

## CONSUMER PROTECTION IN NIGERIA IN THE CONTEXT OF ELECTRONIC COMMERCE

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### Abstract

*Electronic Commerce has witnessed growth worldwide in terms of deployment and usage. In some developing countries however, specific rules for e-commerce remain largely unwritten culminating in the disparity of terms offered by e-commerce companies. This work aims to buttress the consumer detriment that could arise from applying non-uniform rules in e-commerce transactions and expects to proffer solutions such as clear dispute resolution channels and stipulating clear terms on consumer rights and responsibilities. The author specifically focuses on the Nigerian e-commerce sector, which though showing significant growth process is yet to develop specific rules of engagement.*

**Keywords/Phrases** Electronic Commerce, Consumer Protection, Consumer Detriments

### Introduction

Electronic Commerce (also known as E-commerce) is simply the process of contracting for goods and services online from the time of making an order to the time of taking delivery. This term has also been defined as a type of business model, or segment of a larger business model, that enables a firm or individual to conduct business over an electronic network, typically the internet.<sup>1</sup> E-

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<sup>1</sup> Investopedia, 'E-commerce Definition' Available at <http://www.investopedia.com/terms/e/ecommerce.asp#ixzz4dAN3qos4>  
Accessed 12/03/2017

commerce has gone beyond the reference to transactions for sale and purchase of goods and services and digital content on the Internet using classical computers to include transactions completed on mobile phones (m-commerce) or other devices such as tablets and also covers purchases using applications (Apps) and platforms.<sup>2</sup>

Statistics show that the e-commerce industry is valued at USD 1.6 trillion worldwide with China, the United States and the United Kingdom topping the charts for largest markets.<sup>3</sup> Again, Statista projects that 40 percent of worldwide Internet users have bought products or goods online via desktop, mobile, tablet or other online devices amounting to more than 1 billion online buyers.<sup>4</sup>

E-commerce is broadly classified into three models: Business-to-Consumer (B2C), Business-to-Business (B2B) Consumer-to-Consumer (C2C). The B2B involves two or more business entities while the C2C involves two consumers transacting online. These two arrangements are regarded as transactions between two entities of equal standing. The Business-to-Consumer model which is the core concern of this work is the business relationship between a business entity and an ordinary consumer dealing in consumer goods.<sup>5</sup> In this kind of relationship, it is believed that the consumer needs legal protection in view of concepts such as corporate might, asymmetry of information, and low literacy or technological

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<sup>2</sup> United Nations Conference on Trade and Development Manual on Consumer Protection 2016 98

<sup>3</sup> K. McDermott, “Key business drivers and opportunities in cross-border e-commerce: A data-driven landscape” Payvision (2016) 3

<sup>4</sup> Statista, ‘Statistics and Market Data about E-commerce’ <https://www.statista.com/markets/413/e-commerce/> Accessed 15/04/2017

<sup>5</sup> The EU Consumer Rights Directive defines the consumer in Article 2.1 as “any natural person who is acting for purposes which are outside his trade, business, craft or profession.” See Directive 2011/83/EU of the European parliament and of the council

sophistication to decipher complex products or fully grasp the implications of knotty terms/conditions of sale.

In Nigeria, consumer protection is generally regulated by the Consumer Protection Council even though other consumer focused agencies regulate specific sectors. For instance the aviation sector is regulated by Nigerian Civil Aviation Authority (NCAA) while the banking sector is regulated by the Central Bank of Nigeria. Also food safety is overseen by the National Agency for Food and Drug Administration and Control (NAFDAC) and the Nigerian Communications Commission regulates Telecommunications. There is however, presently no regulator, guidelines or regulations on e-commerce and this lacuna seems to have left consumers at the mercy of online merchants who draft terms and conditions to suit company policies or convenience.

In view of this therefore, this paper seeks to propose that e-commerce specific rules must be developed to create uniformity of terms and stipulate corresponding rights and responsibilities for both consumers and sellers. Additionally, this paper seeks to highlight some worrisome insertions in the terms and conditions of some e-commerce companies with the intention of demonstrating how the lack of rules in the industry can expose consumers to detriment. Specifically, terms regarding dispute resolution, notice of terms, representations and warranties are discussed. The paper concludes by recommending some important terms that should be enplaced in an ideal e-commerce User Agreement including a comprehensive definition of terms, clear stipulations of rights and responsibilities of parties and channels of redress to facilitate dispute resolution.

### **E-commerce as a Driver for Growth in Nigeria**

E-commerce in Nigeria commenced in 2012 when some home grown e-commerce companies commenced operation and has blossomed significantly such as Jumia and konga. A variety of goods and services are marketed on e-commerce sites sometimes directly on merchant websites or on online marketplaces hosted by

a website owner. Popular sites in Nigeria include Jumia.com and Konga.com for household goods, Electronic gadgets from Yudala, promotions and discounts from Dealdey and companies such as Cheki for automobiles. Also, services such as airline booking and vacation planning are also carried out by such companies as Wakanow.com. Besides the home grown companies, some others such as Amazon can also be patronised.

E-commerce provides several advantages including the convenience of shopping from home, 24 hour availability and savings on transaction and operational costs. Companies save on rent, reduction of the need for several physical locations and cost of advertising (by using farther reaching online catalogues rather with savings on the cost of physical distribution). Additionally, E-commerce fosters trans-border trade and movement of goods and enables businesses including small business enterprises to expand geographical reach by enabling online visibility which carries the opportunity for worldwide reach. As websites are visible worldwide, it offers the possibility of doing business in every country without the need for physical presence or multiple company incorporation and as Monye notes, without the need to apply for visa, pay air fare, and spend valuable time travelling.<sup>6</sup>

Furthermore, related sectors are impacted by the proper functioning of the e-commerce industry. For instance, the payment system in Nigeria including the system of electronic wallets introduced by these sites has been recognised and replicated by banks and other financial institutions. Further, e-commerce heralds the opportunity for creating new jobs for advertisers, fulfilment/delivery companies, and IT experts. Additionally, E-commerce heralds benefits for both business entities and consumers as the former is able to offer customised services to consumers informed by observed shopping preferences (including the benefits of receiving

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<sup>6</sup> F.N Monye, "Consumer protection in electronic commerce" *Consumer Journal*, Vol. 6, 2010-2011 31 - 32

customer feedbacks through seller ratings and comments resulting in improved customer satisfaction). Consumers on the other hand, get the opportunity of shopping from a wide array of sellers and accessing product reviews and best available purchase prices.

Even though the E-commerce sector is witnessing significant growth, powered by the growing ubiquity of the smart phones and like devices, appreciable Internet penetration and positive consumer patronage, Nigeria must still strive to emplace a specific legal framework to engender consumer confidence and growth in the sector and eschew unfavourable practices. Again an effective framework will ensure that consumers do not become victims of targeted unsolicited advertising and unsatisfactory performance of contracts or disappointing resolution of disputes.<sup>7</sup>

### **The Concept of Consumer Protection**

The European Union Consumer Rights Directive (effective June 2014) defines a consumer as ‘any natural person who is acting for purposes which are outside his trade, business, craft or profession.’<sup>8</sup> Guideline 3 the United Nations Guidelines on Consumer Protection defines the term ‘consumer’ generally as a natural person, regardless of nationality, acting primarily for personal, family or household purposes.<sup>9</sup> Basically, consumer protection is the protection of buyers of goods and services against low quality or dangerous products and advertisements that deceive people<sup>10</sup>. It has also been defined as laws and policies designed to protect

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<sup>7</sup> UNCTAD Manual on Consumer Protection 2016 102

<sup>8</sup> See Directive 2011/83/EU of the European parliament and of the council, Article 2.1

<sup>9</sup> United Nations Guidelines on Consumer Protection 2016 Guideline 3

<sup>10</sup> Cambridge Dictionary, Meaning of “consumer protection, Available at <http://dictionary.cambridge.org/dictionary/english/consumer-protection>. Accessed 28/04/2017

consumers against unfair trade and credit practices.<sup>11</sup> Consumer protection was popularised by John Kennedy in the 1962 speech to the United States Congress where he declared that,

Consumer interests must be protected to avoid waste in consumption, inefficiency in business or Government, waste arising from purchasing inferior/unsafe products, exorbitant prices and the lack of informed choice in order to strengthen competition, foster a higher standard of living and ethical patterns of business conduct.<sup>12</sup>

This movement commenced with the promotion of four basic consumer rights including the right to safety, the right to be informed, the right to choose, the right to be heard – to these have been added four more including the right to the satisfaction of basic needs, the right to a healthy environment, right to redress and the right to consumer education. Presently, there are eight basic consumer rights.<sup>13</sup>

Consumer protection ensures that sellers of goods and providers of services deal in a friendly and ethical manner with consumers to sustain patronage and loyalty. Sellers and service providers in a society with effective consumer protection will be better inclined to demonstrate dynamism in innovating personalised, responsible and novel business plans and practices including offering after sales services and compensation plans and remedies for any breach to impress the consumers.

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<sup>11</sup> Collins Dictionary, ‘Definition of Consumer Protection’, Available at <https://www.collinsdictionary.com/dictionary/english/consumer-protection>. Accessed 28/04/2017

<sup>12</sup> J.F Kennedy, “Special Message to the Congress on Protecting the Consumer Interest” March 15, 1962 Available at <http://www.presidency.ucsb.edu/ws/?pid=9108> Accessed 29/04/2017

<sup>13</sup> Consumers International, ‘Consumer rights’ Available at <http://www.consumersinternational.org/who-we-are/consumer-rights> Accessed 28/04/2017

**Rationale for Consumer Protection**

Consumer protection is essential to every nation because of the limited ability and knowledge of the ordinary consumer when dealing with a seller of goods/products or provider of services as the consumer deals outside the usual sphere of trade, business, craft or profession. Again consumers need protection due to the unequal bargaining power between consumers and business entities especially in relation to standard term contracts. Essentially, standard term contracts are contracts that offer terms and conditions of one party without offering the opportunity for further negotiation or variation to the other party. Typically, these terms are provided in form of lengthy wording and tiny prints written in complex legal language making it difficult for consumers to appreciate the implications of the wordings.<sup>14</sup>

Furthermore, consumer protection ensures that the needs of vulnerable members of the society such as children, the poor, disabled and less literate are catered to.<sup>15</sup> Nations must also be concerned with consumer protection because well informed consumers are in a better position to make more informed choices about complex products and services and to demand fair terms and conditions of trade which reflect positively on the economy of the nation in terms of improved customer service, better value for money, and increased competition leading to more choices for consumers. Consumers also enjoy the benefit of availability of a range of high standard of products and services at the best possible price sold under safe conditions and less onerous terms.

No doubt, having effective consumer protection will enable regulators develop specific Consumer Protection laws that impose rights and obligations, promote equality in business, correct market

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<sup>14</sup> See also the UNCTAD Manual on Consumer Protection 2016 3

<sup>15</sup> UNCTAD Manual on Consumer Protection 2016 3

failure, controlling the activities of sellers and ensure that minimum standard of safety and quality is maintained.<sup>16</sup>

### **Consumer Protection in Nigeria**

The Consumer Protection Council is the apex consumer protection body in Nigeria charged with protection of the general welfare of consumers in Nigeria. The CPC was established in 1992 to strive to, among others, eliminate hazardous products from the market, provide speedy redress to consumers complaints, undertake campaigns as will that lead to increased consumer awareness, ensure that consumer interests receive due consideration at the appropriate forum, and encourage trade, industry and professional associations to develop and enforce in their various fields quality standards designed to safeguard the interest of consumers.<sup>17</sup>

The agency also strives to drive consumer rights consciousness by educating consumers to ensure that Nigerians remain informed to be able to demand rights. Specifically, the agency canvasses for consumer rights in regard to satisfaction of basic needs, access to basic goods and necessities such as food, water, energy, clothing, shelter, health-care, education and sanitation and the promotion of minimum standards to ensure that goods and services meet the asserted standard of quality.<sup>18</sup>

Although having the power to regulate consumer protection, it must be stated that the mandates of the CPC have not been particularly suited to e-commerce but deals generally with protection of consumers. It is suggested that a more specialised agency needs to be established to cater to the needs of e-commerce consumers. At a minimum, a guideline for e-commerce should be introduced for the sector.

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<sup>16</sup> Ibid

<sup>17</sup> CPC, 'Consumer Rights' 12 April 2015. Available at <http://www.cpc.gov.ng/index.php/consumers> Accessed 30/03/2017

<sup>18</sup> CPC, 'Consumer Rights' 12 April 2015. Available at <http://www.cpc.gov.ng/index.php/consumers> Accessed 30/03/2017



**Consumer Protection in the Context of E-commerce**

Consumer protection is even more important in the context of e-commerce as consumers have no opportunity to examine the goods to be purchased but rather rely on the sales description provided on sellers' websites. Again, the buyer has no further knowledge of the identity of the seller besides the unverifiable information provided on these sites. Further, the fact that e-commerce affords anonymity to users makes it important to ensure that terms are fair and favourable to consumers. A core goal in protecting the interest of online shoppers is to ensure that the interests of these shoppers are not less favourable than those of consumers dealing in regular offline stores<sup>19</sup>. These reasons have brought worldwide attention to e-commerce and led to the culmination of a series of Guidelines and models by organisations such as the United Nations and the Organization for Economic Cooperation and Development [OECD] and has received support from International and national agencies, organisations and groups such as the Consumers International.

The OECD in 1999 introduced the Guidelines for Consumer Protection in the Context of Electronic Commerce, which applies only to business-to-consumer electronic contracts. These guidelines provide standards for effective consumer protection in order to eliminate the barriers posed by innovations in e-commerce such as distance, conflicts of laws/legal interpretation and dispute resolution and promote better technologically neutral business relationships.<sup>20</sup> The guidelines also aim to ensure that consumers receive equal rights when dealing online to the same degree as consumers transacting in brick and mortar shops by encouraging

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<sup>19</sup> See sections 63-65 of the 2015 UN Guidelines on Consumer Protection which introduce key e-commerce provision including the equal treatment of offline and online consumer, the adaptation of laws to suit e-commerce peculiarities and specify consumer rights and obligations and maintain international Standards

<sup>20</sup> Organisation for Economic Co-operation and Development (OECD) Guidelines for Consumer Protection in the Context of Electronic Commerce 3

fair business, advertising and marketing practices; clear information about online business identity, the goods or services offered and the terms and conditions of any transaction; a transparent process for the confirmation of transactions; secure payment mechanisms; fair, timely and affordable dispute resolution and redress; privacy protection; and consumer and business education.<sup>21</sup> The Guideline also seeks Global co-operation through information exchange, co-ordination, communication and joint action, development and enforcement of joint initiatives at the international level through bilateral and/or multilateral arrangements.<sup>22</sup>

The United Nations has also been committed to introducing rules for e-commerce through various agencies. Chiefly the United Nations Commission on International Trade Law (UNCITRAL) was developed in 1996 as a 'Model Law on Electronic Commerce'. These rules set the standard for acceptable electronic contracts and have served as the basis for which about 66 countries have developed national electronic commerce Legislations. Significantly, these rules afford recognition to the use of digital signatures in validating e-commerce transactions as well as the legal recognition of data messages transmitted during e-commerce transactions which are accepted as sufficient to fulfil the requirement for signing and writing respectively when stipulated by specific laws.<sup>23</sup> Article 9 of the model also laid the foundation for the admissibility of data messages as evidence in trade disputes so long as the data message was generated, stored or communicated, in a manner in which the integrity of the information was

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<sup>21</sup> Organisation for Economic Co-operation and Development (OECD) Guidelines for Consumer Protection in the Context of Electronic Commerce 3

<sup>22</sup> Guidelines for Consumer Protection in the Context of Electronic Commerce OECD Publications, 2, rue Andr e-Pascal, 75775 PARIS CEDEX 16 RANCE (93 2000 02 3 P) ISBN 92-64-07636-0 – No. 51164 2000

<sup>23</sup> UNCITRAL Model Law on Electronic Commerce 1996 UNITED NATIONS PUBLICATION Sales No. E.99.V.4 ISBN 92-1-133607-4 article 5 and 6

maintained and originator identified. Importantly too, this model specifically defines terms such as ‘time for dispatch’, ‘time of receipt’, ‘place of business’ and ‘place of receipt’ to aid clarity in online transaction.<sup>24</sup>

The UN has also developed the UN Guidelines on Consumer Protection in 2015 which have two important sets of provisions. The first sets out fair business practices in e-commerce transactions while the second stipulates specific guidelines for consumer protection in the context of E-commerce. Some of the principles for good business practices outlined by the guidelines include fair and equitable treatment of consumers, legal and ethical commercial behaviour, disclosure and transparency, education, protection of consumers’ privacy and effective dispute resolution.<sup>25</sup> Additionally, UNCTAD initiated the E-commerce and Law Reform Project in 2002 mainly to engender e-commerce law reform and the Cyberlaw Tracker in 2015 to monitor the adoption of e-commerce laws globally.<sup>26</sup>

Nigeria as a member of the United Nations is yet to adopt an e-commerce policy or enact laws to regulate this sector. The various states in Nigeria however have contract Laws and Sale of Goods Laws that govern trade in Nigeria with varying terms and standards of consumer protection. The following section shows how this is disadvantageous to consumers as the lack of rules have led to a proliferation of self serving terms and conditions of use by existing e-commerce sites in Nigeria.

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<sup>24</sup> UNCITRAL Model Law on Electronic Commerce 1996 UNITED NATIONS PUBLICATION Sales No. E.99.V.4 ISBN 92-1-133607 4

<sup>25</sup> United Nations Conference on Trade and Development, ‘United Nations Guidelines for Consumer Protection New York and Geneva, 2016 , Geneva – 1613427 (E) – July 2016 – 607 –UNCTAD/DITC/CPLP/MISC/2016/1 9,10 IV

<sup>26</sup> See UNCTAD Manual on Consumer Protection 2016 106. See also [http://unctad.org/en/PublicationsLibrary/dtlstict2013d1\\_en.pdf](http://unctad.org/en/PublicationsLibrary/dtlstict2013d1_en.pdf) ECOWAS [http://unctad.org/en/PublicationsLibrary/dtlstict2015d2\\_en.pdf](http://unctad.org/en/PublicationsLibrary/dtlstict2015d2_en.pdf)

## Specific Consumer Concerns in the Nigerian E-commerce Sector

As has been stated earlier, the E-commerce sector has taken off in Nigeria without specific rules of engagement. This has given birth to the availability of various terms offered by the different e-commerce companies in operation. On the positive side, some companies provide escrow services in addition to returns and Payment on delivery options even beyond the provisions of the law. For example, Jumia allows customers to make a return of items bought on the site within 7 calendar days even if items are sold according to described terms and are not defective. Returns are made within 8 -14 days depending on the location of the customers and within 21 days for goods sold by a third party.<sup>27</sup>

Similarly, Konga.com strives to improve the safety of online transactions by introducing the buyer Protection program which offers a 100% guarantee for prepaid items that do not meet customer requests.<sup>28</sup> Further, the KongaPay and escrow services payment system ensures that payments made through KongaPay are held in escrow until the transaction is satisfactorily completed.<sup>29</sup> In other words, Konga will only release payments for items to sellers where the consumer has indicated satisfaction. Refunds, repairs or replacement are also guaranteed when an order does not arrive, is damaged, or is substantially different from what was described when the buyer uses the KongaPay.<sup>30</sup> Impressively also, the company offers the Pay on Delivery option (when delivery is below ₦100,000.00) or payment through Debit card, or POS is

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<sup>27</sup> Jumia, 'Returns and Refunds, <https://www.jumia.com.ng/return-policy/> Accessed 03/04/17

<sup>28</sup> Konga Buyer Protection, <http://www.konga.com/buyer-protection> Accessed 03/04/17

<sup>29</sup> Konga Escrow 100% Purchase Protection' <http://www.konga.com/konga-escrow/> Accessed 03/04/2017

<sup>30</sup> Konga Buyer Protection, <http://www.konga.com/buyer-protection> Konga, 'the Buyer Safety Centre' <http://www.konga.com/buyer-safety-centre> Accessed 03/04/17

permitted.<sup>31</sup> This ensures that consumers have the opportunity of inspecting goods before making payments. Jumia and Yudala also offer this option.

On the other hand however some unfavourable terms are also enmeshed in the terms and conditions that are unfavourable to Nigerian Consumers. Three key provisions have been outlined below to buttress how the lack of rules in this sector creates consumer detriment.

### ***Restrictions on Channels of Redress***

Dispute resolution channels are essential for successful business models especially in nascent markets where consumers are only getting accustomed to the process such as e-commerce transactions. Ordinarily, in offline trade disputes, consumers usually have more than one channel of redress including complaints to company designated bodies or government instituted agencies, in addition to Alternative Dispute Resolution (ADR) Platforms such as mediation, arbitration or conciliation. Again, all consumer are allowed the liberty of seeking redress from the courts in Nigeria where unsatisfied by the available channels of redress as guaranteed by Constitution of the Federal Republic of Nigeria.

Perusing the terms and Conditions of some e-commerce companies operating in Nigeria however reveal some restrictions on this liberty of recourse for consumers as limited avenues for seeking recourse are stipulated. For example, some companies insist that all disputes between arising from trade must be finally settled by private and confidential binding arbitration.<sup>32</sup> Evidently also some

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<sup>31</sup> Konga, 'Pay on Delivery' Available at <http://www.konga.com/pay-on-delivery/>

<sup>32</sup> This is unfortunately inserted by companies such as Jumia, Yudala and Wakanow. See 'Terms and Conditions' <https://www.jumia.com.ng/terms-of-use/> <https://www.yudala.com/terms-and-conditions/http://www.wakanow.com/en-ng/home/termsandconditions/> Accessed 03/04/17

companies insist on time-limit for pursuing an action even though Nigerian laws provide more.<sup>33</sup> For example, an action for matters arising from contracts and torts can be brought within six years in most Nigerian states.<sup>34</sup>

Obviously these practices run afoul of the law. Section six of the constitution of the Federal Republic of Nigeria as amended for example, expressly provides that the courts in Nigeria shall have inherent powers in all matters and in relation to all persons to determine any questions as to the rights and obligations of all persons. In other words, no manner of restriction inserted to limit the right of consumers to seek recourse in a court of law can stand. Interestingly, even the Arbitration and Conciliation Act referred to by these companies specifically provides that a term of submission to arbitration which ousts the jurisdiction of the court will be illegal and void as contrary to public policy.

Without a doubt, arbitration has some advantages such as speedy resolution and convenience especially with the introduction of Online Dispute Resolution (ODR). Disputes can be resolved between the parties with reduction on delays, savings on valuable time and arguably, reduction on cost. The point however is that arbitration as an option for the resolution of disputes must only be resorted to with the freewill of the concerned parties and not as an imposition. The courts in Nigeria while evidently in support of arbitration (as can be gleaned from the institution of the multi door court systems in some states that encourage parties to pursue the option of ADR before resorting to litigation) still insist on the resolve that the right of recourse to arbitration does not oust the

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<sup>33</sup> See Wakanow Terms and Conditions Available at <http://www.wakanow.com/en-ng/home/termsandconditions/> Accessed 28/04/2017

<sup>34</sup> See for example the limitation law of Lagos State which prescribes a 6 year period for matters arising from contract and tort= section 8 Cap L67 Lagos

jurisdiction of the courts. In *Kayode v Royal Exchange Assurance*, the court held that;

An arbitration clause does not in any way oust the jurisdiction of the court, nor does it prevent parties from putting in a claim in court in spite of its existence; it merely enables the other party to apply for a stay of legal proceedings pending such arbitration and such application is within the court's discretion to grant or refuse<sup>35</sup>

In *SCOA PLC v. Sterling Bank PLC*<sup>36</sup> the court described an arbitration clause as written consensus which embodies the agreement of the parties that if any dispute should arise with regard to the obligations which both parties have undertaken to observe, such dispute should be settled by a third party or tribunal of their own choice and constitution<sup>37</sup> the court The court stated further that although parties owe a duty to honour the clause, this however cannot oust the jurisdiction of the court but only implies that there shall be no right of action till the arbitrators have decided.<sup>38</sup>

In simpler terms, arbitration clauses cannot be used as a bar to an action in court. Consumers need to be aware of this fact and be intimated about the various platforms that have been made available for the speedy resolution of disputes. Redress channels will ensure that consumers are protected from breach of contract and businesses are not allowed to retain illicit gains from unfair

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<sup>35</sup> *Kayode v Royal Exchange Assurance* 1955] WRNLR 154

<sup>36</sup> *SCOA PLC v. Sterling Bank PLC* CA/L/170/2013

<sup>37</sup> See also, *L.S.W.C. v Sakamori Construction (Nig) Ltd* (2011)12 NWLR (Pt 1262) 569 and *Royal Exchange Assurance v Bentworth Finance (Nig) Ltd* (1976)11 SC 107.” PER S. C. OSEJI, J.C.A. these pronouncements follow the locus classicus decision in *Scott V. Avery* (1856) 10 ER 1121

<sup>38</sup> See *Obembe v Wemabod Estates Ltd.* (1977) 5 SC 70, See *A.I.D.C v Nigeria L. N.G Ltd* (2000) 4 NWLR (pt 653) 494 SC; *City Engineering Nigeria Ltd v Federal Housing Authority* (1997) 9 NWLR (Pt 520) 22A SC”.

business practices.<sup>39</sup> Ultimately, Consumers must be made aware of the existence of this judicial assurance and e-commerce companies must additionally be prevented from inserting these terms as the average consumer may not be aware of the right to resort to additional channels of redress not stated on company websites.

### ***Representations and Warranties***

In trade contracts, parties are bound by terms and conditions whether expressed by the parties orally or in writing or implied by the law. Express terms are those terms expressly inserted by the parties in the course of contracting and include conditions or warranties.<sup>40</sup> Essentially, conditions are regarded strongly and a breach entitles the innocent party to repudiate the contract. The Kaduna Sale of Goods Laws defines conditions as:

A term which goes directly to the substance of the contract for the sale of goods and so essential to its very nature that its non-performance may fairly be considered by the other party as substantial failure to perform the contract at all and so gives him the right to repudiate the contract and reject the goods, in addition to a payment for damages.<sup>41</sup>

The breach of a warranty on the other hand, does not entitle the innocent party to a repudiation of the entire contract but only to a claim in damages. The Sale of Goods Law of Kaduna State defines it as ‘an agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of such

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<sup>39</sup> TNS BMRB, ‘Consumer Detriment: Assessing the Frequency and Impact of Consumer Problems with Goods and Services, Office of Fair Trading’ 2008, OFT992; Adopted from the UNCTAD Manual on Consumer protection at 91

<sup>40</sup> Some authors include innominate and fundamental terms. F.N Monye, *Law of Consumer Protection* (2003) 196

<sup>41</sup> Sale of Goods (Kaduna State) Edict No.15 1990, s 3(1)



contract, the breach of which gives rise to a claim for damages but not to a right to reject and treat the contract as repudiated'.<sup>42</sup>

Warranties are less severe terms which do not adversely affect the innocent parties but only run contrary to the agreement between the parties or cause some minor inconvenience such as the place of fulfilling a contract as was held in *Reardon Smith lines Ltd v Hansen Tangen*.<sup>43</sup> In that case the defendant's contention that the subject matter of the contract, (a ship) was built in a different building from that specified in the parties' agreement was held not to be an essential term to entitle repudiation.

Besides these express terms, some terms are also implied by law, trade, custom and statutes as binding upon contracting parties. Some of these terms include merchantable quality, fitness for purpose and conformity with description here goods are sold by description. The courts apply these terms in recognition of the fundamentality of such terms irrespective of whether these terms have been inserted in the contract. Examples include fitness for purpose, merchantable quality and compliance with description. By way of description, the Sale of Goods Laws provides that 'where goods are bought by description from a seller who deals in goods of that description (whether or not he is a manufacturer) there is an implied condition that the goods shall be of merchantable quality'<sup>44</sup> In *Henry Stephens v Complete Entertainment Nig. Ltd.*,<sup>45</sup> the court held that a crane that became faulty soon after delivery was not of merchantable quality.

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<sup>42</sup> Ibid s 3

<sup>43</sup> *Reardon Smith lines Ltd v Hansen Tangen* [1976] 1 WLR 989

<sup>44</sup> Sale of Goods Law Lagos State 2003, s. 15(b)

<sup>45</sup> *Henry Stephens v Complete Entertainment Nig. Ltd* [1987] LPELR SC 96

Fitness for purpose supposes that products are fit for the intended purpose. In *UTC Nigeria PLC v Maobison Interlink Associates Ltd*<sup>46</sup>, the court stated succinctly that:

It is a general rule in equity founded on the principles of honesty and the dictates of good sense, that if a person generally speaking, offers anything for sale, the vendee or he who becomes the purchaser is entitled to see that the vendor has it, with the qualification and in the way the vendee understood that he bought it; that is, so as to afford him an assurance of having bought what he wanted and meant to buy or at least what was offered or professed to be sold, he may reject the contract.

Section 14 of the SGL provides for Sale by description, stating that ‘where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond to that description.’<sup>47</sup> In *Olajide Odumbo Stores and Sawmill Ltd v Omotayo Agencies (Nig) Ltd*<sup>48</sup>, the court held that a contract for ‘seasoned wood grooved and finished’ did not comply with description.

It is important to note that even in e-commerce contracts, expressions that specify such terms as the price of goods; delivery dates in addition to the implied conditions of merchantability and fitness for purpose constitute binding communication between parties. However, it is observed that these legal assurances are often disclaimed by most e-commerce sites operating in Nigeria.<sup>49</sup> It

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<sup>46</sup> UTC Nigeria PLC v Maobison Interlink Associates Ltd [2004] 10 CLRN 87

<sup>47</sup> Ibid 3 [14]

<sup>48</sup> Olajide Odumbo Stores and Sawmill Ltd v Omotayo Agencies (Nig) Ltd [1978] CCHCJ/4, 625

<sup>49</sup> Jumia for instance disclaims liability for any delay or failure to deliver the products within the estimated timescales where they did not occur due to our fault or negligence if the same is wholly or partly. See Jumia, ‘Terms and

is argued that this trend should be jettisoned as consumers end up being the victims of such unfavourable disclaimers. A binding agreement is made where items have been selected and checked out and purchase price and place of delivery specified. Failure of the parties therefore to fulfil the terms of the contract triggers the innocent party's right to either repudiate the contract and sue for price or to accept delivery but additionally sue for damages depending on the severity of the breached term (conditions or warranties).

### ***Notice of Terms***

Another noticeable trend on some e-commerce sites is the unconventional pattern of providing notice of change; modification or alteration of terms whereby companies assume that consumers are put on notice by merely using or remaining on the e-commerce sites or by clicking the 'I agree Button'. Essentially these are called browse wrap and click wrap contracts respectively. A browse wrap contract is one where consumers are deemed to agree to all terms just by continuing to browse on the site after terms have been changed even if the consumer has not been specifically notified of these terms. A click wrap contract on the other hand however presumes that consumers effectively agrees to all terms, conditions and company policies whether presented clearly or embedded in layers of pages by simply clicking on the 'I agree' button.<sup>50</sup>

The disadvantage of allowing these terms in consumer contracts is that unfavourable terms can be inserted. Again these terms are sometimes not easily discoverable in addition to the fact that links

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Conditions' <https://www.jumia.com.ng/terms-of-use/> Accessed 03/04/17. See also terms and conditions of Yudala and Wakanow for similar language- [yudala https://www.yudala.com/terms-and-conditions/](https://www.yudala.com/terms-and-conditions/) , <http://www.wakanow.com/en-ng/home/termsandconditions/>

<sup>50</sup> Wakanow insists that By participating in and using this Facility you represent that you have read, accept and are bound by this acceptable use policy see [/http://www.wakanow.com/en-ng/home/termsandconditions/](http://www.wakanow.com/en-ng/home/termsandconditions/) yudala and jumia also have similar terms in place.

to other terms such as privacy policies and terms of use are incorporated. Further, for click wrap agreements the consumers are sent on a voyage of discovery as only links to the various applicable terms are usually provided.

It is important to note that notice of business terms are essential to completing valid contracts and clarity of terms at the point of contracting is no doubt of great important as these reveal the agreed upon rights, responsibilities and limitations of each contracting party. Expecting therefore that customers will read and comprehend complex terms and conditions is actually not the best for consumer protection. Evidently very few customers bother to read company terms and conditions and even when read may not understand the legal Jargon utilised in constructing these terms or incidental implications coupled with the sheer length of terms and conditions per company that the customer patronises.<sup>51</sup>

Moreover, there is no reason why consumers should not be properly notified of a change of terms especially since the same customers are flooded with marketing and promotional notifications on products and deals. A simple notification of terms as a text message (accompanied by a link) to the phones of users or as email attachments highlighting changes should be sent as a minimum. Further, a grace period must be allowed before the application of terms takes effect and companies are encouraged to

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<sup>51</sup> Research on the readability of online privacy notices shows that the language is quite advanced, lengthy, comprehensive, legalistic and mostly ungoverned by laws thereby reducing consumer understanding of notices. The authors suggest that readability can be reduced in a number of ways including ensuring that the target population has the educational level needed to read the notices, using layered notices and adapting formalized structure to improve readability. It is also suggested that incentives could be given to organizations to improve their privacy notices voluntarily and trust seals could be awarded to companies that adopt readable notices. See on Readability G.R Milne, M.J Culnan and H. Greene, "A Longitudinal Assessment of Online Privacy Notice Journal of Public Policy & Marketing," Vol. 25, No. 2 (Fall, 2006) 243,245, 246

improve inclusiveness and consumer participation by opening an avenue for customer comments and concerns before implementing changes.

### ***Weight of Exemption Clauses in Nigeria***

Exemption clauses are generally terms inserted into an agreement between parties principally to outline limits to the rights, duties and obligations arising from the contract. This therefore implies that parties can agree not to be held bound by any failure to fulfil specific terms and conditions. Again, these terms serve to exclude liability even as regards terms implied by the law trade, custom or statutes including the safeguards of fitness for purpose or merchantability. Exemption clauses are ordinarily regarded by the law and respected by the courts as an expression of the freedom of parties to decide on terms and conditions that bind a contract without restriction. Impliedly the courts will not interfere with the intentions of the parties but will only construe terms in a way that demonstrates the expressed liberties of the parties.

It is argued that these clauses are particularly bad for e-commerce contracts pertaining to consumers for several reasons. Firstly, where consumer goods are the subject of a contract, it is important to ensure that business entities do not utilise the advantage of corporate might to work hardship on consumers by inserting self serving terms. Again consumer contracts by their nature already present two contracting parties of unequal standing with the consumer most likely to be the weaker party that must be protected by the law. Further, e-commerce contracts are mostly entered into without the opportunity for the consumer to see or inspect the goods before acceptance. Purchases are only based on the assurances or descriptions of the sellers who also have the asymmetry of knowledge. Additionally, most e-commerce contracts are provide in standard contract form, meaning that consumers have no opportunity of varying the terms before the conclusion of the contract or even negotiating more favourable terms. This therefore opens the avenue for corporations to insert

terms only suitable for business convenience. As Professor Okany puts it, such terms, though legitimate may work injustice in some cases especially in standard form contracts which he describes as ‘ready-made contracts in printed form prepared by powerful monopolistic business organizations’<sup>52</sup>

As noted earlier, trade contracts in Nigeria are regulated by the contract laws and Sale of Goods Laws (SGL) of various States. In Lagos state, the Sale of Goods Law favours this freedom of contract without distinction. Section 55 of the SGL Lagos, provides that, ‘where any right, duty or liability would arise under a contract of sale by implication of law, it may be negated or varied by express agreement or by the course of dealing between the parties or by usage’. The Kaduna State SGL however makes some distinction as section 66(2) adds that ‘Nothing in this subsection shall be construed to permit the exclusion by express agreement or otherwise of any condition or warranty implied by this Edict’ this is obviously provides better protection from consumers and avoids the unguided exclusion of liability that places consumers in a bad position.

In addition to this laudable provision in the Kaduna SGL, it is advocated that an even better provision, that sets minimum standards in consumer contracts be introduced to provide certainty of terms and uniformity of protection across all platforms as is applicable in jurisdictions such as the EU<sup>53</sup>. The SLG laws in Nigeria need to be reviewed to bring these to global standards of trade and afford Nigerian consumers the kind of protection available in consumer friendly jurisdictions. Again a uniform

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<sup>52</sup> M. Okany, *Nigerian Commercial Law* (1992) 120

<sup>53</sup> The Consumer Rights Directive applicable in the European Union has far reaching provisions that protect consumers and sets minimum standards in consumer contracts that cannot be detracted from including standards on withdrawal, delivery and disclosure. See Directive 2011/83/EU of the European parliament and of the council see specifically, sections 5, 6, 9,10,11 and 13

model for e-commerce will create equivalent protection across all states.

While awaiting this legislative step, it must be noted that rules of contract such as doctrines of construction, incorporation and fundamental breach are hallowed by the courts and generally continue to protect consumers who are affected by unfavourable terms in business transactions. These serve to ameliorate the hardships occasioned by unfavourable contract clauses.

The doctrine of construction, also known as the *contra proferentem* rule, empowers the courts to interpret terms in a contract strictly against the party who inserted and hopes to rely on those terms in deviation from the performance of an obligation. Similarly, the doctrine of incorporation ensures that only terms incorporated at the time of contracting binds buyers. This means that no further terms can be inserted and already inserted terms cannot be varied without consequence. Thirdly, the doctrine of fundamental breach aids the courts in limiting the exemption from liability arising from a breach of contract terms. In our context therefore, e-sellers will not be allowed to escape liability from a breach that goes to the root of the contract. This position was accepted by the Supreme court in *International Messengers (Nig) Ltd v. Pegofor Industries Ltd*,<sup>54</sup> where the court, relying on section 190 of the Contract Law of Anambra State,<sup>55</sup> held that a limitation clause could not absolve the breach which was a fundamental breach.

Even beyond the law and regulation, the industry as a whole can explore the option of effective self regulation. This has worked in Switzerland in the sphere of marketing where violations of the industry initiated codes are addressed to and handled by the Swiss Foundation for fair business practices<sup>56</sup> Consumers also have a role

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<sup>54</sup> *International Messengers (Nig) Ltd v. Pegofor Industries Ltd* [2005] 7 CLRN 1

<sup>55</sup> Contract Laws of Anambra State 1991, S 190

<sup>56</sup> UNCTAD Manual on Consumer Protection 2016 40-41

to play in being vigilant about the terms and conditions that are agreed to. Again, where disputes arise, consumers must show activism in pursuing collective redress where claims and injuries are similar.

### **Recommendations**

An ideal e-commerce model must set out rules that place online consumers in the same position as offline ones. Effective Consumer Protection rules for e-commerce must ensure that consumers are treated no less fairly than consumers in offline transactions. This model must give a comprehensive definition of terms such as ‘consumer’, ‘seller’, ‘place and time of delivery or dispatch’ and ‘place of business and receipt’ to clarity of terms and create uniformity of rules. These rules must also set the standard for the quality of goods and services and expressly prohibit harmful business practices.

The rights and corresponding obligations of the parties must also be stipulated including the rights of consumers to make returns and receive refunds and the obligation to pay the purchase price. Consumers need to provide a valid delivery address and contact details for delivery while a business entity must provides as a minimum, details about the characteristics of goods, the identity and contact details of the seller in addition to the prices of goods and services together with all incidental and additional costs.

Additionally, an e-commerce company must provide clearly and on the homepage, fair, transparent, affordable and accessible platforms for speedy redress provided by the company and the time limit for final resolution of complaints. There must also be additional information on the existing channels of redress provided by the law including avenues provided by government entities, ADR and the courts. Finally, this model must stipulate enforcement techniques for the industry regulator and state penalties for default.



## **Conclusion**

Nations must strive to protect the interests of consumers and ensure that businesses do not defeat the essence of consumer protection using corporate might. E-commerce laws must be adopted in Nigeria to protect the Nigerian online shopper. Again, the consumers must be educated on the basic consumer rights and obligations in addition to the channels of redress for the breach of terms. Obviously, an empowered consumer will be in a better position to make wiser decisions about dealing with consumer friendly sites and shunning companies that employ unfavourable terms.