

## A HIGHLIGHT ON JURISDICTIONAL ISSUES IN ONLINE DISPUTES



### INTRODUCTION

Jurisdiction is seen as the power of the court to determine the rights and obligations of parties involved in a dispute.

Rapid developments in the field of technology have ushered in a tremendous shift in the way transactions and communications operate. One of the legal difficulties presented by e-commerce arises from globalization, arguably the most celebrated advantage of the internet, which has metamorphosed our everyday activities into a potential transnational and trans-jurisdictional transaction or communications. The traditional approach of conducting business transaction in a physical environment is being gradually upstaged by transactions taking place via internet. Expectedly, resolving disputes arising from these transactions import a bouquet of legal issues, which are novel and peculiar to the multijurisdictional context within which these transactions take place. We will in this piece highlight some of the jurisdictional issues you may face in online disputes

and suggest ways to get around them.

We would kick-start with a scenario: Mr. Felix who lives in the United Kingdom and sells cars through B2B Store Solution, an online platform owned by a United States based company sold some cars to Mr. John who lives in France. Mr. John paid a substantial amount for the cars without inspection and contacted Mr. Felix to ship the cars to France, only to discover, upon delivery, that the cars did not comply with the specifications he gave to Mr. Felix in the course of their negotiation and also, some of the cars caused damages to Mr. John's properties. Mr. John was aggrieved with this turn of events and has decided to sue Mr. Felix, in the United States and under the laws of United States, for damages arising from the misrepresentation and non-merchantability of the cars. Mr. Felix on the other hand, believes that the transaction is not enforceable because it was signed electronically as opposed to physical signature. He contends further that even if enforceable, the contract dispute should be resolved by the country in which the online platform server location is situated due to the fact that the transaction was



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done online.

The above scenario, as is the case with most e-commerce transactions, throws up different jurisdictional issues in online disputes which we shall briefly highlight hereunder.

The above narratives pose some important questions: is there an offer, If so, what are its contents? Is there an acceptance? If so, when does it become effective?

## 1.0 CHOICE OF LAW IN ONLINE DISPUTES

Choice of law and jurisdiction are two distinct but closely connected and interrelated terms. A finding as to one can sometimes affect the determination of the other. The question of the Choice of law in an online transactional dispute will raise such questions as whether there is a valid contract formed between the parties and whether there are grounds for resisting an imposition of the choice of law?

### i. When is a valid contract formed between the parties?

For an online contract to be valid, there are specific elements that must be present. There must be an offer, the content of which must be acceptance. If so, when does it become effective? And are there any other elements for validity of an online transaction? We shall discuss these elements briefly hereunder:

a) **Offer** – One of the most essential elements for the validity of online contract is the requirement that an offer should be made. By browsing and

choosing the goods and services available on the website of the seller, the consumer makes an offer to purchase such in response to a general invitation to offer made by the seller through the listing. They may also need to take an online agreement by clicking on 'I Agree' or 'I Accept' for availing the services offered.

b) **Acceptance** – Going by normal contracting sequence, an acceptance could naturally be inferred in an online transaction where the relevant website signals an assent to the shopper's order.<sup>1</sup> However, the situation is not always straightforward in a real-life consummation of same. The inherent complexity of this approach has led online merchants to embrace wide-ranging and blanket terms which seek to absolve them from liability for failure to supply and make every order subject to availability.

c) **Intention to create legal relationship** – The internet space may render it difficult to establish an intention to create legal relations due to the hasty transactional context within which transactions are concluded on these websites. We often advise that e-commerce sites should always distinguish between online contracts concerning the sale of goods or services and contracts concerning the use of their website.<sup>2</sup> Reputable e-commerce websites like Amazon.co.uk and Ryanair.co.uk are reputed to master this approach. However, the intention of the parties would still be considered by the court in each case and must be ascertained from the terms of the agreement and surrounding circumstances.

d) **There must be a lawful object** – Parties to an online transaction must contract for a legal object. Thus, a contract on a website designed for the purpose of selling illegal substances online is a void contract.<sup>3</sup>

e) **There must be a legal or lawful consideration** – Online transactions typically accept monetary value as an exchange for the listed goods and services and these payments are predominantly in

electronic format with cash hardly playing any role except in some sort of hybrid transactions.

f) **Capacity of parties** – Parties to online transactions must be capable of entering into a contract. Each must have attained the age of majority and must be of sound mind. However, this is hard to track as parties are not dealing face to face, hence, there may be need for identity and age certification. A Seller desirous of playing safe in valuable online transactions may require the online Buyer to complete his personal details and relevant biodata to foster necessary transparency. This disclosure is potentially complemented by secure payment methods which may offer additional insight into the capacity of the Buyer. Another way to verify age and identity is through digital signatures. Digital signatures not only verify the contents of a message and the identity of a signatory, but also enable a party to confirm that the particular document was duly sent by that particular individual and whether or not it has been changed.<sup>2</sup>

g) **There must be free and unaffected consent** – In a typical online transaction, there is usually no physical communication between the vendor and the customer or consumer utilizing or purchasing their service. In the same vein, most websites do not display the terms of use but only present the consumer with a checkbox or a more generous accept button, as an indication of their free and honest consent. In fact, these consent buttons or checkboxes are fast assuming the status of necessary gate pass or access card, which guarantees the consumer's access to what he desires. In most cases, the consumer cannot access any of the site offerings without clicking on the accept button. In such instance, it may be difficult to construe the users as having freely given his true consent especially to terms which he never got to read. Some of the issues surrounding acceptance of terms are now addressed in the GDPR<sup>4</sup> but surprising the NDPR is yet to address

same.

h) **The possibility of performance** – The terms and conditions of the online transaction agreement must be certain and not vague and must also be such as are capable of performance.

**ii) Are there other grounds for resisting the choice of law in online dispute?**

In some jurisdiction, the consumer protection laws may override consumer's choice to accept or submit to foreign law provision as the operative law of contract. However, this is not the position in Nigeria. Most jurisdictions will override a consumer choice of foreign law provision, if it leads to a result that is contrary to that jurisdiction's public policy. Moreover, if the choice of foreign law is enforceable, it does not completely exclude local laws and the same may still apply in specific circumstances.

## 2.0 HOW CAN WE DETERMINE A COURT OF COMPETENT JURISDICTION IN BREACH OF CONTRACT FOR ONLINE TRANSACTION?

Let us revisit the case of Mr. Felix and Mr. John in the above scenario. To ascertain the court that has Jurisdiction over breach of contract in online transactions present some of the most difficult problems in resolution of online disputes. The court would generally consider whether the parties or subject matter in the online disputes have some nexus with its jurisdiction. As with other jurisdictional issues, determination of court's jurisdiction over online transaction disputes rests primarily on whether or not the Plaintiff can establish either general or specific personal jurisdiction

over the Defendant.

General personal jurisdiction is established if the Defendant has continuous contract with the online forum. The factors to be considered to establish continuous contract within the forum are whether the Defendant makes sales, engages in business transactions be it online or offline within the forum, assigned an agent for the service, holds a license or incorporated/registered his company or business in the forum.

To establish Specific personal jurisdiction the Defendant must be seen to be intentionally conducting business within the jurisdiction, the resulting dispute must be related to the actual basis of claim and the exercise of jurisdiction must be logical and reasonable.

## 3.0 MISREPRESENTATION AND THE JURISDICTION OF THE COURT IN ONLINE TRANSACTIONS

Misrepresentation in online transactions can arise for instance, in a situation where Mr. Felix induced Mr. John, through an online platform to buy a car by stating that it was a new car, whereas he was aware that the car in question is a used car. Mr. Felix could be liable either for the tort of deceit or for misrepresentation under the law of contract. Mr. John in this case, generally has the right to seek for damages and rescission of the online transaction.

In order to succeed and for the court to assume jurisdiction in this case, Mr. John must establish to the court that the online statement was made by Mr. Felix or his authorized agent and that he acted unknowingly on the strength of such misinformation.

## 4.0 ONLINE DISPUTES AND THE LOCATION OF THE SERVER

If we may recall, Mr. Felix believes that the dispute should be resolved in the country in which the vendor's server is located and where the transaction took place. Is this argument valid?

Let us take a look at the case of CompuServe Inc. v. Patterson. Just as with the Mr. Felix's illustration, it was argued that the jurisdiction over the online dispute should be decided as per the geographical location where the website server is hosted. This is a logical and simple approach, but the location of the server is not always a nostrum for establishing jurisdiction. For instance, the location of a server will usually have less weight in determining jurisdiction, where the territorial element and footprint of its operation has far more effect or impact on the activities than the location of the server.

For instance, where a United Kingdom radio channel runs a website in France to broadcast anti-Semitic propaganda in contravention of the United Kingdom law. In this case, the mere fact that the server is located in France could not prudently-limit the assumption of jurisdiction by a United Kingdom's court. In the same vein, an online shopper will be least interested in the real location of the host server for the website that he visits. The same goes to the vendor in those matters if it rents storage space on the server. Besides, if the server's geographical location is given this widespread consideration, it may open the door for the bypass of the jurisdiction of consumer-friendly States to set-up their websites on servers located in States with comparatively weak or consumer protection appetite. So, Mr. Felix's argument that the matter should be resolved by the country in which the online platform server is

hosted as opposed to the location where the transactions were made while plausible, cannot be valid in all cases.

## 5.0 WHAT IS THE APPLICABLE LAW IN A TORTIOUS LIABILITY SUIT AGAINST MR. FELIX, WHICH EMANATED FROM THE ONLINE TRANSACTION?

The general principle applicable to online disputes with tortious element is as follows:

- a) For personal injury or death resulting from personal injury, the operative law of Dispute Resolution is the law of the country where the individual sustained the injury;
- b) For damage to property, the operative law of Dispute Resolution is the law of the country where the property was damaged; and
- c) In any other case, the operative law of Dispute Resolution is the law of the country in which the most significant parts of the events constituting the tort occurred.

## 6.0 ENFORCEABILITY OF E-SIG NATURE IN ONLINE DISPUTE RESOLUTION

Is Mr. Felix correct in his contention that the use of e-signature in the contract invalidates the contract? An e-signature, or digital signature in certain context, is an authentication of an electronic record through the use of an electronic procedure or method. They serve the same purpose in electronic documents, as

hand written signatures do in printed documents. It also confirms that the signee agrees to the information in the document. So, Mr. Felix's contention that it was an e-signature goes to no issue in invalidating the contract. It has been confirmed that an e-signature enhances the security of an electronic document better than the handwritten signature does for the printed document.

The major setback connected with e-signatures in online transactions is that there is no alternative means for authenticating and/or verifying the identity of the counterparty beyond the digital proof of identity. It is therefore relatively easy to forge the identity of a person through digital platforms.

## 7.0 DOES A COURT HAVE THE JURISDICTION TO ENFORCE THE MERCHANTABLE QUALITY OF GOODS SUPPLIED IN ONLINE TRANSACTIONS?

Where goods are bought by description via online transactions from a vendor who deals in goods of that description, there is an implied condition that the goods shall be of merchantable quality. Provided that if the buyer has examined the goods as is sometimes the case with online car auctions, there shall be no implied condition as regards defects which such examination ought to have revealed.<sup>7</sup>

In the above scenario, there was no way Mr. John could have examined the cars due to the nature of the transaction. Thus, Mr. Felix could be construed to have breached the contract between him and Mr. John. The court has the absolute jurisdiction to enforce the right of Mr. John to receive the cars in a merchantable condition/state.

## 8.0 ASSUMING MR. JOHN HAS OBTAINED JUDGMENT, HOW WILL HE ENFORCE IT AGAINST A VENDOR WITHIN A CIVIL LAW JURISDICTION?

An online vendor familiar with the common law jurisdiction may run into confusion as to how to enforce his Common law obtained judgment in a civil law jurisdiction. The legal framework under which a foreign judgment may be enforced in France is the French Code of Civil Procedure and the French Code of Civil Enforcement Procedures and case law.

In France, a foreign judgment must qualify as a court judgment and be enforceable in its jurisdiction of origin, according to the law of that jurisdiction. Unlike the case in the Common Law jurisdictions, a foreign judgment need not be final and the same can still be enforced, even while an appeal is pending against same. The foreign decision must have been rendered by a court having jurisdiction over the online dispute and must not fall under the exclusive jurisdiction of French courts.

Revisiting Mr. John's illustration, to obtain an enforcement order, he must summon the opposing party before a court of first instance. This application may be brought before the court of the vendor's domicile or the court of the place where the enforcement is contemplated. Note that French law does not require any specific connection to France to accept jurisdiction for recognition of a foreign judgment.

## 9.0 WHAT IF THE JUDGMENT IS TO BE ENFORCED IN THE UNITED KINGDOM (A COMMON LAW JURISDICTION)?

At common law, a foreign judgement in an online transaction is not directly enforceable, instead such judgement will be treated as a contract debt between the parties. The foreign judgment must be final and conclusive and on the merits of the legal action. The creditor will therefore need to bring an action in the relevant court of competent jurisdiction for the enforcement of the debt obligation. The judgment creditor may resort to Summary judgment procedures to recover the judgment sum. However, courts will not give judgment on such a debt where the original court lacked jurisdiction, offends certain tenets of the relevant conflict of laws rules, if the judgment was obtained by fraud, or if the judgment is contrary to public policy or natural justice.

## 10 IS THERE A SIMPLE WAY OUT OF JURISDICTIONAL ISSUES IN ONLINE DISPUTES?

Arguably, one of the best ways to resolve or avoid jurisdictional issues in online dispute is through Online Dispute Resolution (ODR). ODR is a platform which is in the form of an interactive, multilingual website and it offers a single point of entry to parties seeking to resolve out-of-court disputes concerning contractual obligations stemming from online sales contract just like the case of the online transaction between Mr. Felix and Mr. John in the above scenario. ODR is simple, fast, flexible and strongly secure, without the need for physical presence at a meeting or hearing. The online dispute resolution platform is

available to parties who are resident in countries that are members of the United Nations. It is however not compulsory that the parties should be based in the same Member State or that a dispute has arisen in relation to transactions bordering on online goods or services. Nigeria, especially Lagos State, has integrated ODR as a dispute resolution mechanism in commercial transactions. ODR is seen as a broad term that encompasses forms of ADR and court proceedings, which use the internet as a means of dispute resolution process. ODR was instituted by the United Nations Commission on International Trade Law (UNCITRAL) in 2016.

## CONCLUSION

It can be seen that Jurisdiction of the court in online dispute is very fundamental in any court proceedings because it is the basis of the court to decide matters that are litigated before it or take cognizance of the court matters. Jurisdiction, they say, is the life wire of every court proceeding. The foregoing set-out a highlight on jurisdictional issues in online disputes. It does not attempt to offer specific advice or guides on this multidimensional subject. Any party who intends to enter into online relations or seek redress in respect of dispute with online flavour should seek proper guidance from their lawyers for a more specific guide on the particular issue.

### REFERENCE:

- <sup>1</sup> This could take the form of your order whether it is successful, approved or has been processed.
- <sup>2</sup> The purchase of goods requires an account, the use of the website does not.
- <sup>3</sup> However, it is widespread knowledge that transactions are done on sites like Darknet or Dark web and with potentialities for illegalities and violation of extant criminal laws but that is not within the legal framework of an institutional system and therefore not within the framework of our subject of discussion.
- <sup>4</sup> See the General Data Protection Regulation (EU) 2016/679
- <sup>5</sup> See Nigeria Data Protection Regulation (NDPR), 2019.
- <sup>6</sup> (89f.3di257(6th Cir.1996).
- <sup>7</sup> Section 15(b), The Sale of Goods Act, 1895.

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