



IFE BUSINESS LAW REVIEW

A JOURNAL OF THE DEPARTMENT OF BUSINESS LAW, OBAFEMI AWOLOWO UNIVERSITY, ILE-IFE, OSUN STATE, NIGERIA.

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**A Journal of the Department of Business Law,
Obafemi Awolowo University, Ile-ife,
Osun State, Nigeria.**

November, 2021

Vol. 3

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Ife Business Law Review

The journal offers peer reviewed research and strives to connect town and gown in the business law sphere.

Subscription rates for 2021

Two print issues per annum, in May and November

Institutions

Nigeria	United Kingdom	North America	European Union	Africa
₦90,000	£120	\$300	€100	\$USD280

Individuals

Nigeria	United Kingdom	North America	European Union	Africa
₦40,000	£50	\$150	€40	\$USD130

Subscription details

Department of Business Law, Obafemi Awolowo University, Ile-Ife, Nigeria.

Email: ifebusinesslawreview@oauife.edu.ng

Published by Obafemi Awolowo University Press Limited, Ile-Ife, Nigeria.

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ISSN: 2714-2922

Printed by:

Obafemi Awolowo University Press,
Ile-Ife, Nigeria.

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E-CONTRACTS IN NIGERIA, LEGAL ISSUES, CHALLENGES AND PROSPECTS

Olusegun O. Onakoya *

ABSTRACT

Trade and trading activities in the 21st century have taken a new trend. Unlike in the early centuries, commercial transactions are now carried out with much ease given the technological advancement. This technological advancement has given rise to what is known as electronic contract (e-contract). This term is sometimes used inter-changeably with e-commerce.

Nigeria as a nation is not left out of the aforesaid development, hence Nigerian economic space does not only recognise e-contract but also encourages its growth within the environmental sphere of the available infrastructural facilities. E-Contractor e-Commerce is defined as the practice of buying and selling of goods and services through online consumer services on the internet. This usually involves online advertisement, negotiation, contractual agreement, payment (fintech) and delivery of goods and services. However, this kind of contractual relationship is not without its challenges, particularly in Nigeria which records deficit in the area of provision of infrastructural facilities and enabling environment (agood example is the erratic supply of electricity and high cost of internet facilities which is an offshoot of the former) constitute hindrances to the growth of e-contract.

This paper therefore examines the legal issues, challenges and prospects of e-contract in Nigeria.

Keywords: Commercial transactions, Electronic contract, Legal issues, Challenges.

1.0 Introduction

Contract is as old as human existence, though not in the modern form. Trading activities in goods and services started since the early centuries. No individual has everything he needs on earth, though he may possibly have what it takes to acquire it, usually from another who has the goods or possesses the skill for the needed service(s).

As a result of the foregoing, it becomes necessary for individuals and group of persons to exchange goods for goods, goods for service or service for service, this is called trade by barter. Barter method of trading is an ancient process adopted by people to exchange their services and goods. This practice can be dated back to about 6000 BC very many years before money was introduced as a means of exchange¹.

The effectiveness of barter became noticeable, when human wants became unlimited and insatiable, weighing and measuring of goods and services to the satisfaction of parties to the transactions also became problematic.

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¹Nair, S., 2018. Barter Service – History of Barter System. Retrieved September 20, 2019 from <https://historyplex.com/barter-services-history-of-barter-system>

With increase in trading activities, money was introduced as a medium of exchange, a unit of measurement and symbol of wealth. Money allows people to trade goods and services indirectly, know the price of goods and services, and monetary value attached to them. Interestingly, different economies of the world have introduced currencies of diverse values and denominations. Today, globalization and advancement in technology have in no small measure changed the conventional mode of trading activities across the globe. Trading activities, whether in goods or services, or whether within the border of a nation or trans-border transaction are referred to in legal parlance as contracts. Contracts in whatever form or classifications are regulated by law.

What is a Contract?

A contract may be defined as an agreement which is either enforced by or recognised by law as affecting the legal rights or obligations of the parties². The parties are usually referred to as the Offeror (promisor) and Offeree (promisee). It is a situation whereby someone (party A) gives something of value in return for something of value from another (party B).

Contract has also been defined as a promise or set of promises, the breach of which the law will give remedies, or which the law deems the legal duties and obligations under same enforceable³. According to Tobi, JCA contract could be defined as an agreement between two or more parties which creates reciprocal legal obligations to do or not to do particular things. For a contract to be valid, "there must be mutuality of purpose and intention"⁴.

Law of contract in a more simplified form involves set of principles and rules which regulate enforceable transactions for exchange of goods for goods, money or something of value in the eye of the law. It may be rendering of service for money or money's worth between two or more parties.

For a contract to be valid, the following essentials must be present:

- i. There must be an offer, which must be certain and with the intention to enter into a legal obligation.
- ii. There must be an acceptance which is the communication by the offeree to the offeror of his agreement to the exact terms of the offer without any variation(s). The communication of acceptance must be specific and with the intention to enter into legal obligation.
- iii. Consideration is an essential element which links or connects the offeror to the offeree.

The doctrine of consideration is based on the notion that a promise given by a promisor is legally binding if it is given in return for some benefits which the promisor also reciprocates. Thus, Lush, J. gave a very comprehensive and all-encompassing definition in *Currie v. Misa*⁵ thus:

A valuable consideration in the eye of the law may consist either in some right, interest, profit or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility, given, suffered or undertaken by the other. Thus, consideration does not only consist of profit by one party but also exists where the other party abandons some legal right in the present, or limits his legal

²Treitel, G.H., 2004. *An Outline of the Law of Contract*. Sixth Edition, Oxford University Press. P. 1

³Beatson, J., 2002. *Anson's Law of Contract* 28th ed. Oxford, Oxford University Press. P.1

⁴*Orient Bank (Nig.) Plc. v. Bilante International Ltd.* [1997] 8 NWLR (Pt. 515) 37 at 76.

⁵(1875) L.R. 10 Exch. 153 at 162. See also, Sagay, I.E., 2000 *Nigerian Law of Contract*, Second Edition, Ibadan, Spectrum Books Limited PP. 59-60.

freedom of action in the future as an inducement for the promise of the first. So it is irrelevant whether one party benefits but enough that he accepts the consideration and that the party giving it does thereby undertake some burden, or lose something which in contemplation of law may be of value.

Consideration, contrary to the position of Lord Mansfield is not a question of moral obligation but a legal issue, for its presence in contract is *sine qua non* for its validity⁶. It is noteworthy that all contracts are agreements but not all agreements are contract.

2.0 NATURE AND CLASSIFICATION OF CONTRACT

Contract being a contractual relationship between two or more persons have its moulding in the hands of parties to such agreement. It means therefore that its nature is often defined by the parties who agree to its contents on issues such as the object(s) of the contract (whether in goods or services or both), mode of payment (consideration, whether executory or executed), specified time of performance (delivery of goods and services), place of performance (location) and mode of dispute settlement, which may arise from the said contract. All the aforesaid and many others are referred to as terms of a contract.

Contracts may either be by *parol* or in writing. A *parol* contract is that which the terms of the agreement are oral or verbal or partially written, while written contract is that which requires formal writing/document encompassing the terms of the contract being drawn-up and signed by the parties⁷.

Contracts may further be classified either as express or implied, or unilateral and bilateral. A contract is described as express when the terms of such contract are clearly and often comprehensively spelt out. It may be written or by *parol*. In case of implied contracts, the terms are not expressly stated. The inference as to the intention and the contents of the contract are usually deduced from the conduct of the parties rather than from their words or correspondence.⁸

A unilateral contract is a contract created by an offer that can only be accepted by performance,⁹ while a bilateral contract is one in which there is an exchange of a promise from both parties, namely from offeror to offeree and *vice-versa*.

Atiyah, defines bilateral contract as follows:

*In a bilateral contract, a promise or set of promises on the other side. In a unilateral contract, on the other hand, a promise on one side is exchanged for an act (or a forbearance) on the other side.*¹⁰

However, irrespective of the nature, scope or classification of a contract, what is constant is the freedom of the parties to contract.

⁶Eastwood v. Kenyon (1840) 11 A & E 438. See, Yakubu, J. A., 2003. *Law of Contract in Nigeria*. Lagos, Malthouse Press Limited. p. 34.

⁷The Law Dictionary. Retrieved Sept. 21, 2019 from thelawdictionary.org

⁸Sagay, I.E., *ibid.* p.5

⁹Unilateral Contract/Wex Law Dictionary/Encyclopedia/LIT. Retrieved Sept. 21, 2019 from <https://www.law.cornell.edu/wex/>

¹⁰Atiyah, P. S., 1981. *An introduction to the Law of Contract*. 3rd ed. Oxford, Oxford University Press (OUP) p.32.

3.0 FREEDOM TO CONTRACT

This is an age-long doctrine that parties to a contract have the unfettered rights to bind themselves legally. It is a judicial concept that contracts are based on free agreement and free choice of contractual relationship free of undue external influence.¹¹ It therefore means that a person by law is not compelled to enter into a contract since it becomes apparent that the more the law is permitted to interfere with the relationship of the parties, the less significant the inputs of the parties will seem.¹² The right of individuals to adjust his or her obligations through mutual consent of all the parties to the contract is sacrosanct.

Invariably, statutes and trade practices/customs recognize the principle of *laissez faire*, otherwise translates as freedom of contract. This position is judicially-recognized, as courts in plethora of cases have sanctioned this principle of law. In *Cooperative Development Bank Plc. v. Arc.MfonEkanem&Ors.*,¹³ the Court of Appeal reiterating the principle of *laissez faire* stated thus:

The entire law of contract is founded on the consensus or will-theory of contract, which asserts that contractual obligations are by definition self-imposed and in terms of the role of the courts, finds expression in the idea that the exclusive task of a court in contract cases is to discover what the parties have agreed and give effect to it except in cases of mistake, duress and illegality.

Similarly, the Supreme Court of Nigeria further elucidates the principle of “freedom to contract” as follows:

*A court of law must always respect the sanctity of the agreement reached by parties. It must not make a contract for them or rewrite the one they have already made. The court however has a duty to construe the surrounding circumstances including written or oral statements to discover the intention of the parties.*¹⁴

His Lordship, Ariwoola, JSC; stated pointedly in the appeal under reference, quoting copiously from the notable pronouncement of *Ogbuagu, JSC*, in an earlier decision of the Supreme Court as follows:

In Baker Marine (Nig.) Ltd. Chevron (Nig.) Ltd. (2006) All FWLR (Pt. 326) 235, (2006) 8-9 SCM 103 at . . ., (2006) 13 NWLR (Pt. 997) 276 at 287-288, this court, per Ogbuagu, JSC opined thus: It has been stated and restated in a number of decided authorities that in the interpretation of contracts or documents, the basic principle of law is that, it is not the duty of any court or tribunal to make contract for parties: Fakorede v. Attorney-General, Western State (1972) 1 All NLR (pt.1) 178 at 189. Contract as a rule are made by the parties thereto who are bound by the terms thereof and the courts are always reluctant to read meaning into a contract terms on which there is no agreement: Alhaji Baba v. Nigerian Civil Aviation Training Centre (NCATC) and Anor. (1991) 5

¹¹ Black's Law Dictionary, 1990. Eight ed. St. Paul MN. West Publishing Company, p. 689.

¹² Treitel, G. H., *ibid.* p. 4

¹³ (2009) 6 NWLR 585.

¹⁴ BFI Group Corporation v. Bureau of Public Enterprises [2013] All FWLR 444 at 476, paras.A-B.

NWLR(Pt. 192) 388 at 413, (1991) 7 SCNJ 1. In other words, a court or tribunal cannot write a new contract for the parties.¹⁵

Contract in the recent years has taken a new dimension as a result of globalisation and technological advancement which have led to surge in cross-border business transactions and electronic contract, otherwise known as *e-contract*.

4.0 WHAT IS E-CONTRACT?

The word 'e-contract' is sometimes used interchangeably with 'e-commerce'.

E-commerce is defined as the practice of buying and selling goods and services through online consumer services on the internet. The 'e', a shortened form of the word 'electronic' is a common prefix for other terms related to electronic transaction.¹⁶ Black's law dictionary, defines *e-contract* as any type of contract formed in the course of e-commerce by the interaction of two or more individuals using electronic means, such as e-mail and other computer program.¹⁷

This simply means formation of a binding agreement by means of a computer or other electronic or automated technology. E-contract is a contract modeled, specified, executed and deployed by a software system. E-contracts are conceptually very similar to traditional or conventional contracts, sometimes, *contra inter partes*. Purchasers consider their options, negotiate prices and terms, where applicable, place orders and make payments, while vendors reciprocate by fulfilling their obligations under the contractual arrangements.

E-contract is now common in view of many online platforms or outlets whose modes of transactions are through electronic means. This form of transaction has both merits and demerits, with myriads of technical and legal challenges almost outweighing its benefits.

Individuals, group of persons and corporate bodies in exercise of their freedom to contract sometimes adopt e-contract for a number of factors, such as location, accessibility, transfer of funds (usually due to cashless policy being currently adopted globally), mobility and time, among others. However, there are other online platforms that bring together vendors and purchasers, such platforms include, *shopify* (where any product could be placed for sale), *BigCommece*, *Magento* (owned by *eBay*, another online platform), *3dcart*, *amazon*, *Jiji*, *Konga* among many others.

It is however important to note that e-contract has not lost its roots in conventional law of contract, even with its attendant challenges and difficulties.

One thing that is common to both *e-contract* and conventional contract is dispute. In every area of human endeavour, conflicts are likely to arise. Although, a court will not interfere in the formation or making of a contract, however when disputes arise, a court will have to look into the terms of the contract between the parties and construe same to do justice between them.

In some cases, parties decide the mode of dispute settlement mechanism and thereby sometimes insert arbitration clause in the terms of the contract.

¹⁵*BFI Group Corp. v. B. P. E(Supra)* – Per AriwoolaJSC., Pp. 482-483, paras. G-C

¹⁶ Black's Law Dictionary. *ibid* p. 551

¹⁷*Ibid.* at 553

5.0 E-CONTRACT AND COURT'S JURISDICTION

As a result of peculiar mode of formation of e-contract, the issue of dispute settlement may sometimes be technical and problematic. The issue of jurisdiction is very fundamental to the adjudication of disputes. The word 'jurisdiction' refers to the right or power to administer justice and to apply laws, usually with respect to the exercise, extent or limit of such right or power or authority in general.¹⁸ According to Black's law dictionary¹⁹, judicial jurisdiction is the legal power and authority of a court to make a decision that binds the parties to any matter properly before it. There are twin fundamental judicial issues which usually arise from e-contract disputes, these are-(i) jurisdiction of court and (ii) enforcement of judgment. The Supreme Court in *Inakoju v. Adeleke*²⁰ making pronouncement on the nature and scope of jurisdiction held that:

Jurisdiction is a radical and crucial question of competence, for if the court has no jurisdiction to hear the case, the proceedings are and remain a nullity ab-initio, however well conducted and brilliantly decided they might be, as a defect in competence is not intrinsic, but rather extrinsic to the entire adjudication. Jurisdiction is the nerve centre of adjudication, it is the blood that gives life to the survival of an action in a court of law; in the same way blood gives life to human beings and the animal race.

A court has jurisdiction to adjudicate over a matter when the following highlighted factors are present.

- (1) It is properly constituted as regards members and qualifications of the members of the bench (Judges) and no member is disqualified for one reason or the other.
- (2) Also, where the subject matter of the case is within its jurisdiction and there is no feature in the case which prevents the court from exercising its jurisdiction.
- (3) The case has come before the court initiated by due process of law and upon fulfillment of any condition precedent to the exercise of jurisdiction.²¹

Territorial jurisdiction is the geographical location or venue where a case is heard and determined. It is also an aspect of court's jurisdiction.²² This is of particular importance in disputes arising out of e-contracts, some of which are cross-border transactions.

In Nigeria, the High Court Civil Procedure Rules of various states of the federation and the Federal Capital Territory provide for place of instituting, and trials of suits. The relevant provision for suits on contract, be it for specific performance or breach of contract states thus:

*All suits for the specific performance, or upon the breach of any contract, may be commenced and determined in the Judicial Division in which such contract ought to have been performed or in which the defendant resides or carries on business.*²³

¹⁸Collins English Dictionary Ninth ed. Glasgow.HarperCollins Publishers. P. 879

¹⁹ P. 867

²⁰ [2007] All FWLR Pt. 353 P. 3 at 87 paras B-D

²¹*Eneh v. NDIC* [2009] All FWLR Pt. 982 p. 105 at 1073-1074; paras. G-A

²²*Santory Coy Ltd v. Bank of the North Ltd.* [2005] 8 NWLR Pt. 925 at P. 612 Para-G-H; *Essang v. Aurem Plastics Ltd. & Or.*[2002] 17 NWLR Pt. 795 at P. 155 pp. 178-180 para. G-C; *S.L.B. Consortium Ltd. V. N.N.P.C* (2011) All FWLR Pt. 586; *Obaro v. Hassan* (2003) 8 NWLR Pt. 1357 p. 425;*Ajayi v. Adebiyi* (2012) All FWLR Pt. 634, p. 1; *Duru v. F.R.N* [2019] All FWLR pt. 985 p. 404 at 430; paras C-G.

²³ See Order 2 Rules 1, 2, 3 and 4, Lagos State High Court Civil Procedure Rules. There are similar provisions in Order 2 of the High Court Civil Procedure Rules of Rivers, Enugu, Kaduna, Anambra, Akwa-Ibom, Cross-Rivers, Bayelsa, Oyo and many others states of the Federation.

The Rules further provide that all other suits (outside that of breach of contract and specific performance) may be commenced and determined in the judicial division in which the defendant resides and carries on business or in which the cause of action arose.

However, where there are many defendants who reside or carry on business in different judicial divisions, the suit may be commenced in any one of those judicial divisions subject to any order or direction or Judge may make or give as the most convenient arrangement for trial of the suit. E-Contract is usually not contract *inter-partes*, it takes place often between offeror and offeree who are far wide-apart in terms of geographical location, essentially it is more than mere making payments electronically (paytech) for goods and services or any other object of the contract.

As noted earlier, in spite of the exponential growth being witnessed by *e-Commerce* and the popularity it is gaining by the day, particularly among the youths, there are still plethora challenges hindering its wider acceptance.

Since *e-commerce* involves electronic transaction, it goes without saying that, constant power (electricity) supply will aid this kind of contract in no small measure. The technologies, such as internet being deployed in the contract of this nature rely primarily on electricity supply. However, with erratic and epileptic power supply in Nigeria, *e-commerce* faces a major setback and barrier to smooth contractual activities. The combination of 'power' and internet failure usually give rise to conflicts that otherwise could have been avoided. For instance, electronic transfer of money becomes a herculean task with either or both parties to the contract doubting the sincerity of each other.

Nigeria, being a developing country with high level of illiteracy generally, and in particular in the area of use of modern-day gadgets (technologies), it therefore becomes difficult for a vendor to upload his products on any of the online platforms for prospective purchaser to take advantage of such channel of business. Sometimes, if the vendor is literate enough to upload such goods and services, conversely the purchaser might not be savvy in the use of computers, to enable him search for such goods or services and consequently enter into e-contract with the prospective vendor.

Another major challenge limiting the growth and wider acceptability of electronic contract is mistrust and gross insincerity which is rooted in large-scale internet fraud being experienced all over the world. Internet fraud continues to grow in leaps and bounds in spite of legislations against such act.²⁴ For instance in September, 2019 the United States Department of Justice announced the arrest of 281 persons running so-called business email compromise (BEC) Schemes, with breakdown of the countries where arrest were made as follows: (i) United States – 74 (ii) Nigeria – 167 (iii) Turkey – 18 and (iv) Ghana – 15, among others. The figure posted above is evident of large scale internet/cyber-crime, which no doubt affects enabling environment for thriving e-contract.²⁵

In some cases, breach of contract may arise as a result of difficulties of delivery process of goods or services or both. This may sometimes be as a result of loss of goods in transit. Taxes, taxing authorities and tax regimes may also be another complex issue in e-contract, particularly where such transaction is cross-border in nature.

²⁴ Section 6(b) Economic and Financial Crimes Commission (Establishment. etc.) Act Cap. E1 LFN 2004

²⁵ Hundreds arrested in US – Nigeria Crackdown on cyber scams. Retrieved Dec. 4, 2019 from <https://www.dw.com>

However, it is encouraging that some of the issues bothering on territorial jurisdiction, proper party to a suit and enforceability of court's judgment have all been fairly laid to rest.

For instance, the court in *Nu Metro Nigeria Ltd. V. Tradex S.R.L.*,²⁶ in determining whether a Nigerian court of law can assume jurisdiction over two foreign incorporated companies whose certificates of incorporation are not in compliance with the relevant Nigerian Laws held thus:

*By the provisions of section 60(b), CAMA nothing in the Act shall be construed as affecting the right or liability of a foreign company to sue or be sued in its own name or in the name of its agent. Nigerian courts recognize as juristic person, corporations established by a foreign law by virtue of the fact of their creation and continuance under and by virtue of that law. Such recognition is said to be by the comity of nations and such evidence being given of the proper instruments whereby the law of the foreign country it was effectually created as a corporation. . .*²⁷

In the same vein the court further held on the issue of enforceability of cross-border contracts, most of which could be classified as e-contracts as follows:

*It is unconscionable for a party who had taken benefit of a contract with a foreign company duly registered under the laws of its country to turn round to contend that such a contract cannot be enforced in Nigerian courts while keeping to himself the proceed or benefit of the said contract since in law no one can be allowed, in good conscience and in equity, to benefit from his own wrong and resile from a contract after taking the benefit therefrom . . . the trial court properly held that the appellant was bound by the terms of the contract.*²⁸

E-Contract: Lessons from select jurisdictions

The experience of parties and stakeholders with regard to e-contract differs from one jurisdiction to the other. The emergence and growth of e-contract in the United States of America (US), United Kingdom (UK) and South Africa are comparatively examined with the Nigeria situation.

United States of America (US)

In many climes; including the US, it is being debated whether electronic contract standards should develop from daily contractual activities, which like the 'conventional' contract can regulate itself rather than delimiting its scope through legislation which seeks to protect parties to the contract and consequently increase their trust in the process.

The United Nations Commission on International Trade Law (UNCITRAL) discovered that the increase in electronic trading activities deserves formal recognition that contracts can be legally entered into through the use of internet.²⁹

²⁶[2019] All FWLR Pt. 996 p. 1035 at pp. 1065-1066; paras.E-A.

²⁷ See also the following cases: *Bank of Baroda v. Iyalabani Co. Ltd.*(2002) FWLR Pt. 124, P. 494, *Procter & Gamble Co. v. G.S. & D. Industries Ltd.* (2013) NWLR Pt. 1336 p. 406, *Ritz & Co. KG v. Techno Ltd.* (1999) 4 NWLR Pt. 598 at 298, *SaebjJernstoberi M.F. A/S v. Olaogun Enterprises Ltd.* (1999) 14 NWLR pt. 637 at 128

²⁸ See also the following cases: *Oyegoke v. Iriguna*(2001) FWLR pt. 75 at 448, *Ibrahim v. Osim* (1988) 3 NWLR pt. 82 at 257; *Oilfield Supply Centre Ltd. V. Lloyd Johnson* (1987) 2 NWLR Pt. 58 at 625.

²⁹Article 16 of the UNCITRAL Model Law on Electronic Commerce.

The law further provides that states should make it mandatory that such online or electronic contract are not only legally binding on the parties but also enforceable. Electronic signature; which will no longer require the presence of the parties to sign or endorse contractual documents also became an integral part of the whole process.

The United States adopted the UNCITRAL Model Law by virtue of its adoption of the Uniform Electronic Transactions Act (UETA 1999) and the Electronic Signatures in Global and National Commerce Act (E-Sign). Section 2 of the former which provides for the definition of terms defines *electronic signature* as electronic sound, symbol or process logically associated with a record and executed or adopted by a person with the intent to sign the record. It is instructive to note that forty-seven states, the District of Columbia, and the U.S. Virgin Islands have adopted UETA.³⁰

Before the enactment of the E-Sign in June 2000, the courts in various states in US had to decide whether electronic transactions satisfy the requirement of writing. The courts were therefore partially guided by the statute of frauds. They held that the requirements of the statute of frauds are satisfied in electronic transactions³¹ plethora of other controversial issues arose, such as: (i) Disclosures of terms of contract on a mobile device, whether it was legible or not (ii) validity of electronic signature (iii) identifying the signer and (iv) procedure for tendering of electronic evidence.³²

One significant position taken by the US laws/courts is the preservation of the parties right of freedom to contract as may be spelt out in the terms of the contract. This is an age-long principle of law under the conventional contracts.

In US, UETA and E-Sign apply only where the parties agree to transact through electronic mode. The contract may be wholly electronic, that is the offer, acceptance, consideration and the intention to enter into legal relation, or it may be electronic in part, depending on what the parties agreed to without duress, mistake, fraud and on undue influence.

The courts have held that for electronic contract under UETA to be binding and enforceable, it must be apparent that the parties by their actions and conduct desire to contract in-line.

It is important to note that in addition to the legal framework that helps to regulate and streamline electronic contract, the US also boasts of internet facilities and technologically savvy populace which make electronic contract less cumbersome.

Unlike in the US and other developed countries, Nigeria lacks a well-structured legal framework for e-contract. Nigeria relies on sundry of related statutes such as statute of Fraud³³ (applicable by virtue of statute of general application), Evidence Act³⁴, Cyber-crime Act³⁵ etc.

³⁰Uniform Electronic Transactions Act-Rights Signature.Retrieved Feb. 17, 2020 from <https://rightsignature.com>ueta-act>.

³¹Electronic Contracts – Law Teacher.Retrieved Feb. 17, 2020 from <https://www.lawteachers.net>electronic>.

³² See generally the following cases: *O' Connr v. Uber*, No. 14-16078 (9th Cir. 2018); *Meyer v. Uber* 868 F. 3d 66 (2017); *Berkson v. Gogo LLC*, 97f. Supp. 3d 359 (E.D.N.Y. 2015); *Adams v. Quiksilver, Inc* (unpublished) Cal. App. 4th Div. Feb. 22, 2010.

³³The Statute of Frauds (29 Car 2-c.3) 1677 is an Act of Parliament in England applicable in Nigeria by virtue of SOGA.

³⁴ Cap. E 14 Laws of Federation of Nigeria 2004.

³⁵ Cybercrime (Prohibition, Prevention etc.) Act.

India

Electronic commerce, popularly referred to as e-contract is recognized and enforceable under the Indian legal system. Section 10-A of the Indian Contract Act, (1872) provides *inter-alia*.

...Where in a contract formation, the communication of proposals, the acceptance of proposals, and acceptances, as the case may be, is expressed in electronic record, such contract shall not be deemed to be unenforceable solely on the ground that such electronic form or means was used for that purpose.

This provision has however been re-produced in the Information Technology (Amendment Act), 2008 as a result of growing electronic commercial transactions in India. Contracts of this nature, much unlike the traditional contracts are entered into through means or electronic process such as e-mail, internet, fax and many other electronic channels. Once parties' minds meet on all terms (*consensus ad idem*) such contract is valid and in the absence of any legally recognized vitiating factors³⁶, such contract is valid and enforceable. It is however instructive to note that the Information Technology (IT) Act does not accommodate all forms of contract or commercial agreements. The law exempted contracts that take the following forms:

1. Negotiable Instruments;
2. Powers of Attorney;
3. Trust Deeds;
4. Wills;
5. Contracts for sale or Transfer of Immovable Property³⁷; and others specifically provided in the Registration Act, 1908 and various stamp Acts etc.

The courts in India, just like in Nigeria by virtue of its section 65-B of the Evidence Act recognize electronic documents as evidence and the procedure for tendering same is spelt out in section 65A thereof. India Evidence Act provides among other things that information contained in an electronic record produced by a computer in printed, stored or copied form shall be deemed to be a document and it can be admissible as evidence in any proceeding without any further proof of the original. Another milestone in Indian e-contract is the legal recognition of e-signatures which enjoys the same status as the handwritten signature.

The IT Act recognizes two types of signatures; namely:

- (i) E-signatures that combine an Aadhaar with an eKYC Service. Interestingly, users with an Aadhaar ID, is the unique identification number issued by the Indian government to all Indian residents, are free to use an online e-signature service to securely sign documents online. An app is designed for the users to apply e-signatures to any online document by authenticating their identity using an eKYC service such as OTP (one time passcode) provided by an e-sign service provider.
- (ii) Digital Signatures that are generated by an asymmetric crypto-system and hash function. An 'asymmetric crypto system' refers to a secure pair of keys: a private key and a public key. Both are unique to each user, and can be leveraged to verify and create an e-signature.³⁸

It is important to note that under the IT Act, there are conditions that must be satisfied for e-signatures to be valid. They are:

³⁶ Duress, mistake, misrepresentation, fraud, illegality etc.

³⁷ See generally Section 1(4) of the IT act, 1872

³⁸ Everything you need to know about e-signature laws in India-SignEasy, retrieved 16th March, 2020 from <https://signeasy.com>esign-law-india>

- (a) E-signatures must be uniquely linked to the person signing the document. This condition is often met by issuing a digital-based ID.
- (b) Secondly, at the time of signing, the signer must have total control over the data used to generate the e-signature. Most online e-signature service providers allow signers to directly affix their e-signature to the document in order to meet this requirement.
- (c) It is also a condition that the person signing or any other person should be able to detect any alteration of the e-signature. Alteration can be detected where the contract document is encrypting the document with a kind of seal that will make any tampering obvious.
- (d) A close examination and auditing to confirm that due process was observed in the course of affixing e-signature must be ensured.
- (e) Finally, the digital signature certificate must be issued by a Certifying Authority recognized by the controller of certifying authorities as may be appointed under the IT Act.³⁹

It is however instructive that Nigeria has so much to learn from the India experience, with particular reference to the India Legal Framework.

South Africa

Much like every other nations with legal framework for electronic contracts, such contracts are considered valid for as long as they conform with the traditionally recognized essentials of a contracts.⁴⁰ In South Africa, there are five (5) major requirements that must be complied with for electronic contracts to be valid. This form of contracts are also referred to as digital contracts.

- (i) For electronic or digital contracts to be valid, such contracts must meet the common law requirements as enacted in the South African Law. Such elements such as offer, acceptance, consideration, intention to enter into legal relations, consensus ad idem must be present. Also, all contracting parties must have contractual capacity. Similarly, the contract must be legal and capable of performance.
- (ii) Generally, not all forms of agreement can be entered into electronically. Such exemptions are contract agreements for the sale of real property, wills (testament), bill of exchange and stamp duties. Other forms of contractual agreements can be executed electronically. The foregoing principle of law is established by court in *Spring Forest Trading CC v. WilberrytlaEcowash and Anor.*⁴¹
- (iii) Exchange of electronic mail is one of the channels through which electronic/digital contracts can be entered into it should therefore be considered as having binding effect on the parties. The court in *Jafta v. Ezemvelo KZN Wildlife*⁴² held that Electronic mails and SMS are valid means of entering into electronic/digital contracts.
- (iv) Considering the issue of jurisdiction of courts and the applicable laws that govern electronic/digital contracts, the South African legal system places much emphasis on the time and place of the completion of the contract. The South African ECT Act provides that electronic contracts are formed at the time, when and place where the offer or receives acceptance to the offer.⁴³

³⁹ Everything you need to know about e-signature in India. Retrieved March 30, 2020 from <https://signeasy.com/blog/electronic-signature-law/esign-law-india/>

⁴⁰ Essential of valid contract-e-Transactions. Retrieved March 31, 2020 from www.etransactionslaw.utc.ac.za>elaw.

⁴¹ 2015 (2) Sa 118 (SCA).

⁴² 2008 JOL 22096 (LC)

⁴³ About Contracting Online. Retrieved March 31, 2020 from <https://smesouthafrica.co.za>>

- (v) Finally, electronic signature must follow the laid down procedure before same can be validly affixed to an electronic contractual agreements. All ECT Act⁴⁴ recognises electronic signatures and the provision of this law is modeled after the European Union (EU) conventions on e-signature.

However, it is important to know that the Act does not prescribe the technology, device or process to be adopted. Irrespective of the process, it is clear that in the absence of fraud, and with the parties' agreement any form of e-signature affixed to electronic document is valid and admissible as evidence.

In spite of the noticeable shortcomings observed in the South African legal system, it is obvious that Nigeria has some lessons to learn from that jurisdiction.

THE EFFECTS OF COVID 19 ON E-CONTRACTS

The outbreak of corona virus, otherwise referred to as COVID 19 worldwide changed the face of many things and affected virtually every sector, ranging from the global economies, commerce, health, education, agriculture, transportation, just to mention but a few.

This global pandemic necessitated government of different nations putting several measures in place to curtail its further spread and minimize its effects on people. One of the proactive measures taken by several countries was restriction of human movement within and outside their geographical boundaries. Many countries of the world enforced the restriction of movement during the lockdown, such countries which host large commercial centres include, United States of America, United Kingdom, China, Australia, Italy, South Africa, Nigeria etc.

One immediate effect of lockdown was the inability of free movement of goods and services from one location to the other. People continue to demand for goods and services which were not readily available as a result of the 'lockdown'. The effect of the aforesaid is that, more than ever before, resort was made to the e - contract or e-commerce. For example, *Washington Post* reported that sales on *Amazon* soared to \$75.5 Billion during the covid-19 lockdown, up from \$59.7 Billion the same quarter a year ago (before the pandemic). This period witnessed increased activities on various online and electronic platforms. With the banks and other commercial institutions physically shut, most people resort to online commercial transactions, even the educational sector and service-providers were not left out. As almost all the sectors went digital so as to meet the need of the customers and users, it became imperative for online transactions to witness a surge as it became the only viable option for commercial activities to thrive.

In the words of Gupta and Wadha,⁴⁵ e- contracts are not only valid and enforceable but also the way forward. They posited that –

Talking about the benefit of e – contracts, these times provide the necessary impetus to the legal fraternity as well as corporate houses, to explore the digital route, not only for business continuity but for the convenience of record keeping and ease of access.

Most of the businesses and commercial transactions were not so adversely affected as a result of COVID 19 and its attendant consequences. This was largely as a result of more people resorting

⁴⁴ Chapter III Part 1 of the Electronic Communications and Transactions Act No. 25 of 2002

⁴⁵ Gupta, P. & Wadha, A. (2020). 'E' sign of the times. *India Business Law Journal*. Retrieved 28th October, 2020 from [https:// law.asia/e-contracts-sign-times/](https://law.asia/e-contracts-sign-times/)

to commercial transactions through online / electronic means. However, as earlier noted much is still desired in terms of process, structure, and legislations (regulations) to ensure that digital commercial transactions (whether locally or internationally) are without hitches.

6.0 CONCLUSION

The impact of e-contract on the growth of global economy in general and that of Nigeria in particular cannot be over-emphasised. The ease of transfer of money as a result of advanced financial technology (fintech) has in no small way aids e-contracts. Vendors and purchasers are not limited by time and distance to effectively transact with one another. However, some impediments to the growth of e-contracts are still noticeable and usually serve as a clog in the wheel of the progress of e-contract. Principally, Nigeria's infrastructural deficit, particularly in the area of power-supply is alarming. The word 'electronic' in 'e-contract' suggests that the process can only work without hitches with constant supply of electricity. Constant supply of electricity; in turn will enhance information technology which makes electronic transfer of money possible with ease. This is against the backdrop that larger percentage of e-contract is cross-border transactions, not contract *inter-partes*. Similarly, high cost of internet-facilities is another obstacle to the growth of e-contracts in Nigeria. It is therefore suggested that the National Communication Commission (NCC) and the Federal Government put in place a policy that will make internet facilities affordable to Nigerians. All the aforesaid measures will enhance the growth of e-commerce in Nigeria, and its consequential economic growth.

Finally, among other things, government should intensify efforts on fight against cybercrime, so as to give the prospective parties in e-contract some level of confidence and security from internet-fraud.