

# REGULATION OF ONLINE CONTRACTS UNDER CAMEROONIAN LAW: A CRITICAL APPRAISAL

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## ABSTRACT

Online contract is relatively a fast growing phenomenon in the world today and Cameroon in particular. Given the rapid growth of this form of contract, the need for regulation becomes all the more compelling. The rights and obligations of contracting parties, the legal aspects of online contracts, the use of digital signatures and other intricacies that are peculiar to online contracts still remains of utmost concern, since the parties concern needs legal protection from their defaulting partners. The ICT revolution has brought multiple direct and indirect impacts in almost every aspects of life be it socially, politically, economically and technologically. These impacts have in turn gone to change the whole pattern of our legal systems and most especially on aspects of contract. Furthermore, such technological advancement has not yet been domesticated, nor being well legislated, as well as introduced to the society. It would not be wrong to say to that, this has brought a number of impacts in contract principles. Most of the citizens entering into electronic contracts, have no prerequisite protection of the law and protection as consumers. These novelties have led to increasing legal uncertainties in the event of contractual disputes as most judges are unable to ascertain whether a contract concluded electronically is in tandem with the existing legal principles or not. The lack of knowledge about applicable law in the event infringement and disputes, jurisdiction, and other intricacies peculiar to online transactions is a call for concern.

In fact, the laws dealing with online contracts in general and e-commerce in particular are more or less those which support paper based transactions, and as such: there is always a great possibility that parties may not clearly address all the contract terms. On the other hand, online contracts may be challenged by the requirement of consent, that is, *consensus ad idem*. It may be difficult to ascertain consent if the parties in the online environment fully negotiated and

gave their consent, especially in shrink-wrap and browse-wrap agreements. Information and Communication Technology might have created a significant and considerable gap and also have created a number of legal risks which traditional contract principles and laws might not be able to tackle. It is unanswerable as to whether there have been sufficient efforts taken by the government to address the challenges posed by ICT in contract formation and e-commerce development in Cameroon. Hitherto, a number of mechanisms have been put in place at the national, regional and international spheres. The United Nations Commission on International Trade Law (UNCITRAL)<sup>i</sup> offers more flexibility relating measures of e-commerce, the International Chamber of Commerce (ICC) and some regional jurisdictions such as the Economic Community of Central African States (ECCAS), Association of South East Asian Nations (ASEAN) and other lofty measures have offered some form of solutions to address some concerns of online contract. It should be mentioned that in spite of all these resolutions and measures aimed at addressing some inherent concerns in online contracts, a number of these concerns still continue to thrive. This research is therefore predicated on these problems affecting the regulation of online contracts in Cameroon. There is a need for appropriate regulation of online contracts to solve the intricacies involved.

**Keywords:** Regulation, Online contracts, Cameroonian law, critical appraisal

## INTRODUCTION

The regulation of online contracts is influenced by the rapid growth of technology that is moving away from traditional to modern or online business. The growing insecurity perceived in online shopping environment has become one of the major impediments to the growth of electronic commerce today. Nowadays, electronic retailers are using technology to convert “touch-and-feel” attributes into “look-and-see” attributes. In so doing, e-vendors typically try to provide convenient, safe and pleasant online contracts appropriate in addressing their goals. Therefore, risk is an important ingredient in the consumer decision-making from the perspective of the buying decision process in online contracts. However, one only has to mention the enormous success of eBay, Facebook, Google, Second Life or Amazon around the world to illustrate how consumers and businesses alike have embraced electronic commerce and the internet in the last decade due to rapid digitalization.

As Nyamaka Daudi<sup>ii</sup> opines,

*Human history, in a sense, is a story of technology. From flint stones to that of genetic clones. The tribulations and triumph of such a journey, which will continue in future has one constant aspect at its core; the laws governing them. The cyber revolution holds the promise of quickly reaching the masses as opposed to earlier technologies which had a trickledown effect. Such a promise can only be realized with an appropriate legal regime based on the socio-economic matrix.....*

The author above better explains that, electronic commerce is fast moving and has difficulties or loopholes in its existence and so therefore, the law equally have to move altogether in order to provide appropriate possible protection and solutions to the victims involved. This is an important reason why Cameroon have to promulgate a specific law regulating online contracts.

The globe is experiencing unprecedented transition into an era of technology marked by the robustness of networks and the impact of convergence. The 21<sup>st</sup> century in realm of digitalization and the very popular cyber world is characterized by swift changes with paperless technology setting into motion a space less world. Cyber space has since its inception grown at an incredible rate with indications that the rate will continue explosively with the exponential growth in networks.<sup>iii</sup> The introduction of Information and Communication Technology<sup>iv</sup> (ICT's) has consequently brought about considerable changes to the people of Cameroon and the rest of the world at large. These developments have led to significant social, economic and legal changes. Law regulates particular technologies and solves conflicts and co-ordination problems related to these technologies.<sup>v</sup> This means that there are also new risks which must be managed.

Conventional wisdom portrays contracts as static distillations of parties' shared intent at some discrete point in time. In reality, either, contract terms evolve in response to the environment, including new laws, legal interpretations, economic shocks and technological advancement.<sup>vi</sup> Increased use of computers, telephones and other information and communication technology (ICT) tools have led to tremendous changes in the formation of contracts.<sup>vii</sup> ICT-enabled mechanisms have engendered a vast electronic marketplace for the conclusion of contracts.

Information technology governs different facets of our daily life. It has hitherto been an instrument for strengthening legal and law enforcement systems, promoting sectors and revolutionising legal and law enforcement systems, promoting service sectors and revolutionising the marketing.<sup>viii</sup>

Cyberspace is today's dominant market place and all kinds of goods, applications and services can be acquired at the click of a button. This new development is heightened by the increasing availability of sophisticated information communication technology tools. For instance, a great number of persons no longer stop at having mobile phones for only making and receiving calls. Smartphones and other devices are a common sight and internet access is quite common. Flights and hotel reservations as well as conferences and registrations for all manners of examinations are conducted online. This recent phenomenon has revolutionized the law of commerce and trade, more particularly so as contract is at the heart of commerce and trade. Knowledge of online contracting rules is of particular significance to the contract law curriculum. This is because as a result of the nouveau prevalence of online trade transactions in Cameroon, most reputable organisations now require subscriptions, applications, online purchase of goods and services, to be submitted through their websites.

A contract is an agreement with legal force.<sup>ix</sup> Every promise and every set of promises forming the consideration for each other. A contract may be oral<sup>x</sup>, in writing or partly oral and partly in writing or may be implied by conduct of the parties. Online contracts could be seen as every activity comprising the electronic exchange of data. With recent technological advancements, a new system of contracting has emerged mainly incorporating oral and written agreements but using electronic channel to communicate the contractual agreements. Thus, today, paper based contracts are regarded as traditional forms of contract.<sup>xi</sup>

Generally, contracts are divided into two broad categories: special contracts<sup>xii</sup> and simple contracts.<sup>xiii</sup> The ease and flexibility of communicating across electronic networks allows users to enter into agreements with others without many difficulties. The formation of contracts flows from the traditional view of offer and acceptance. An offer is more than just a manifestation of willingness to enter into a bargain so made as to justify another person in understanding that his/her assent to that bargain is invited and will conclude it. A party can accept such an offer through any manner or medium he/she deems he desires, unless the offer

stipulates that the other party must accept in a particular manner. To determine what constitutes a reasonable response involves consideration of speed and reliability of the medium, which constitutes prior course dealing between parties and trade usage.

While most individuals are versed with traditional forms of contracting by exchange of paper, this traditional method is rapidly changing. Today, most transactions are made electronically. It is said that by contracting online, businesses can improve efficiencies, reduce paperwork and streamline their operations. However, new technologies create challenges for the legal system and thus government have to enact specific laws regulating e-commerce.

Although it seems clear that a valid contract can and does result from online communications, lots of controversies have been generated on this issue. Chiefly, given the borderless coverage of the internet, which courts will have jurisdiction in the event of a dispute, and what law(s) will apply?<sup>xiv</sup> How can the terms of the contract be determined? How is the contract evidenced? Given the instantaneous nature of internet transactions, for instance, a message is sent as soon as a key is pressed or at the click of a button, what happens in situations where a message is garbled or sent in error? How about situations where the message is unauthorized or sent by an impostor? What rules of contract apply to online transactions or electronic commerce? In other words is there any law on which the courts rely when one access and violates any condition?

However, a contract is no less contract simply because it is entered into via a computer.<sup>xv</sup> In most cases, the traditional contract law principles apply to online contracts. The same essential requirement of offer, acceptance, considerations, capacity to contract and intentions to create legal relations, legality of object have to be fulfilled in other for a contract to be valid and binding.<sup>xvi</sup>

## **ELECTRONIC CONTRACTS**

Electronic contract is defined as a contract which is created wholly or in part through communication over the internet through exchange of e-mails.<sup>xvii</sup> A contract is created wholly over the internet if both the offer and acceptance are made entirely by exchange of emails and it is partly made over the internet when it combines electronic communication, paper documents, faxes and oral discussion.<sup>xviii</sup> Electronic contract is also defined as an agreement

drafted and signed in electronic form. The definition goes further to comment that an electronic agreement can be drafted in a similar manner in which a normal hard copy agreement is drafted, for example an agreement is drafted on your computer and sent to a business associate via e-mail and the business associate in turn emails it back with an electronic signature indicating acceptance and in that way an electronic contract is created.<sup>xix</sup>

An online contract can also be species of enforceable agreements created and signed in an electronic form; that is to say, no paper or hard copies are used. It is not a paper-based contract, but a contract in an electronic form. For example, MTN Cameroon drafts an agreement on her computer and e-mails it to one of its business associate and the business associate later e-mails it back with an electronic signature indicating acceptance; these e-mails give rise to a contract. Similarly, an online contract can also be in the form of a “click to agree” contract, generally used with downloaded software; the user clicks on “I Agree” button on the page containing the terms of the software license before transaction can be completed.

Another approach in defining online contract is by separating the meaning of the two words which make the phrase that is ‘electronic’ and ‘contract’. Electronic means something which is controlled by electric current and Contract means an agreement which is enforceable by law. If read together the term Electronic Contract therefore means an agreement which is made and communicated by means of electric current.<sup>xx</sup> The meaning of Electronic Contract reflects the mode of making and communicating it. The meaning suggests that electronic contract uses electric current and internet connection to create and communicate it.<sup>xxi</sup> The literature shows that the most common ways of entering into electronic contract on the World Wide Web is by exchange of e-mail or by what is known as Web-click whereby a shopper visits the website of e-merchant and selects the items or orders the service that he or she wants to shop.

E-commerce has seen the formation of various contracts over the internet, hence the phrase “online contract” according to Smith, is the typical subject matter of contracts currently formed over the internet such as: contracts for the sale of physical goods like books; contracts for the supply of digitised products, for example software, music and multimedia products; and contracts for the supply of services and facilities like financial services; giving of professional advice over the internet; and provision of voice telephony and potentially video conferencing.<sup>xxii</sup>

In all, an electronic contract is an agreement created, communicated and accepted wholly or in part by electronic means like internet connection which is enforceable by law.

## TYPES OF TRANSACTIONS IN ELECTRONIC CONTRACTS

Internet vendors always seek to conclude their online sales with customers through standard license agreement. Online sellers are different in the way they present their license agreement, as some clearly pop-up their license terms and conditions on the computer screen, and require the consumer to click on “I agree” icon, while others may disclose their license without asking to click on any acceptance button. As a result, courts have considered some of these licenses as binding while others are not. So basically, there are three major types of agreements: Shrink wrap, Click wrap, and Web wrap<sup>xxiii</sup>

**Shrink Wrap:** Shrink wrap license agreement gets its name from the plastic or paper wrap that the product is packed in, as the vendor encloses a license agreement notice on the surface of the pack, which accordingly binds the customer to the agreement terms and conditions in case of opening the package. The producer can then enjoy certain privilege over the customer as the producer sets the terms of the agreement without negotiating with the customer, which also gives the producer a control over the customer on how to use or benefit from the product.<sup>xxiv</sup>

**In *ProCD v. Zeidenberg***<sup>xxv</sup>, the seventh circuit court of appeals in 1990s embraced a trend recognising and enforcing shrink wrap licenses. According to this case, the seventh circuit court validated electronic transactions and shrink wrap licenses terms and conditions that governed contractual agreement after the payment for the product was concluded. As Mathew Zeidenberg who is a customer bought ProCD software and ProCD stated that there are terms and conditions regarding the use of the product in an enclosed license. The license was printed on the CD itself, the user manual, and the computer screen on every time the software operates. It was clearly stated that the software is not for commercial usage. Zeidenberg established a company in order to make copies of ProCD’s software and sell it, which was in contradiction with the terms and conditions of the license, and then ProCD sued Zeidenberg for copyright infringement and breaching license. The court treated the license as a simple contract that would be governed by the common law of contracts and the UCC. The court found that ProCD mentioned an opportunity to reject the product if the user found the license terms inconvenient,

and what happened is that Zeidenberg checked the product, used it, reviewed the license, and did not reject the product. Finally, the court upheld that the shrink wrap license is valid.<sup>xxvi</sup>

**Click Wrap:** Click wrap license agreement is almost an upgrade to the concept of shrink wrap license, as in click wrap form, the license is being displayed on the screen prompting the user to click on an acceptance icon such as “I agree”. This type of contractual license agreement is favorable because the customer must primarily accept the terms and conditions of the license before proceeding in downloading the software or entering the website. Moreover, all the terms and conditions that are stated on the website are preliminary terms which means that the customer will be approving those terms before accessing the website and then negotiating another terms.<sup>xxvii</sup> In *Hotmail Corp. v. Van \$ Money Pie Inm*<sup>xxviii</sup>, Hotmail grants free email services for a huge amount of individuals worldwide on the internet under the concept of click wrap license terms and conditions agreement that prevents users from using their email accounts to send spam or pornographic messages. Some Hotmail users started using their accounts for sending spam and pornographic messages which are considered in violation with the license agreement, then Hotmail sued the defendants for breaching the contract. The court granted a preliminary injunction as the defendants agreed to abide by the terms of the agreement but violated it by sending spam and pornographic messages.

**Web Wrap:** Web wrap agreements also known as —Browse wrap agreements are different from click wrap agreement because of the way they are displayed to the customer. Web wrap agreements are being accessed through a link or at the main homepage of a website stating the terms and conditions decided by the owner of the website, and determining what is permissible to the user. As the owner of the website may display an icon —click here to show legal terms, then the internet vendor gives the user the right to check the agreement terms of sale, but without requiring the user to show his compliance with these terms before purchasing a product.<sup>xxix</sup> In *Pollstar v. Gigmania Ltd*<sup>xxx</sup>, Pollstar which is a website providing information about concerts in the form of a web wrap license agreement, and stated terms to restrict any copying of the information. The license agreement was not present on the homepage of the website but it was on another page, yet there was a notice mentioning that usage of information on this website is subject to license agreement. Though the website users were able to see the license, they didn’t need to click on a button to specify their consent. The website sued a user for breaching the license agreement, but the user aimed to dismiss the case on the basis of not



showing any approval to the license. The court decided that the web wrap agreement may be arguably enforceable, as the presence of such a license prevented the court from dismissing the case.

In *Spechtss v. Netscape Communications Corp*<sup>xxxii</sup>, an internet user downloaded computer software that included a message stating, please review and agree to the terms of the Netscape smart download software license agreement before downloading and using the software, and at the same time did not request a review or clicking a button for approving the terms. The court declared that there was no agreement between the parties as there was no demonstration of assent by the user to the terms displayed by the website, and therefore there was no contract.

Generally, courts are of the view that the rise of online contracts has not necessitated any changes to the fundamental principles of the law of contract, although commentators argue that the enforcement of online contracts has stretched the requirement of mutual assent beyond recognition. The issue of enforcement of online contracts comes in where a party alleges that there is a breach of agreement.<sup>xxxiii</sup> It follows that when parties comply with the terms of their agreement, there will be no need of enforcement. Online contracts are enforceable both at the international and national plane. It does not matter that an online contract involves several electronic correspondences or communication as it is settled position of law that, in the interpretation of a contract involving several documents, the document must be read together as one.<sup>xxxiii</sup>

Electronic contract enforcement covers various mechanisms for ensuring that actual behavior of parties governed by a contract is complied with. The legal system, which traditionally is seen as the strongest mechanisms for contract enforcement, is seen as inappropriate for many e-commerce disputes. Problems include evidentiary challenges, and other issues of privacy. It can also be difficult to determine which law applies to e-commerce disputes, which authority has jurisdiction over a dispute, and whether or not the decision is enforceable across borders.<sup>xxxiv</sup> Although legal mechanisms will remain as a means of enforcing electronic contracts, these bottlenecks remains evident. It would be important to state some important legal principles in e-commerce.

## LEGAL PRINCIPLES IN ONLINE CONTRACTS

### ➤ *The principle of consumer protection*

These principles can be seen in section 3 of the 2011 consumer protection Law as follows;

- a) The principle of protection; according to which consumers and or buyers have the right to the preservation of life, health, safety and environment in the consumption of technology, goods or services.
- b) The principle of satisfaction; according to which consumers have the right to satisfy their basic needs in the health, food, water, housing, education, energy, transport, communication and any other domain mentioned under this Law.
- c) The principle of information; according to which consumers have the right to access of information, to enable them have an informed choice during any transaction concerning the supply of technology, goods, and services.
- d) The principle of equity; according to which consumers have the right to fair, non-discriminating treatment by suppliers of technology, goods and services.
- e) The principle of redress to which consumers and business men have the right to full compensation for the wrong or losses suffered which according to this law or other regulations shall be attributable to suppliers or providers.
- f) The principle of participation; according to which consumers have the right and freedom to form voluntary autonomous independent consumer associations or organisations to promote and protects or participations in the promotion and protection of the rights provided for under this law

### ➤ *The principle of Electronic Signature*

### ➤ *The principle of Electronic Certification*

### ➤ *The principle of privacy*

### ➤ *The principle of Authentication*

### ➤ *The principle of Electronic Advertisement*

The study is relevant in that it creates awareness and highlights the need for both legislative and policy change in Cameroonian contract law, which has for decades formed a major theme in the economic chronicle of the history and future of Cameroon. The study helps to suggest the need for some reforms<sup>xxxv</sup> in the aspect of regulation of online contracts.

It is not difficult to find justification for an inquiry into any branch of law in Cameroon. This is because of the staggering dearth of subject-specific literature on almost any topic in law. This is not the place for an inquest into the causes of the conspicuous absence of local literature particularly in the area of contract law. Given the dearth in literature, a study like this becomes more invaluable.

The study is indispensable to the Government of Cameroon because it grapples with issues of cyber criminality, e-commerce, hacking and cracking which in most cases emanate from online contracts. Policy recommendations will therefore help the government to adjust and improve its legal system in the domain of online contracts. It also draws the attention of the government to the problems plaguing this aspect of scholarly interest which is a fundamental aspect of the Cameroonian economy. This will enable the state of Cameroon achieved emergence by 2035. Also, this study will be beneficial to legal scholars in that it will serve as a reference for those who intend to research in this area of the law. Most importantly, the write up would arouse national consciousness and provoke sensitization of stakeholders and the citizenry on the legal nature and challenges on online contracts in Cameroon. The study does not only stand to benefit the Cameroonian citizenry as it will provide useful knowledge of the legal implications of online contracts in Cameroon. This is because it is not associated with certain customers or users.

Given Cameroon quest to attain emergence by 2035, the regulation of online contracts become all the more compelling. It is important to state here that emergence can only be attained if the various challenges that affect online contracts are looked into. These multiple challenges, therefore, make this study worth embarking upon as the study seeks to propose relevant recommendations which if implemented will curtail these challenges and set the pace for Cameroon's emergence come 2035.

Given that online contracts are a universal phenomenon, an expected result for this topic, a thorough analysis of the substantial perils that might occur in e-contracting would be detected. This will support internet users to be aware of their legal rights and duties that may arise from electronic contractual agreements. The upsurge of the Covid-19 pandemic has further necessitated the move of E-transactions in general and E-contracts in particular. This research will therefore solve some contemporary challenges hampering electronic contracts. Also, legal

practitioners and scholars faced with contractual issues, disputes and other complex issues in the domain of online contracts will find this study valuable for better understanding, interpretations and implementation of the law.

The questions that begs for an answer are:

To what extent have online contracts been effectively regulated in Cameroon?

How have online contracts evolved in Cameroon?

How are the principles of offer and acceptance manifested in online contracts?

What are the legal principles regulating online contracts and the institutions put in place for the regulation?

What constitutes online infringement, what laws can be relied upon by the parties, which jurisdiction, challenges faced and the way forward?

For better understanding of this study, the researcher adopts a qualitative research methodology which involves a detailed exploration and analysis of concepts, principles and doctrines using non-statistical method. The method adopted is doctrinal which involves content analysis of both primary and secondary sources of data. There is use of case law, treaties, direct observations, legislation, and policy documents as a source of primary data information. As far as case laws are concerned, the researcher makes use of mostly Cameroonian case law and foreign cases for purposes of better understanding. However, because contract law in Cameroon is intrinsically English Common Law and French Civil Law, it will be futile to attempt any study of Cameroonian contract law without making recourse to English and French Law. This piece of work makes reference to cases, statutes and academic writings from other Common Law and Civil Law jurisdictions. This is not for the purpose of providing exhaustive elaboration of foreign laws but for purposes of comparisons. There is equally use of secondary data information which includes; textbooks, journals, articles, reports and online internet sources.

## CHALLENGES TO THE ENFORCEMENT OF ONLINE CONTRACTS IN CAMEROON

The advent of the information communications technology revolution poses new challenges for the legal system and the administration of justice. This has triggered an extensive marketplace for the formation of contracts. Several difficulties have sprung up in with the coming of online contracts most of which were not foreseen by the legislator in traditional law contract. New technologies continue to emerge for online contracting which has hitherto posed as a stumbling block for to meeting the existing legal requirements of contracting. We have legal and other challenges.

### *Jurisdiction/Conflict of Laws and the Internet*

The borderless nature of electronic commerce makes the issue of jurisdiction very important. Jurisdiction addresses questions relating to which country will hear a dispute and resolve it, and enforce the contractual terms.<sup>xxxvi</sup> The borderless nature of online contracts makes the issues of jurisdiction and choice of law very important. Contracting on the internet presents a challenge to website owners in cyberspace because the internet is a form of communication that rises above special boundaries.

The question of jurisdiction is crucial in litigation particularly so in dispute relating to electronic transactions as it transcends territorial boundaries. The problems arising here are; which court assumes jurisdiction in a dispute between parties arising from an e-contract transaction and which law is to be applied by that court? Is it the law of the place of residence of the defendant? Where is that residence if the only address available is an email address? Do you use the residence of the registrar for the “url” for the email account or that of the Internet Service Provider (ISP) from where the mail was generated? Again is the law the place of performance or principal place of business of the defendants? What if the defendant has warehouse around the world and can direct supply from a warehouse in China to a call center in Cameroon, which is the place of performance? It could be argued that current conflict rules and conventions can be stretched to accommodate electronic transactions but this is not always an easy task.<sup>xxxvii</sup> The complexity involved in the choice of applicable law has been described as follows:

The question of choice of law... is particularly difficult in the case of International computer networks where, because of dispersed location and rapid movement of data and geographically dispersed processing activities, several connecting factors could occur in a computer manner involving elements of legal novelty.<sup>xxxviii</sup>

With regards to conflict of laws, It is important to emphasize that freedom of contract is an established principle in the law of obligations and that the parties to an Internet contract can therefore agree on the terms and conditions of the contract including the choice of laws to govern the transactions.<sup>xxxix</sup>

Taking into cognizance the time tested principles of state independence sovereignty and territorial integrity, each nation-state of the world, have the authority to make laws binding on things and all persons within its geographical entity, called a country. For the above stated reason of nation-states making laws on the same matter from different jurisdictions, conflict of laws is unavoidable.

Jurisdiction may be defined as the power of a court or judge to entertain an action, petition or proceedings. See *Alade v Alemuloke*<sup>xl</sup>. The issue of jurisdiction is so radical that it forms the basis of any adjudication, stated otherwise; it goes into the roots of any matter before the courts. If a court lacks jurisdiction, it also lacks necessary competence to try the case. A defect in competence is fatal, for the proceedings are null and void *ab initio*, however well conducted and well decided the case maybe.

The court must first of all be competent, that is, possess jurisdiction before it can go ahead on any adjudication as was held in *Oloba v. Akereja*<sup>xli</sup> and *Madukolu & Ors. VMkemdilim*.<sup>xlii</sup> Given how fundamental the issue of jurisdiction is at law, and bearing in mind its radical nature, it has been asserted to the effect that, there is no technical word in the whole of conflict of laws that is more variously used and abused than jurisdiction. It is a word with too many meanings and all that can be done about it is to ascertain the sense in which it is being used at any given time.<sup>xliii</sup>

At this juncture, it is necessary to earmark the fact that jurisdiction has many facets; however, the concern of jurisdiction with respect to enforcement of cybercrime laws basically revolves around two issues, namely, geographical jurisdiction and jurisdiction *in personam*. Geographical jurisdiction addresses the fundamental issue as to if a court have the power beyond the territory where it is situate, while jurisdiction *in personam* deals with whether or

not a court is empowered to hear and determine a case of a cybercriminal not within its jurisdiction as could be seen in the case of *World-Wide Volkswagen v. Woodson*.<sup>xliv</sup>

Given the peculiar nature of online contracts, problems often arise because the parties are living in different jurisdictions in the globe. Thus, the parties often face difficulties in delivering claims against the other party because the law of the defendant's country might not recognize such contracts concluded electronically and therefore cannot enforce it. Checking and verifying the identity of the defendant and his or her place also poses a problem, especially in scenarios where the party does make personal data available at the time of the contract.<sup>xlv</sup>

It is believed that the existing traditional legal notion cannot be applied in online contracts because of this pertinent challenge. It is necessary here for the defendant to voluntarily accept to submit to the suit in which the plaintiff has explicitly or implicitly chosen the competent court of a particular state, notwithstanding the fact that the court lacks competence. Thus, the principle of ascertaining which court has competence to try cases for breach of contracts formed online acts as a challenge in online transactions.<sup>xlvi</sup>

The courts have had divided opinions as to the issue of jurisdiction. In the United States, two different groups of court decisions have emerged with regard to Web sites. One line of judicial authority has granted jurisdiction over nonresidents on the grounds that their Internet involvement encompassed significant interactivity. In the case of *CompuServe Inc. v. Putterson*, a federal appeal court ruled that a computer programmer in Texas was subject to Ohio law. The programmer and Ohio based CompuServe had formed an electronic contract under which CompuServe distributed and sold copies of software. During contract negotiations, the programmer had never visited Ohio.

In *Cody v. Ward*, a federal district court asserted jurisdiction based on telephone and e-mail communications that consummated a business relationship started over Prodigy's "Money Talk" discussion forum for financial matters. In both these cases, the Internet activities of those subjected to the jurisdiction of a distant court involved more than a visit to a passive Web site over a non-resident defendant.

### ***Cyber Criminality and the Anonymous Nature of Criminals***

The researcher is of the view, that one of the greatest legal impediments in online contracts is cyber criminality and the anonymous nature of perpetrators. One of the cogent challenge to online transactions in Cameroon appears to be centered on anonymity of the parties to a typical

online transaction. Such anonymity tends to create hesitancy in the disclosure of personal information and financial details and provides a measure of cover for unscrupulous person's intent on mischief. In this respect, the absence of specific data protection laws in Cameroon, other than the constitutional right to privacy, has not helped any.<sup>xlvi</sup>

While the electronic platforms usually have privacy policies, the enforcement of such policies can be boosted by local laws relating to privacy and data protection. There is no easy means of identifying who is doing what and where is a user of the Internet is situated at any point in time; the global information system is free and there is no prerequisite that needs to be fulfilled, before a user can login to connect with anywhere and anyone across the globe. Thus, the unfettered freedom of information and communication enables to cybercriminals the anonymity that information and communication technology affords users or enables them to engage in a contract without revealing themselves and/or their actions to others.<sup>xlvii</sup>

Further, anonymous proxy servers hide users' identity data by masking their IP address and substituting it with different IP address.<sup>xlvi</sup> Even if a cybercriminal were traced to a particular location, the next hurdle cannot be scaled as the identity of a cybercriminal is undisclosed to the owner or operator of Internet service provider. Several telecommunications gadgets are used to shield the identity of Internet users and communication are often routed via many servers which further compounds the possibility of cybercriminals being traced. In effect, if the identities of criminals are incapable of being traced, how can the laws enacted to address cybercrimes work? The dictum of Lord Denning<sup>1</sup> in a celebrated case to the effect that, it is a cardinal principle of Law that "*You cannot put something on nothing and expect it to stand.*"

The point being emphasized here is that, in so far as the identities of cybercriminals remains elusive, no law, however well-crafted nor intended can work because the law does not work in vacuum; stated in another way, cybercrime laws were principally enacted to apprehend and prosecute cybercriminals, so, if the criminals are not identifiable, any law(s) put in place, is nothing but a nullity.

It should be quickly added that the campaign in some quarters to end anonymity in the use of the Internet by the mandatory introduction of identification as a prerequisite has been ferociously opposed by human rights activists on the ground of violation of privacy rights, with that development, cybercriminals appear to have been offered latitude to continue to operate unhindered and by so doing, they continually engage in online agreements with individuals.



Most contracting parties online are being duped by the other party since the contract is often concluded at distance without knowing the true identity of the other party or whether the good in question is existing.

Up to this point, the issue of challenges faced with respect to cybercrime has been discussed, it is necessary to sum it up by stating that the nature of such evidence is difficult to gather, nay, the said evidence is fragile and susceptible to manipulation and destruction besides being costly as same is forensic.<sup>li</sup> This is thus a challenge.

### ***Digital Evidence***

Digital evidence is another impediment to the enforcement of online contracts in Cameroon. Evidence is that which tends to prove the existence of some fact. It may consist of testimony, documentary evidence, real evidence and when admissible.<sup>lii</sup> The law of evidence comprises all the rules governing the presentation of facts and proofs in proceedings before a court, including in particular the rules governing the admissibility of evidence and the exclusionary rules. Evidence could take any form such as circumstantial, conclusive, direct, extrinsic, primary and secondary but the purview of evidence with respect to online contracts may be forensic.<sup>liii</sup>

Unlike in terrestrial crimes where physical evidence could be presented to the court with the view of securing conviction of the accused, physical evidence is rare in online transactions. All what the courts rely on, are mere footprints on the computers used by the criminals and traces left on the Internet; the nature of these proofs have little evidential value and same is hardly convincing to courts seized of such trials.

Be\ that as it may, the digital era has brought with it so many advantages; however, the challenge of digital concoction that comes with advantages of electronics in cyberspace is overwhelming in view of evidential nature being a representation of sound or light waves as number by means discrete signals interpreted as numbers, usually in the binary system; this peculiar nature of evidence arising from digitalization is delicate in character and makes it vulnerable to damage whether intentional or otherwise, ditto manipulations, which naturally would render such evidence to be of little or no value and thus inadmissible by the courts.

What is being emphasized as to nature of digital evidence is that, generally, they are delicate so much that mere examination by inexperienced investigator(s) may contaminate or out rightly damage such evidence and of course if that happens, experts in data recovery would have to be

called in to carry out repairs which is not cheap. Added to above is the propensity of willful destruction of evidence by cybercriminals so as to escape justice, in other words, when evidence that could provide solving of a crime in the cyberspace is destroyed, investigators usually would have little or no clue to follow in the arrest and prosecution of such crime(s).

One other practice engaged by criminals which compound evidence in cyberspace is impersonation or identity theft; this is intentionally done to sway and steer off investigation as to the real identity of criminals, more often than not, innocent persons are arrested and prosecuted for offences they know nothing about. In other words, digital technologies provide ample opportunities for impersonation by way of identity disguise so as make it difficult if not impossible to ascertain who the actual party to a contract is.

In *King v. State ex. Rel Murdock Acceptance Corp*<sup>liv</sup> the English court set the following guidelines in ensuring the reliability of information obtained from the computer namely: that the electronic computing equipment is recognized as standard equipment; the entries were made in the regular course of business at or reasonably near time of the happening of the event recorded; the foundation testimony satisfied the trial court that the sources of information, method and time of preparation were such as to indicate its trustworthiness and justify its admission.

### ***Privacy Concerns/Data Protection***

The principle of confidentiality is an important principle that applies to all disciplines. It is not just the controllers and operators of modern ICT's that will have to comply with the principle of confidentiality.<sup>lv</sup> Lawyers, teachers, counselors, Health care providers, insurers, banks and any form of company dealing with sensitive personal data will also be on the hook. This is to ensure that access to personal data is limited only to authorize individuals and to prevent unauthorized disclosure of information to non-recipients enabling the reading, listening, intentional or unintentional or accidental, illegal copying during storage, process orb transfer.<sup>lvi</sup>

Cyber law recognizes the importance of protection of information obtained in strict confidence from users and places on operators a number of obligations, one of which is the duty of confidentiality. According to Lord Goff,

Confidentiality is a duty which arises when information comes to the knowledge of a person (confidant) in circumstances where he has notice, or is held to have agreed, that the information is confidential and that he should be precluded from disclosing the information to others.<sup>lvii</sup>

Confidentiality and privacy are considered as challenges in online contracting.

### ***Absence of one universal law governing Online Contracts***

The absence of one universal law governing online contracts is the final point which this research emphasizes. In online contracting, a criminal can seat in Cameroon and perpetrate his act that would have effects in Germany, Britain or anywhere in the world. Stated in other words is that, cybercrimes are borderless, transnational and international crimes and which said crimes, are committed in the cyberspace; but the majority of the laws and policies dealing with online contracts to date, are either national or regional.

Online transactions have only one jurisdiction, that is, the entire world; by so doing, the extant laws and policies which are fragmented, national, regional or quasi- international cannot possibly cope with the problems engendered by online transactions; *ipso facto*, cyber laws shall continue to suffer from enforcement challenges; the only law that can frontally address issues of online agreements, is that law that would have only one jurisdiction, applicable globally, and not until the political will is mustered to enact that universal law, mankind shall continue to be plagued by challenges of enforcement posed to online contracts

## **CONCLUSION**

The smart emergence of online contracts suggests a new chapter of law and technology. The use of online contracts has a potential to change our understanding of contractual law of dispute resolution and enforcement. With more businesses conducted online, disputes arising from misunderstandings, conflicting interest or malicious actions are inevitable. A product or service purchased online may have some hiding effects. This makes it unsatisfactory and not meeting the requirements of fitness of purpose or merchantability.<sup>lviii</sup> The difficulty of obtaining satisfactory redress may render recourse illusory. Some of these weaknesses is caused by the distance separating the parties, the different legal systems, the cost as well as the complexity

of legal actions. To guarantee the continuous use of e-commerce therefore, there is need for an effective dispute resolution mechanism. Dispute resolution is a means of guaranteeing the minimal order and stability necessary for viable social cohesion. There is therefore a need for a new legal approach that will accommodate the peculiarities of electronic commerce.

Further research is therefore needed is certainly address the legal implication arising from the increasing use of online contracts. It appears that our Cameroonian courts should step up the use of computers in general and internet facilities in particular in the area of dispute resolution so as to meet the exigencies of e-commerce.

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- <sup>x</sup> See cases of *Buku v. Magori* (1971), n. 161 and *Merali Hirji v. General Tyre (E.A) Ltd*, (1983), T.L.R 175 where the courts held oral agreements to be valid though the alleged relationship was merely verbal.
- <sup>xi</sup> See Nditi N, (2009), op cit at Pp.196
- <sup>xii</sup> These are formal contracts. They are known as “Contracts under Deeds” and are most often times signed by three or more persons with or without consideration. Formerly, these contracts had to be in writing, it must be signed, sealed and delivered for it to be deemed as valid.
- <sup>xiii</sup> Simple contracts on the other hand are informal contracts that may be made in any way between two persons. That is, it may be made orally, in writing or they may be implied from conduct and must be backed by consideration.
- <sup>xiv</sup> Article 3(1) of Decree No. 2011/021/pm of 15 June 2011 fixing the modalities for the application of Law No. 2010/021 of 21 December 2010 Regulating Online Commerce in Cameroon.
- <sup>xv</sup> *Forrest v. Verizon Communications Inc.*, 805 A 2d 1007 (DC App 2002).

- <sup>xvi</sup> *Bilante International Ltd v. Nigeria Insurance Deposit* (2011), LPELR-SC177/1996.
- <sup>xvii</sup> N.N.N. Nditi, *The General Principals of Contract Law in East Africa*, (Dar es salaam University Press, Dar es Salaam, 2009), P. 49
- <sup>xviii</sup> *Ibid.*
- <sup>xix</sup> <http://www.legalserviceindia.com/article/127-E.Contract.html> (Accessed on the 28th/10/2021)
- <sup>xx</sup> N.N. Kilekamajenga, “The Cyber-Market: Formation of Contract Under The United Nation on the Use of Electronic Communication” *The Open University Law Journal* .Vol 2, 79, P. 178.
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