

## **Formation of Electronic Contracts: Melding the Traditional Contract Law with Contemporary Electronic Commerce.**

Ihuoma K. Ilobinso\*

### **ABSTRACT**

*The evolution of Information Communication Technology (ICT) has changed our world tremendously. It has flung the doors of nations wide open and its application to business has made the world a global marketplace. However, in Nigeria, this positive phenomenon brought by the growth of ICT and the emergence of electronic commerce has met with some legal obstacles. One of which is the uncertainty surrounding the validity and enforceability of contracts formed via electronic means.*

*This article analyses the traditional rules of contract formation to determine how they can be effectively applied to electronic contracts. In doing so, it will examine the question of who makes the offer in an electronic contract; where and when an offer is made and accepted; and, how an electronic contract can be authenticated?*

Keywords:

---

\* Lecturer, Department of Commercial and Industrial Law, Faculty of Law, University of Lagos. [ihuomakelechi@gmail.com](mailto:ihuomakelechi@gmail.com).

## 1.0 Introduction

The invention of electronic technology and the internet has changed the way we communicate, learn, work, and do business. It has brought the world's people closer in time and space; businesses now work more efficiently with suppliers and consumers; consumers now have a greater choice and can shop from the comfort of their homes; offices; or even while travelling, for a wide variety of products, from sellers all over the world. Marketability of products is no longer confined to the boundaries of their nations. With a couple of clicks one can buy and sell from any part of the world and the desired product will be delivered at the buyers door step. It is therefore not surprising that more businesses and consumers have developed interest in this highly convenient and fast way of doing business. In this age of instantaneous and cross border communications, electronic commerce (e-commerce) has truly become a global phenomenon.

In Nigeria, though e-commerce is still in its infancy, it is not left behind in this convenient way of doing business. This is evidenced by the rise and growth of e-commerce stores like Jumia, Konga, Dealdey, Gidimall, effritin.com etc. and also the efforts by the government to enact a law that regulates electronic transactions<sup>1</sup>. However, a high percentage of businesses and consumers are still very wary about doing extensive business over the internet. This is primarily because of the risks associated with concluding a commercial transaction from a distance with an anonymous party (in most cases), the absence of a legal framework governing electronic transactions in Nigeria and the uncertainty surrounding the ability of parties to form valid and

---

<sup>1</sup> The Electronic Transactions Bill, 2011 which has been passed by the National Assembly, and is currently awaiting presidential assent.

enforceable contracts via this paperless mode of communication. To facilitate e-commerce in Nigeria, these fundamental issues must be addressed.

The novelty of electronic transactions make it necessary to address some questions with respect to whether the traditional rules of contract formation can effectively be applied to the formation of electronic contracts; who makes the offer in click-wrap contracts,<sup>2</sup> where and when does acceptance become effective.

Most jurisdictions have addressed some of these issues in new legislations.<sup>3</sup> Also, International organizations such as the United Nations (UN) and the European Union (EU) have offered solutions to some of these concerns through the provision of articulation of model provisions and directives, which nations can utilize when drafting their legislations. Even so, a number of these concerns still remain unsolved and might be resolved by applying the traditional contract law principles.

This article is divided into five parts. Part II discusses the concept of electronic commerce and the modes of electronic contractual relations, Part III analyses the issues in formation of electronic contracts, with particular emphasis on issues relating to offer, acceptance and consideration. Part IV deals with the issue of authentication of contracts entered via the internet. Finally, Part V concludes the discourse.

---

<sup>2</sup> Is it the seller who advertised the goods on the website or the buyer who makes an offer by selecting the item?

## 2.0 Electronic Commerce and Technological Concepts

There is no generally accepted definition of e-commerce. However, e-commerce refers to any form of buying and selling of information, goods and services via the internet or other computer networks, with or without physical contact.<sup>4</sup> Electronic transactions can be executed either between parties within the same jurisdiction or parties in different jurisdictions. These commercial transactions usually occur between businesses;<sup>5</sup> businesses and consumers<sup>6</sup>; private businesses and the public sector<sup>7</sup>; and between consumers<sup>8</sup>.

Electronic contracts are legally binding agreements which are formed wholly or partly through communications over the internet or other computer networks. There are various modes through which electronic contracts can be executed, however this article focuses on the most commonly used ones, and they are as follows:

1. Electronic Mail System (email),
2. Website Trading (Click wrap).
3. Electronic Data Interchange (EDI)

---

<sup>4</sup> Goods could range from conventional products like furniture, beverages, clothing, books, where the contract of sale is executed via electronic means but delivery is effected by conventional methods; or intangible products like software's, copyright images and music etc., where both the contract of sale and delivery is effected through electronic means. It also covers a wide range of services such as banking and financial services, insurance services, legal services, travel and tourism services etc.

<sup>5</sup> Business-to-Business e-commerce, for instance manufacturers, wholesalers and retailers.

<sup>6</sup> Business-to-Consumer e-commerce

<sup>7</sup> Business-to-Government e-commerce e.g of this is public procurements, licensing procedures and other government related operations

<sup>8</sup> Consumer-to-Consumer e-commerce

**2.1 Electronic Mail (Email)** is the system where simple messages, letters, pictures, sounds, videos etc. are exchanged from an author to one or more recipients, via the internet or other computer networks. The email can be described as the digital equivalent of the traditional mail, where the sender types out information, attaches documents, and then the items to be sent are digitally packed into appropriate parcels/envelopes and sent to the recipient. However, unlike the traditional postal service, what is sent to the recipient is an identical copy of the content of the parcel and not the original mail created by the sender.<sup>9</sup>

Contracts formed via email bear a resemblance to the traditional contracts, for instance, **A** sends an email offer to **B** proposing a contract, after reviewing the offer **B** accepts it unconditionally. In this case, the parties negotiated the terms of their contract via email. This is done by exchanging messages until the parties agree on the terms of the contract. In contracts entered into via email, the mails exchanged by the parties could become the contract or a separate electronic document could be prepared containing all the agreed terms and signed by the parties.

**2.2 Website Trading (click-wrap agreements)** is the most common mode of electronic contracting. Products for sale are advertised on the website (webvertisement) and the buyer clicks on icons indicating the item he wishes to purchase, the mode of payment<sup>10</sup> and delivery. The buyer is then presented with a standard form contract which sets out the rights and obligations of the parties. The agreement can be viewed by the buyer who either ‘Agrees’ or ‘Disagrees’ with the standard terms and conditions by mouse-clicking the desired icon. In the instance where he ‘Agrees’ to the terms of the contract, he may proceed with the transaction, but where he ‘Disagrees’ with the terms of the contract, the transaction is automatically terminated.

---

<sup>9</sup> T. Elle's Gringras: The Law of the Internet, 3rd edn. 2008 pg 5

<sup>10</sup> In Nigeria, buyers are usually provided with the option of making payment at physical delivery.

In a click-wrap transaction, the buyer does not deal directly with the vendor, but rather with the vendor's computer system (software), this gives rise to electronic agency. Even though most jurisdictions have resolved some of these issues and recognized that click-wrap contracts create legal obligations, certain issues still remain unresolved, especially in Nigeria, as to when a click-wrap agreement is really formed, and what constitutes an offer and acceptance.

### **3.0 Formation of Electronic Contracts**

A contract is an agreement which gives rise to rights and obligations which can be enforced and recognized by law.<sup>11</sup> Under the common law, a contract is not required to take any particular form. It may be concluded expressly or by implication through a variety of methods which includes; correspondence through the post, telex or facsimile; orally, either in person or by telephone; or by completion of a formal document or a receipt,<sup>12</sup> provided the elements of a valid contract are present. Formation of electronic contracts therefore is not entirely different from formation of contract via facsimile, post or telex, thus, a contract can be validly formed electronically provided all the elements of a valid contract are present.

Article 11 of UNCITRAL Model Law on Electronic Commerce<sup>13</sup> provides that:

In the context of contract formation, unless otherwise agreed by the parties, an offer and the acceptance of an offer may be expressed by means of data messages. Where a data message is used in the formation of a contract, that contract shall not be

---

<sup>11</sup> E. Peel's Treitel: The Law of Contract, 12<sup>th</sup> edn. 2010

<sup>12</sup> Christensen S., "Formation of Contract by Email- Is it Just the Same as the Post", [2001] Vol 1 No. 1 QUTLJ 25.

<sup>13</sup> United Nations Commission on International Trade Law (UNCITRAL) Model Law on Electronic Commerce, adopted in 1996, United Nations Publication

denied validity or enforceability on the sole ground that a data message was used for that purpose.<sup>14</sup>

Section 3 of the draft Electronic Transaction Bill 2011 has a similar provision.

In most jurisdictions, the above provision might be seen as merely stating the obvious and therefore unnecessary. However, such provisions are very necessary in the Nigeria, where recognition of the validity of electronic records is still viewed with suspicion and uncertainty.

The UNCITRAL Model Law on E-commerce does not make any specific provision as to when and where an offer and acceptance becomes effective. The reason given by the commission for this is that making express provisions as to the time and place an electronic contract is formed might interfere with the national law applicable to contract formation.<sup>15</sup> The writer is of the opinion that the Model Law should have gone ahead to make express provisions as to when and where an electronic contract is formed, because this would aid in promoting harmonization and dispelling the uncertainties surrounding formation of contracts via electronic means. Besides, the Model Law serves as a guide to States who wish to enact or review their national laws on electronic commerce. Hence, The States reserve the right to disregard any provisions that interferes with its existing laws.

### **3.1 Offer and Invitation to Treat**

It is pertinent to first analyse what constitutes an offer and invitation to treat in a traditional paper-based contract before delving into the issues in the formation of electronic contracts.

---

<sup>14</sup> For the purpose of the Model Law, 'Data message' means information generated, sent, received or stored by electronic, optical or similar means including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.

<sup>15</sup> Guide to enactment, Paragraph 78, UNCITRAL Model Law on Electronic Commerce.

An offer is a promise made by one party to another with the intention that the promise will be legally binding on the offeror should it be accepted by the party to whom it is addressed. An offer becomes effective when it reaches the offeree. It must be definite and unambiguous.<sup>16</sup> It can be made to an individual, group or the entire world.<sup>17</sup> However, where it is found that there is a lack of intention to be bound in a contract, then such a promise will be treated as an invitation to treat<sup>18</sup> rather than an offer. Acceptance of an offer creates a contract, while the acceptance of an invitation to treat is merely an offer.

Electronic transactions is still an emerging area of law in Nigeria, therefore there is currently no decided case as to whether a webadvertisement constitutes an offer or an invitation to treat. This is important because an offer can be retracted any time before acceptance. Once a party accepts the offer, the contract in most cases is concluded. Hence, disputes might arise as to the effectiveness of a revocation of contract.

### **3.1.1 Offer - Website Trading**

The display of goods with prices attached on a website can either be likened to the display of goods in a shop or an advertisement. The rules that apply to these two situations are somewhat different. Therefore, it is important to ascertain which party is the offeror and which party accepts the offer.

Where the goods displayed on a website is likened to the display of goods in a shop window or shelf, such a display constitutes an invitation to treat to which the buyer makes an offer by

---

<sup>16</sup> *Oriental Bank Plc v. Bilante Intl.* [1997] 8 NWLR 515

<sup>17</sup> *Carlill v Carbolic Smokeball Coy* [1983] 1 QB 256

<sup>18</sup> This simply indicates a willingness to negotiate.



picking up the goods<sup>19</sup> and taking them to the sales clerk who either rejects the offer or accepts the offer and receives payment for the goods.<sup>20</sup> The rationale for this rule is that the seller should not be bound to an unforeseeable number of acceptances. While the rationale may equally apply to sale of goods via the internet, it might not apply to provision of services or the sale of intangible products.<sup>21</sup> Nevertheless, if the display of goods whether in a shop or on a website was to be treated as an outright offer, then the seller would be bound to a contract as soon as a buyer accepts the offer by clicking or picking up the desired goods and taking them for check out.

The rule governing advertisement is not as uncomplicated as that of shop invitation. Some jurisdictions, for instance Brazil and Canada, considers an advertisement by a seller on a website as a binding offer, at least for a reasonable period of time and when a prospective buyer places an order for goods on the website, such an order should constitute an acceptance. While in common law jurisdictions like the United Kingdom and Nigeria, the law views advertisements in two categories, those that pertain to bilateral contracts<sup>22</sup> and those that pertain to unilateral contracts.<sup>23</sup> In a bilateral contract, the advertisement is viewed as an invitation to treat, while the advertisement in a unilateral contract is viewed as an outright offer. In determining whether a webadvertisement is a bilateral or unilateral contract the words of the webadvertisement and the objective intention behind it will be examined.<sup>24</sup> In instances where the website is non-interactive, the website displays the goods and gives information about the goods, the contract is

---

<sup>19</sup> Or selecting the goods by a click of his mouse.

<sup>20</sup> *Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd* [1953] 1 QB 401, *Fisher v Bell* [1961] 1 QB 394

<sup>21</sup> Software, music and information etc.

<sup>22</sup> A bilateral contract takes the form of an exchange of promises. Whereas the offeror promises to do something in exchange of the offeree's promise to do something else in return. Although the contract has come into existence, there is yet to be performance.

<sup>23</sup> A unilateral contract takes the form of a promise in return for performance. The offeree has no obligation to perform the requested act neither does he need to communicate acceptance to the offeror.

<sup>24</sup> E. Todd's *Gringras: The Laws of the Internet*, 3<sup>rd</sup> edn. 2008 at pg. 25

then concluded through other means or face-to-face. Display of goods in this case will be viewed as an advertisement.

It will be to the advantage of the seller for the display of goods on the website to be likened to a shop display or viewed as a bilateral contract. In both cases, the seller reserves the option to accept or not to accept the order/offer of the buyer. This is so as to protect himself from being automatically bound to everyone who gets on the seller's website regardless of their location. It also protects the seller, at instances where there is a mistake in the statement of the price of goods or where the stock is depleted. The seller is however advised to make an express provision in the terms and conditions of sale that the display of goods on the website constitutes an invitation to treat and consequently an order by the buyer constitutes an offer which the seller can accept or reject.

In the United Kingdom, an online retail shop, Argos, erroneously advertised televisions for sale on their website for E2.99 instead of E299. They received hundreds of orders from customers in the UK. If the advertisement was to be treated as an offer, and the orders received, as acceptances, then the retailer would have been bound to sell the items at that ridiculously low price. On the other hand, if the offer was to be treated as an invitation to treat, and the customer's orders, as offers, then the retailer could reject the offer as soon as it realized the mistake.

### **3.1.2 Offer – Electronic Mail (Email)**

Contracts concluded via email are similar to the paper-based/traditional contracts, in that the parties usually negotiate the terms and conditions of sales by exchanging mails, therefore it is easier to determine which party made the offer and which party accepted it by reading through the emails exchanged by the parties. In a case where the email received only displays the goods

and their prices for the interested party to conclude the contract by other means like telephone, fax or even face-to-face, then such a contract might likely be viewed as an advertisement. In such a case the email from the seller could be construed as an offer<sup>25</sup> or an invitation to treat<sup>26</sup> depending on the wordings and the objective intention of the email.

### 3.2 Acceptance

Determining the time and place of an acceptance is of great importance in formation of contracts. This is because the acceptance of an offer creates a legally binding contract. Besides, it determines the jurisdiction where the contract was formed. This is especially vital because e-commerce by its nature goes beyond boundaries; contracts can be entered into by parties in different jurisdictions.

For an acceptance to be valid, it has to be an absolute and unqualified expression of assent to the terms of the offer.<sup>27</sup> It may be manifested by words, or conduct.<sup>28</sup> However, silence or inactivity does not amount to acceptance.

Where the offeror prescribes a mode by which acceptance may be communicated in mandatory terms, the prescribed mode must be followed else the acceptance is invalid. Where the offeror does not insist that only acceptance in the prescribed mode shall be binding, then any other mode which is faster than or at least equally as fast as the prescribed mode may be used.<sup>29</sup> Where no method of acceptance is prescribed, the general rule is that acceptance may be given by the same or by a method equally as fast as the method used in making the offer.

---

<sup>25</sup> *Carlill v Carbolic Smokeball Coy* [1983] 1 QB 256

<sup>26</sup> *Granger & Son v Gough* [1896] AC 325

<sup>27</sup> I. E. Sagay's *Nigerian Law of Contract*, 2<sup>nd</sup> edn. 1999 pg 20

<sup>28</sup> *Orient bank (Nig.) Plc v Bilante International Ltd* [1997] 8 NWLR (Pt 515)

<sup>29</sup> *Manchester Diocesan Council of Education v Commercial and General Investments Ltd* [1969] 3 All E.R. 1593

In traditional contract law, acceptance becomes effective not merely when communicated, but when actually received by the offeror.<sup>30</sup> Until an acceptance is received by the offeror, the offer may be revoked. The main rationale for this rule is that it could cause hardship to the offeror if he is to be bound without knowing that his offer has been accepted. However, the ‘postal acceptance rule’ is an exception to this general rule.

The postal acceptance rule states that, where acceptance is to be communicated to the offeror via the postal system, then acceptance becomes effective when posted<sup>31</sup>, rather than when it reaches the offeror.<sup>32</sup> Consequently, the contract is made once posted and therefore may not be revoked. The rationale for this rule is that the post office is treated as a common agent of both parties<sup>33</sup> and that it is easier to prove that a letter has been posted than that it has been received,<sup>34</sup> but this cannot be a justifiable reason in this modern times where the sender of a mail could request that the receiver acknowledges receipt. Another reason given is business convenience, without the rule no contract will ever be completed by the post, because if the offeror was to be bound only when he has received the acceptance then the offeree should not also be bound until he receives a confirmation from the offeror that his acceptance has been received and accented to it, it might go on *ad infinitum*. The postal acceptance rule was developed at a time when postal system was the only means of communication between distant parties.<sup>35</sup> With the emergence of faster and more reliable means of communication<sup>36</sup> one cannot help but wonder if this rule should still be

---

<sup>30</sup> Entores v Miles Far East Corporation [1955] 2 Q.B. 327 C.A, Anon Lodge Ltd v Merchantile Bank [1993] 3 NWLR (Pt 284) 721

<sup>31</sup> A letter is deemed posted when it is out of the control of the acceptor and in the control of the post office or of one of its employees who is authorized to receive letters.

<sup>32</sup> Adams v Lindsell [1818] 1 B

<sup>33</sup> Dunlop v Higgins 1 H.L.C 381

<sup>34</sup> E. Peel's Treitel: The Law of Contract, 12<sup>th</sup> edn. 2010

<sup>35</sup> Scottish Law Commission, "Review of Contract Law, Discussion Paper on Formation of Contract" 2012 pg 58

<sup>36</sup> Telex and Facsimile

applied in modern times. There is presently an ongoing debate as to the fairness of this rule, however, it is beyond the scope of this article to join this active debate.

The postal acceptance rule also applies to telegrams and courier services but not to forms of communication that are taken to be instantaneous, for instance telephone, faxes and telexes. In the case of *Entores Ltd v Miles Far East Corporation*,<sup>37</sup> Denning L.J. stated that in instantaneous communications, the acceptor will often know that his attempt to communicate was unsuccessful, and is under the duty to ensure that the communication is properly made.<sup>38</sup>

However, it remains unclear which of the rules of acceptance will be applied to electronic communication of acceptance. Will it be the 'receipt rule' of acceptances where electronic communications will be treated as instantaneous or the 'postal acceptance rule'?

### 3.2.1 Acceptance via Electronic Mail (Email)

It has been argued that email communications should not be categorized as instantaneous communication, because just like the postal system, there is no direct connection between the sender and the recipient. It involves the participation of third party Internet Service Providers (ISP), whose servers receives and sends emails via mailboxes.<sup>39</sup> ISP acts in a manner similar to the post office. This third party involvement makes email communications potentially subject to third party delays which could be caused by technical issues. Thus, there is no certainty as to when an email communication may be received. Given that the mail is put beyond the control of the sender once transmitted, he should not be made liable for any faults which may occur after

---

<sup>37</sup> (1955) All E.R. 493

<sup>38</sup> E. Peel's Treitel: The Law of Contract, 12<sup>th</sup> edn. 2010

transmission. Also, the contracting parties themselves may also contribute to the delay by addressing the mail wrongly, or even reading the delivered mail late.

However, the postal acceptance rule should not be applied to email communications merely because it shares some similarities with the postal system. Most other instantaneous communications also rely on the participation of third parties, for instance the telephone, telex etc., where there are also third party involvements like the telecommunication network providers who might also cause some delays in communication. Secondly, the postal acceptance rule was developed at a time when the postal system was the only means of distance communication. However, today there are faster and more effective means of distance communication, so the rationale that the postal acceptance rule avoids the continuous exchange of mails *ad infinitum* does not apply to electronic communications. Also, there are software's that have the ability to inform the sender when his email has been delivered and read. Most often, the sender will be notified when delivery of an email has failed, but the receiver on the other hand, has no way of knowing that there has been a failed attempt at sending him an email accepting his offer. The sender's knowledge of the status of the email in transmission and duty to ensure the offeror receives the acceptance should the yardstick for determining where to categorize electronic communication. Finally, with the availability of other forms of instantaneous communication, the parties involved can ensure that there is no extended lapse in communication.

Due to the hardship and injustice that the application of postal acceptance rule has caused, most countries are already working on the reform of their contract law in order to limit the application of the rule. Additionally, courts seem reluctant to extend the application of the postal acceptance rule to other modes of communication, such as fax, unless it is perceived that the parties contemplated the use of the rule in their contract.

Whether the court chooses to apply the ‘receipt rule’ or the ‘postal rule,’ there still remains the question of when an electronic communication is deemed to be dispatched and received? Article 12,<sup>40</sup> of the UNCITRAL Model Law on Electronic Commerce clarifies when and where a message is deemed to have been dispatched and received. It states that an electronic communication is dispatched when it enters the information system outside the control of the sender and received when it enters the designated information system of the receiver or when accessed. Section 19 of the Electronic Transactions Bill further provides that where the sender and the receiver use the same information system, then electronic communication is deemed to be sent when it is capable of being received and processed by the receiver.

### 3.2.2 Click-wrap Acceptance

Unlike acceptance communicated via email, a click-wrap acceptance in a website trade is less complicated. It has been described as having the same quality as telephone communication, but

---

<sup>40</sup> (1) Unless otherwise agreed between the originator and the addressee, the dispatch of a data message occurs when it enters an information system outside the control of the originator or the person who sent the data message on behalf of the originator.

(2) Unless otherwise agreed between the originator and the addressee, the time of receipt of a data message is determined as follows:

- (a) If the addressee has designated an information system for the purpose of receiving data messages, receipt occurs:
    - (i) At the time when the data message enters the designated information system; or
    - (ii) If the data message is sent to an information system of the addressee that is not the designated information system, at the time when the data message is retrieved by the addressee;
  - (b) If the addressee has not designated information system, receipt occurs when the data message enter an information system of the addressee.
- (2) Paragraph (2) applies notwithstanding that the place where the information system may be different from the place where the data message is deemed to be received under paragraph (4).
- (3) Unless otherwise agreed between the originator and the addressee, a data message is deemed to be dispatched at the place where the originator has its place of business, and is deemed to be received at the place where the addressee has its place of business. For the purpose of this paragraph:
- (a) If the originator or the addressee has more than one place of business, the place of business is that which has the closest relationship to the underlying transaction, the principal place of business;
  - (b) If the originator or the addressee does not have a place of business, reference is to be made to its habitual residence.

between computers rather than humans.<sup>41</sup> The communication is usually interactive and automated. The software controlling the transactions allows contracting parties to determine whether an agreement has been reached or not. Acceptance via an interactive e-commerce website can safely be categorized as an instantaneous communication and the 'receipt rule' of acceptance will therefore be applied.

### **3.3 Consideration**

For a contract to be valid there must be consideration, among the other elements of a valid contract. Consideration can be described as a promise by a party to another, to do something in return for the promise of the other party. Each party must obtain a benefit from the contract. In the case of e-commerce, this is rarely an issue, because like the paper-based commercial transaction, the buyer usually receives the goods while the seller receives payment.

### **4.0 Authentication of Electronic Contracts**

There are various reasons why some parties might prefer the traditional paper-based mode of contracting to the electronic mode, one of the main reasons is the ability of the parties to endorse the contract.

In paper-based contracts, signatures are generally used to identify the parties to a contract; to provide certainty as to the personal involvement of the party in the act of signing and to attest to the intent of the party to endorse authorship of the document written by himself or on his behalf;

---

<sup>41</sup> E. Todd's Gringras: The Laws of the Internet, 3<sup>rd</sup> edn. 2008 at pg. 41



and to associate that party with the content of the document.<sup>42</sup> Authentication could take the form of a handwritten signature, thumbprint, stamping, or even typewritten signature. However, these authentications are usually linked to paper-based contracts.

Apart from most parties desire to have their contracts authenticated as an assurance of genuineness, there are instances where the law might require that an agreement be signed if it is to be deemed as valid and enforceable.<sup>43</sup>

There are now technologies that allow for the authentication of an electronic document. With the availability of scanners and PDF documents, identification documents can be made available electronically.

On the question of the legality of electronic signatures,<sup>44</sup> section 93 of the Evidence Act 2011 provides that electronic signatures are admissible. This issue has also been addressed in the UK by the enactment of the Electronic Signatures Regulation 2002 and the Electronic Communication Act 2000, which promotes the use of digital signature and provides that electronic documents should not be denied enforceability merely on the grounds that it is in electronic form.

The UNCITRAL Model Law on Electronic Commerce and the UNCITRAL Model Law on Electronic Signatures<sup>45</sup> deal with electronic communications and signatures in the context of commercial activities. The Model Laws provide that electronic signatures shall have legal effect

---

<sup>42</sup> UNCITRAL model guidance note

<sup>43</sup> For instance, a hire purchase agreement under the Hire Purchase Act of 1965.

<sup>44</sup> Article 2 (a) of the UNCITRAL Model Law on Electronic Signature defines electronic signature as ‘...data in electronic form in, affixed to or logically associated with, a data message, which may be used to identify the signatory in relation to the data message, and to indicate the signatories approval of the information contained in the data message’.

<sup>45</sup> Adopted in 2001

once they satisfy the criteria. The Model Law on Electronic Commerce adopted the ‘functional equivalent approach in dealing with electronic signature and other formal requirements. This means that it identifies the basic function of the legal form requirement, provides criteria which once met by the electronic record, enables the record to enjoy the same level of legal recognition as the corresponding paper-based documents performing the same function. In the case of ‘signature,’ it identified its function in a paper-based environment as including: identification of parties; provision of certainty as to the personal involvement of that person in the act of signing; and the association of the person with the content of the document.<sup>46</sup> The law then provides that an electronic signature must have the ability to identify the person and indicate the approval of that person of the content of the message, that it must be sufficiently reliable in all circumstance. The Model Law, however, does not provide any guidance as to how the electronic signature may be created to meet the requirements.

Electronic signatures, just like the paper-based signatures, do not have to be generated in any particular form.<sup>47</sup> It could be created by simply typing one’s name and initials, making any mark in the designated area through the use of encryption software or through a connected fingerprint device etc. The courts also retain the discretion to question the reliability and authenticity of a hand-written signature as well as an electronic signature.

---

<sup>46</sup> Guide to Enactment 1996, Paragraph 48

<sup>47</sup> E. Todd’s Gringras: The Laws of the Internet, 3<sup>rd</sup> edn. 2008 at pg. 25

## **5.0 Conclusion**

Even though our existing contract laws are predicated upon the traditional paper-based contracts, it has been able to accommodate evolutions in communication and the way contracts are formed, for instance, the development of telephones, faxes, and telex. Hence, the emergence electronic communication is therefore not entirely different from other modes of communication and can also be accommodated by the existing contract law.

It is therefore concluded that even though the principles of the traditional contract law can be applied to this modern mode of entering into contracts, there is need for certain issues to be specifically provided for in the Electronic Transactions Bill. For instance, the issue of who makes the offer and who accepts the offer in electronic commerce, and when does an acceptance becomes effective. This will greatly go a long way in removing most of the uncertainties surrounding electronic commerce and also facilitate this contemporary means of transacting business.

Electronic commerce, by its nature, goes beyond borders and so it is important to harmonize the laws that regulate electronic commerce. The United Nations has taken a commendable step in that direction. However, it should have gone ahead to make provisions addressing the issue of who makes the offer and who accepts the offer in electronic commerce, and when an acceptance becomes effective.

Finally, Nigeria is lagging behind in taking definitive steps to remove the obstacles to the facilitation of electronic commerce. The Electronic Transactions Bill was before the national assembly for a very long time, though it is presently awaiting presidential assent. It is therefore imperative that this Bill is quickly reviewed and assented to. This way Nigerian businesses and

electronic consumers can benefit from this fast and highly convenient means of transacting business.