancing Law Cap P Laws of Delta State 2006 s. 77, and the Companies and Allied Matters Act Cap C24 Laws of the Federation of Nigeria 2004 s. 74

⁴³ Also called parol contract

⁴⁴ See the case of *Padachabasaya v. Joe Anwasi* (2010) All F.W.L.R. (Pt. 528) p. 839, where the Nigerian Supreme Court held that consideration is a basic necessary element for the existence of a valid contract

⁴⁵ J Mohammed, *Essentials of Business Law*, (Obafemi Awolowo University Press, Ile-Ife 2011)

⁴⁶ *Labinjoh v. Abake* (1921) 5 N.L.R. 33

⁴⁷ Emphasis supplied

Section 17 of the same statute also requires a contract for the sale of goods for a price of £10 (ten pounds) or more to be in writing. Section 4 has however been repealed in England by virtue of the Law Reform (Enforcement of Contracts) Act 1954 as well as the Law and Property Act 1925 and the position today is that in England only two types of contracts are required to be in writing to be enforced, and they are: (a) Contract to answer for the debt, default or miscarriage of another person (contract of guarantee); (b) Contract for the sale or transfer of land or interest in land. With reference to sale of goods Section 3 SOGA 1893⁴⁸ provides that a contract of sale may be either orally, 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 parties⁴⁹. 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. Section 4(1) of the SOGA 1893 has no equivalent in the SOGL Delta State or the SOGA 1979 (U.K), and it provides that;

A contract for the sale of goods of the value of ten pounds or upwards shall not be enforceable unless the buyer accepts part of the goods sold and actually receives same, or gives something in earnest to bind the contract, or part payment or unless some note or memorandum in writing of the contract be made and signed by the party to be bound or his agent in that behalf⁵⁰.

In view of the fact that most goods sold these days are obviously far above ten pounds in value and having regard to the formalities involved in written contracts, it therefore comes as no surprise that parliament decided to jettison this provision in the SOGA 1979 and SOGL Delta State, as failure to do so would work hardship on simple transactions involving buying and selling. It is submitted, here, that the provisions of Section 3 SOGA 1893 and Section 5 SOGL are more than sufficient to meet the aims and objectives of the law while allowing the parties to the contract the freedom to decide whether to reduce their transaction into writing or not. The question now is whether any particular format is required to be followed when it comes to buying and selling over the internet, must it be in writing? Is there room for oral contract in E-Commerce? The special nature of the internet, as rightly pointed out by Akomolede⁵¹ has made some of the Common Law rules applicable to commercial transactions inapplicable to contracts conducted using the internet. While recognizing that almost all contracts on the internet involve some form of writing, this does not do away with the fact that there is a possibility of a contract being concluded orally. This scenario could arise where the buyer responds to the seller's advert, sends an e-mail, both parties exchange correspondence during negotiation and, in the course of that, exchange their telephone details and continue negotiations over the phone until finally agreeing on the price and mode of payment, delivery, as well as time of delivery of the goods. Be that as it may, where both parties fulfil their obligations under the contract, dispute may not arise, but in the event that there is a dispute, how would the party seeking to enforce the contract prove the terms of the contract to enable the court decide on whether or not to hold the other party liable for breach. The exchange of correspondence might show that there was offer and acceptance at some point, but it would not be sufficient proof what was actually discussed orally over the phone.

However, where a meeting is fixed by the parties to discuss and finalise details of the contract, there is in existence a modern technology for recording telephone conversation or what is being discussed orally. In addition, there is the availability of video conferencing. This underscores the importance of having a contract reduced into writing. A written contract is one whose terms have been reduced into writing⁵² and it is commonly signed. The key features here are 'writing' and 'signature'. 'Writing' is defined in Section 18 (1) of the Interpretation Act⁵³, to include printing, lithography, photography, typewriting and other modes of reproducing words or figures in a visible form.

5. The Current Position of Nigerian Law on the Validity of Electronic Contract and Electronic Signature

Prior to 2011, it was virtually impossible to admit computer generated documents as evidence. The Enactment of the Evidence Act 2011 paved the way for the admissibility of computer generated documents by Nigerian Courts. This Act in turn laid the foundation for the legal recognition afforded electronic signature and electronic contracts under the Cybercrimes (Prohibition, Prevention, etc) Act 2015 and the Electronic Transaction Bill 2015 which is currently awaiting the assent of the President in order to come into force.

Section 84(1) of the Evidence Act 2011 provides as follows;

In any proceedings, a statement in a document produced by a computer shall be admissible as evidence of any fact stated in it of which direct oral evidence would be admissible, if it is

⁴⁸Which is in *pari materia* with the SOGL Delta State, s. 5 and the SOGA 1979 (UK) s. 4

⁴⁹ SOGA 1893 s. 3

⁵⁰ Emphasis supplied

⁵¹ Akomolede (n. 35) 4

⁵² Garner (n. 12) 375

⁵³ Cap I23 Laws of the Federation of Nigeria 2004

shown that the conditions in subsection (2) of this Section are satisfied in relation to the statement and computer in question⁵⁴.

The above highlighted Section 84(1) of the Evidence Act 2011 provides for the admissibility of documents produced by a computer. However, this is not done as a matter of course as such documents must satisfy the conditions specified in subsection 84(2) for them to be admissible. At first glance, one would be tempted to conclude that the conditions do not pose any obstacle to the admissibility of such documents, or even where it does, such obstacle could easily be surmounted⁵⁵. However, on closer inspection, it becomes obvious that a party seeking to rely on such documents produced by a computer has a heavy onus to discharge. For instance, for the purpose of Section 84(2) (a) where the computer is not used regularly and the document sought to be relied on was produced during one of such period when the computer was not being used regularly, the document would not be admissible⁵⁶. To further compound the dilemma of the party seeking to rely on this type of document, the Evidence Act does not define what constitutes ‘regular use’, thus making it an issue for interpretation by the court. Section 84(2) (b) and (d) envisages that information contained in the document sought to be relied on must tally with or correspond with the information ordinarily supplied to the computer; for example, a party seeking to rely on a POS (point of sale) print-out as evidence of a retail transaction for sale of goods, must prove that the POS from which that particular document was printed is used ordinarily for retail transactions. With reference to the condition in paragraph 84(2) (c) an adverse party could easily rely on it to argue against the admissibility of a particular document produced by a computer where it is established that the computer in question was not operating properly or was out of operation at the material time in question, unless the party seeking to rely on that document proves otherwise.

Similarly, Section 93(2) of the Evidence Act 2011 provides thus; ‘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’. By this provision, it is clear that an electronic signature is valid under Nigerian Law. However, whether or not a contract to which an electronic signature is affixed is valid, would depend on the circumstances of each case. However, by virtue of Section 84(3) (a)-(d), the fact that several computers were involved in storing or processing of information or that a combination of or different computers operated over the period in question, would not prevent the admissibility of a document produced by such computers, as all the computers would be treated as if they were a single computer. The provisions of Sections 84 and 93 of the Evidence Act 2011 could be regarded as a commendable improvement on the provisions of its predecessor (the old Evidence Act) which neither allowed the admissibility of computer-generated evidence nor made provision for the legal recognition of electronic contract. The Cybercrimes (Prohibition, Prevention, etc) Act 2015 also provides in Section 17(1), with reference to electronic signature as follows;

- (a) Electronic signature in respect of purchases of goods, and any other transactions shall be binding.
- (b) Whenever the genuineness or otherwise of such signatures is in question, the burden of proof, that the signature does not belong to the purported originator of such electronic signatures, shall be on the contender.⁵⁷

From the above highlighted Section 17(1) (b) of this Act there appears to be a presumption of genuineness in favour of an electronic signature and the burden is on the party who alleges otherwise to prove same. In addition, Section 17(2) specifies the nature of transactions that would not be valid if an electronic signature is used and they include wills, death certificate, birth certificate, matters of family law such as; marriage, divorce, cancellation or termination of utility services, e.t.c.⁵⁸.

The first impression one would have by taking a look at Section 17 of the Act is that the said Section applies to civil cases especially since Section 17(1) (a) used the term ‘electronic signature in respect of purchases of goods’. However the objectives of the Act, as highlighted in Section 1(1) are to;

- (a) Provide an effective and unified legal regulatory and institutional framework for the prohibition, prevention, detection, prosecution and punishment of cybercrimes in Nigeria;
- (b) Ensure the protection of critical national information infrastructure; and

⁵⁴ Emphasis supplied

⁵⁵ J E Jessah, ‘E-Commerce: The Validity of Electronic Contract and Electronic Signature under Nigerian Law’, being a Doctoral Seminar paper presented at the Faculty of Law, Delta State University Abraka, Nigeria in January 2017

⁵⁶ Ibid.

⁵⁷ Cybercrimes (Prohibition, Prevention, e.t.c.) Act 2015 s. 17(1)(c) Emphasis supplied

⁵⁸ See Cybercrimes (Prohibition, Prevention, e.t.c) Act 2015 s. 17(2)

- (c) Promote cyber security and the protection of computer systems and networks, electronic communications, data and computer programs, intellectual property and privacy rights⁵⁹.

It is therefore clear that this Act is a penal law and as such cannot be said to apply to civil cases. It is suggested here that Section 17, which recognizes the validity of electronic signature in respect of sale of goods, would apply in a criminal case where a party is being prosecuted for a crime arising from or connected with the purchase of goods over the internet, such as identity theft, fraud (obtaining by false pretence), e.t.c, and the authenticity or otherwise of the electronic signature becomes a fact in issue. Though the Bill has passed through the House of Representatives and the Senate, it is yet to receive presidential assent, though there have been calls on the president to assent to the Bill⁶⁰. Section 7(1) of the Bill is pertinent and is reproduced hereunder;

In any legal proceedings, nothing in the application of the rules of evidence shall apply so as to deny the admissibility of any document in evidence;

- (a) On the sole ground that it is in the form of a document as defined in this Bill; or
(b) On the grounds that it is not in its paper form⁶¹.

Where the case is purely civil, it appears that the Cybercrimes Act 2015 would not be applicable. It can however still be argued that the Act nevertheless serves a useful purpose, even in a civil case, as an aggrieved party would have the option of either exploring a civil remedy or having the other party in breach of the contract prosecuted for any of the cybercrimes under the Act. The availability of this alternative in favour of the aggrieved party could be used to exert subtle pressure on the party in breach and thereby make him to be more inclined to having the matter resolved expeditiously through civil means. But where there is no criminal element to the transaction, there would be no existing Nigerian Law to rely on which gives legal recognition/validity to electronic signatures or electronic contracts. The principles of common law would have to be relied on for the purpose of proving the validity of the signature or the contract where such signature is used. The above provisions of the Evidence Act simply make it clear that it is futile to object to the use of a document as evidence simply because it is in electronic form and not in a paper form.

Thus, these provisions in no way give validity to electronic contract. Hence, a law that specifically clarifies the status of electronic contracts in Nigeria, which parties to internet-based contracts can rely on to enforce their contract, ought to be in place. The effect of the failure or neglect of Nigeria to enact the Electronic Transaction Bill into Law would be better appreciated when the laws of some other African, countries on electronic contract, are considered. Section 23 provides that an agreement is valid, even if concluded partly or in whole, through an electronic medium. Thus, by this Section, electronic contracts are valid under Ghanaian law. The applicable law in Ghana, on the validity of Electronic contract is the Electronic Communications and Transactions Act 2002. By Section 11 of the Act, information which is entirely or partly in electronic form is not to be regarded as having no legal force on the sole ground that it is in electronic form. The advantage that Ghana and South Africa have over Nigeria is that the former have law already in force to regulate E-commerce, while the latter has taken some steps towards legislate on it but failed to consummate the process.

6. Conclusion and Recommendation

From the foregoing, however laudable the provisions of the Bill are, it is still just a Bill. It is unfortunate that this Bill is yet to receive presidential assent despite calls on the President to do so and as such cannot be considered as a current law in force in Nigeria. Therefore, the current applicable law in Nigeria on the validity of electronic contract in Nigeria remains the Common Law. The provisions of Sections 11 and 26 of the Bill are so fundamental that, if the Bill is eventually enacted into law, it would bring Nigerian Law up to date with modern realities. It is therefore recommended here that this Bill should be enacted into law, without further delay as it would give further clarity, and certainty, to the legal status of electronic contracts particularly with reference to sale of goods transactions on the internet.

⁵⁹ Cybercrimes (Prohibition, Prevention, e.t.c) Act 2015 s. 1(1). Emphasis supplied

⁶⁰ Cybercrimes (Prohibition, Prevention, e.t.c.) Act 2015 s. 17(1) (a) (b)

⁶¹ This provision is closely resembles those of the Singapore Electronic Transactions Act 2010 s. 6 and s. 11. See also the Electronic Transactions Act 1999 of Australia as amended in 2011 s. 8