

## Legal Framework for the Protection of Consumers in On-Line Sales of Goods

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### **Abstract**

*Most economic activities involve buying and selling of movable goods. With the advent of computer age, sales of goods and services are increasingly being transacted over the Internet. Unfortunately, as technology advances, it is often a challenge for legislation both at the local and international levels to keep pace with current development in the on-line sale or auction of goods. Modern laws on e-commerce seem to give more attention to perfection and proof of on-line contracts to the detriment of some aspects of on-line contract for sale or auction of goods such as the right of the buyer to examine goods to determine whether they are of acceptable quality before payment. This paper argues that in essence, e-commerce is like any existing commercial activity. The major differences lie in the fact that existing legal regimes are no longer adequate to deal with the abuse and threat that emerged with the development of on-line sale or auction of goods. This problem calls for new protective rules. Thus, it is imperative that United Nations Convention on Contracts for the International Sale of Goods as well as the United Nations Commission on International Trade Law being the two major international instruments on contract should be developed to suit this new challenge because with the 21<sup>st</sup> century development in e-commerce, these Conventions' silence on the on-line sales of goods have made e-consumers (buyers) to operate under ridiculous and outrageous conditions often provided by producers or sellers. In Nigeria, the Sale of Goods Act also needs an urgent legislative attention. Being an Act enacted in 1893, there is the need for it to be amended to suit the 21<sup>st</sup> century challenges in on-line sale of goods. In particular, the Sale of Goods Act should be amended to meet the needs of technological evolution and its implication on the consumers.*

### **Introduction**

Most economic activities involve buying and selling of movable goods. With the advent of computer age, sales of goods and services are increasingly being transacted over the Internet. Being a borderless market, internet has become the world's biggest

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shopping mall<sup>1</sup>. The world is now a global marketplace as people can purchase goods without leaving their home. The benefits of e-commerce are myriad and it depends on each participant's purpose. For traders, online transaction brings greater efficiency, increased responsiveness and reduces cost. It enables small companies and newcomers on the market to extend their reach far beyond what was previously possible. Consumers also stand to gain from wider choice, increased availability of specialized products, more comprehensive product information and lower costs<sup>2</sup>. In short, this medium of transaction has made the world a smaller place and has enabled business to be carried out 24 hours a day in a seemingly borderless environment. Additionally, the development of e-commerce has witnessed the emergence of a new group of consumers known as e-consumers. E-consumers generally refer to the purchasers of goods and services over electronic systems such as Internet and other computer networks. This new group of consumers is increasing in number over the years as on-line sales and auction become a trend and manifestation of modern life-style<sup>3</sup>. However, the protection of the interests of this new group of consumers through the traditional legislation regulating sale of goods has remained a serious challenge. For instance, the face-to-face method of sale of goods allows for the application of the common law principles of caveat emptor, i.e., "Let the buyer beware". Under this principle, it is up to the buyer to examine whether the goods were merchantable or fit for the purpose for which he needed them. If he finds they were not after the sale, and the defect was such that careful examination would have revealed, the buyer would have no remedy. He thus becomes saddled with useless goods<sup>4</sup>. But, unlike face-to-face sale of goods transaction, online sale does not involve face-to-face communication. In fact,

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<sup>1</sup>Naemah, A. & Roshazlizawati, N. (2013) *Online Shopping: Legal Protection for E-consumers*, *European Journal of Business and Management*, Vol. 5, No. 24, p. 2, available @ [www.naemah@iium.edu.my](http://www.naemah@iium.edu.my), accessed on 16<sup>th</sup> July, 2015.

<sup>2</sup>Ling, C.T.N. et al. (2012), *Predictors of business to consumers electronic commerce usage among online consumers*, Proceedings of the 2nd International Conference on Business and Economic Research, 2nd October, 2012.

<sup>3</sup> Nazrin (2012), Nazrin (2010), "PayPal study breaks down of online spending habits", *PC.COM Magazine*, available @ [www.liveaatpc.com](http://www.liveaatpc.com), accessed on 23<sup>rd</sup> July, 2015.

<sup>4</sup> Paul, A. (2014) *Principles of Nigerian Business Law*, ARC Publication, Kaduna, p. 123.

in most cases it is not made on paper. It is a distance transaction which provides no opportunity for consumers to examine the goods and to know the suppliers and their business places. The issue may be less problematic in situations where the buyer pays when the goods are delivered. In which case, he must have examined them before making payment. However, physical examination of goods in the case of online auctions for instance raises a big challenge. Online auction begins with a seller posting items on-line and continuing with subsequent bids from prospective buyers. The highest bidder on the website wins. Often-times, the seller and buyer usually agree through email about the terms of payment and delivery<sup>5</sup>.

Thus, traditionally, the seller sends the merchandise to the buyer after having received payment. It is therefore possible that a seller can also, upon receipt of payment, deliver a good of lesser quality (or not deliver at all). In circumstances like these, the question is, At what point will the buyer physically examine the goods in order to ascertain whether they are of merchantable quality or whether they are fit for the purpose for which he needed them, is it after the goods are supplied in which case, the risk in them must have passed to him? This paperless and distance transaction potentially raises complex e-consumer protection issues in a sale of goods which not only challenges the way the law deals with it but also whether there are adequate national and international legal frameworks to deal with such issues.

### **The Doctrine of Caveat Emptor and Caveat Vendor**

The term “caveat emptor” is derived from two Latin words “Caveat” which means “caution” or “warning” or “beware” and “Emptor” which means the buyer or purchaser. Caveat emptor therefore means “let the buyer beware”<sup>6</sup>. This is a settled maxim applying to a buyer who is bound by actual as well as constructive knowledge of any defect in the goods bought, which is obvious or which might have been known by proper diligence<sup>7</sup>. It should be noted that caveat emptor does mean either in law or Latin that the purchaser must take chances, it means that he must take care<sup>8</sup>. This

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<sup>5</sup>Diane Rowland, (2005) *Information Technology*, Psychology Press, 3rd ed.p.34

<sup>6</sup> Paul, A., op.cit. p. 123.

<sup>7</sup> Munir, A.M. “Caveat Emptor Rule” (2011) available @ [www.Munirahmadmughal.hubpages.com](http://www.Munirahmadmughal.hubpages.com), accessed on 4<sup>th</sup> September, 2014.

<sup>8</sup> Willis v. Russell (1902) 21 R 585, 615.

doctrine is good advice for buyers, not necessarily a statement of some duty of buyers to ask every possible question concerning the good. Thus, it requires that the purchaser ought not to be ignorant that he is buying the rights of another. The rule therefore applies whenever the buyer voluntarily chooses what he buys. Traditionally, it is believed that the maxim “let the buyer beware” gives sellers the right to misrepresent anything and no duty to disclose whatsoever. However, in real sense, the law requires even a greater responsibility from the seller. For instance, the buyer is expected to purchase goods after satisfying himself as to their quality and fitness, but under this principle, the seller is also required not only to give the seller the opportunity to examine the goods and decide whether they are merchantable and fit before he agrees to buy them, but also reveal to the buyer such defect which cannot be discovered even with reasonable examination<sup>9</sup>. In any case, the purchaser is expected to examine the goods, failure to do which would be at his own peril. It is important to note also that upon sale of goods, the general position with regard to their nature or quality constitutes a *caveat emptor*.

Consequently, in the absence of fraud, the purchaser has no remedy against the seller for any defect not covered by condition or warranty expressed or implied<sup>10</sup>. Thus, while the principle literally refers to buyers, *caveat emptor* is usually interpreted so as to also include *caveat vendor* (“seller beware”). The idea is that all parties are responsible for their own mistakes in arm’s-length during negotiations<sup>11</sup>. Technically therefore, the principle of *caveat emptor* can best be applied in relation to the principles of *least-cost information-gatherer* (LCIG). LCIG requires that information should be produced and communicated by the party that can do so with the least costs. This can be the buyer, but it is usually the seller who may have obtained information as a result of his expertise or for having owned the product<sup>12</sup>. For instance, in the case of sale of a house infested with termites, LCIG would require the seller (who learned of this infestation as a result of living in the house) to reveal this information, and not allow the buyer figure this out himself, for instance by spending ₦50,000 on a termite

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<sup>9</sup> Gerrit, D.G. (2014) *The Death of Caveat Emptor* University of Chicago Law School, Law and Economics Workshop, Tuesday, February 18th, 2014, p.1

<sup>10</sup> Munir, A.M. op.cit.n.13.

<sup>11</sup> Ibid. p. 2

<sup>12</sup> Calabresi (1970), *The Costs of Accidents: A Legal and Economic Analysis*, New Haven, Yale University Press, p. 23

inspection. This expenditure would be wasteful, because the inspection will only reveal information that was already known by the seller. The best solution is therefore to oblige the seller to reveal this information, as it only costs him the time that it takes to utter a few words. The seller is the least cost information gatherer because he obtained the information at a lower cost than the buyer could have done. To narrow this principle down to on-line sales, it implies that sellers should have a duty to publish prices on the Internet (since price information is material, sellers are the absolute LCIGs, and publishing on the Internet is the most efficient form of disclosure). It also implies that it is up to sellers to finance extensive quality tests of their products and not the e-consumers or their organizations. The LCIG principle also implies that sellers should reveal statistical data on repair rates, which they receive as a by-product of doing business. Another implication is that the seller should reveal whether they give honest or biased advice and be held to fiduciary standards when they pretend to give honest advice.

### **Regulatory Framework for On-line Sales**

The proliferation of e-commerce needs support from the law in order to build trust and confidence among the e-consumers in the on-line contract for sale of goods or auction. One important international instrument on sale of goods generally is the United Nations Convention on Contracts for the International Sale of Goods (CISG) which came into force on 11th April 1980. This convention was set out to create uniform rules to govern contracts for the international sale of goods thus removing legal barriers in international trade<sup>13</sup>. Article 1 of the Convention<sup>14</sup> provides that this Convention applies to contracts of sale of goods between parties whose places of business are in different States, (a) when the States are Contracting States; or (b) when the rules of private international law lead to the application of the law of a contracting State. Arising from this, it is important to note that the CISG restricts its application to contracts between parties who have their places of business in different contracting states or to cases in which the proper law of the contract is that of a contracting state. One serious problem with this Convention is that it is silent on

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<sup>13</sup>See Preamble to CISG, 1980. See also D'Arcy Leo et al. (2000), *Schmittoff's Export Trade: The Law and Practice of International Trade*, Sweet and Maxwell, London, p. 688.

<sup>14</sup> Ibid.

online sales of goods<sup>15</sup>. With the advancement in e-commerce particularly on-line sales of goods, this gap questions the ability of the CISG as a 21<sup>st</sup> century international legal instrument in protecting e-consumers who in most cases are unable to take care of themselves in a modern market economy. Furthermore, the gap from legal standpoint questions the applicability of caveat emptor and caveat vendor principles in the 21<sup>st</sup> century on online sales.

Another international legal instrument for the regulation of e-commerce is the United Nations Commission on International Trade Law (UNCITRAL). The UNCITRAL Model law on e-commerce was adopted in 1996. This was followed by the adoption of the UNCITRAL Model Law on e-signatures in 2001. The UNCITRAL Model Law on Electronic Commerce is based on the recognition of the functions of a signature in a paper-based environment. These model laws have been largely accepted by the majority of developed countries. Consequently, the use of identification mark, usernames, passwords, certification, box ticking, etc., are now used as sufficient evidence to establish proof of electronic signature depending on the system. For instance, Article 7<sup>16</sup> provides that:

- (1) Where the law requires a signature of a person, that requirement is met in relation to a data message if;
  - (a) a method is used to identify that person and to indicate that person's approval of the information contained in the data message; and
  - (b) that method is as reliable as was appropriate for the purpose for which the data message was generated or communicated, in the light of all the circumstances, including any relevant agreement.

Sub Art. 2 further provides that Paragraph (1) applies whether the requirement therein is in the form of an obligation or whether the law simply provides consequences for the absence of a signature. Though this convention is intended to provide a unified and harmonised law on e-commerce internationally, a critical look at the above provision will suggest that the law is meant to facilitate rather than regulate electronic e-commerce. Even at that, the Convention is more concerned with the protection of use of data on

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<sup>15</sup> Article 13 does not deal with sales of goods on-line.

<sup>16</sup> Article 7 United Nations Commission on International Trade Law, 2001

the internet relating to proof and enforcement of ordinary contract. It does not contain within its purview any provision relating to the regulation of on-line sale or auction in general or the modalities for the protection of the interests of the e-consumer in particular.

In Britain, the Electronic Communications Act (ECA) and the Electronic Signatures Regulations<sup>17</sup> constitute the legal framework for E-commerce. Part II of the ECA<sup>18</sup> introduces the concept of “Advanced Electronic Signature” (AES) which is a secured electronic signature treated as a handwritten signature because the electronic signature is capable of identifying and is uniquely related to the signatory, is under the sole control of the signatory and is attached to the data in a way that subsequent changes can be detected very easily. Section 7 of ECA<sup>19</sup> makes clear that electronic signatures, supporting certificates and the processes under which such signatures and certificates are created, issued and used can be admitted as evidence in court. So e-signatures are admissible provided that it is certified and is incorporated in an electronic communication.

The position is slightly different in Malaysia. In Malaysia, the Consumer Protection Act (CPA)<sup>20</sup> is the first legislation that provides specifically for consumer protection in relation to the supply of goods and services<sup>21</sup>. The preamble to the Act clearly states that the purpose of the Act is “to provide for the protection of consumers, the establishment of the National Consumer Advisory Council and the Tribunal for Consumer Claims, and for matters connected therewith”. The CPA provides for the protection of e-consumers against misleading and deceptive conduct, false representations and unfair practices. This is contained in section 13 of the Act<sup>22</sup>. Thus, this section requires the sellers to provide e-consumers with sufficient and correct information since many of consumers’ problems are actually caused by lack of information and awareness of products and suppliers. This is particularly crucial for e-consumers who rely totally on the information given

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<sup>17</sup> Electronic Signatures Regulations, 2002

<sup>18</sup> Part II Electronic Communications Act, 2000

<sup>19</sup> Ibid.

<sup>20</sup> Consumer Protection Act, 2007.

<sup>21</sup> Wu Min Aun (2001), *Consumer Protection Act 1999: Supply of Goods and Services*, Longman, Malaysia, p. 29

<sup>22</sup> Consumer Protection Act, 2007.

on the webpage. Non-compliance with the regulations under section 13 of the Act is an offence.

Another aspect of the protection under the CPA includes warranties as to the quality of goods and services. In this respect the CPA has significantly improved the law on supply of goods by introducing a new concept of implied warranties especially a guarantee as to acceptable quality<sup>23</sup> and guarantees as to the availability of spare part and repair facilities<sup>24</sup>. Here, the Act replaced the concept of “merchantable quality” with “acceptable quality”. The latter appears to be wider than the former. Ordinarily, it seems to cover all aspects of goods, not only their quality and suitability but also their safety. It would therefore be undoubtedly more favourable to consumers compared to the concept of “merchantable quality” under the traditional sale of goods legislations. The CPA provides an entirely different remedial scheme for breach of the warranties which depends on whether the defect in the good is remedial or substantial. In a case of a failure that can be remedied, the supplier may remedy the failure by repairing or replacing the goods or providing a refund where repair or replacement cannot reasonably be carried out<sup>25</sup>. The right to reject the good and claim for refund or replacement is only available in cases of substantial defect<sup>26</sup>. The “substantial defect” here include a defect that either exists as a latent defect at the time of purchase or it might result because of an accumulation of more minor defects which appear one after another continuously over a period of time<sup>27</sup>. In a later case the consumer is only entitled to reject the good at the point where he could be said to have lost confidence in its usability or reliability<sup>28</sup>. It may be seen as favourable and practical remedy for consumers who opt for face-to-face transactions but it might not be the case for e-consumers.

In Nigeria and the USA, the Sale of Goods Act<sup>29</sup> and the Uniform Commercial Code (UCC) respectively are the laws that regulate contract for the sale of goods. However, unlike the Malaysia Consumer Protection Act, these laws which were

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<sup>23</sup> Ibid. S. 32

<sup>24</sup> Ibid. S. 37

<sup>25</sup> Ibid. S.42

<sup>26</sup> Ibid.

<sup>27</sup> *Puncak Niaga Sdn Bhd v NZ Wheels Sdn Bhd*, (2012) 1 MLJ 27.

<sup>28</sup> S. 42 (1) Consumer Protection Act, 2007.

<sup>29</sup> Sale of Goods Act, 1893

originally devised for face-to-face transactions are inappropriate for on-line transactions. In fact, they have no single provision geared toward protecting the rights and interests of e-consumers. Instead, only the parties to a face to-face contract for sale of goods enjoyed legal protection. For instance, under these laws<sup>30</sup>, the buyer has the right to examine the goods. If there is an indication that the goods are not as described or does not corresponds with the sample (in case of sale by sample) or if the goods are not fit for purpose for which the buyer needed them, the buyer may decline the transaction. However, if the buyer goes ahead to purchases the goods, it is possible that he may have no remedy. It is here that caveat emptor rule applies.

From the forgoing, it can be said that modern laws on e-commerce seem to bother more on authentication of on-line contracts to the detriment of the protection of the parties' interests in goods sold on-line. In fact, most of these laws as considered above with exception the Malaysian Consumer Protection Act, only govern the protection of use of data on the internet relating to personally identifiable data of human beings. Even the CPA may however, only apply successfully with respect to on-line sale where both the seller and the e-consumer are domiciled in Malaysia. But its application to e-consumers resident in other jurisdictions may be hampered. This is because internet is a borderless technology. Thus, internet transactions are inherently global as they implicate many different national regulations<sup>31</sup>. Consequently, every encounter in cyberspace brings the possibility that diverse laws will apply. Consequently, there is guarantee that the CPA would always apply in internet sale of goods involving Malaysians and the nationals of other country.

This raises the of issue choice of law. In determining the applicable or "proper law" of the contract, various approaches have been used. English courts, for example, have largely relied on the *lex loci contractus* (the place where the contract was made) and the *lex loci solutionis* (the place of performance of the contract) to determine the law applicable to an international sales contract<sup>32</sup>. A further test for the determination of the proper law was enunciated

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<sup>30</sup> Art. 2 U.C.C. 2003, see also S. 12 (1), 13 (1), 14 (1), 15 (1), Sale of Goods Act, 1893.

<sup>31</sup> Peter P. Swire, *Of Elephants, Mice, and Privacy: International Choice of Law and the Internet*, (1998) 32 *Int'l Law*, p. 991.

<sup>32</sup> Clarkson, C.M.V. & Hill, J. (1997) *Jaffey on Conflict of Laws*, Butterworths, London. p. 43.

by Lord Wright as the law with which the contract has the closest and most real connection. In determining the law with the closest and most real connection regard must be had to the place of contracting, the place of performance, the place of residence or business of the parties and the nature of the subject matter of the contract<sup>33</sup>.

Our concern is not to consider the application and difficulties or uncertainties associated with these approaches for determining the applicable law in contract involving foreign elements, but to see if these rules are adequate enough to support e-commerce. In relation to on-line sale or auction, these rules of private international law would no doubt be faced with serious challenges in its application. For instance, any rule we adopt (whether *lex loci contractus*, *lex loci solutionis* or *the closest and most real connection*), its application will depend on whether there are existing legal frameworks on ground. And as already pointed out, not all countries have established viable statutory frameworks for on-line sales or auction. It should be noted that the relative success in the application of this rule in face-to-face contract of sale of goods involving foreign elements is due to the existence of an established legal framework, and this is grossly lacking in on-line contract for sale of goods or auction.

#### **On-line Auction and the Protection of E-consumer**

In a literal sense a consumer refers to a person who acquires goods or uses services. In *Puncak Niaga Sdn Bhd v. NZ Wheels Sdn Bhd*<sup>34</sup>, the court decided that a private company who bought Mercedes Benz motor vehicle to be used as a company's car was a consumer. Thus, practically everyone including public-sector agencies is a consumer in one way or another of various goods and services supplied by others. Development of the law relating to consumer protection is the manifestation of a growing social concern to protect the weak and those unable to take care of themselves in a modern market economy. An inequality of bargaining power is the main justification for additional protection

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<sup>33</sup> *Mount Albert Borough Council v Australasian Temperance and General Assurance Society* (1938) AC 224 at 240. See also *Bonython v Commonwealth of Australia* (1951) AC 201 at 219.

<sup>34</sup>Supra, no. 25

to this vulnerable group<sup>35</sup>. Besides, consumers also need to be protected from all sorts of unfair trade practices of market operators such as protection against sale of defective, substandard and dangerous products and various fraudulent trading practices such as false advertisement, misleading price indication, false description of goods, etc. Consumers are also facing problems of insufficient information and limited choice to exercise a prudent product buying decision. Consumer protection laws are thus designed to ensure fair trade competition by preventing businesses that engage in fraud or other unfair practices from gaining an advantage over consumers<sup>36</sup>. Unfair trade practice may include misleading price indication, the advertisement of product or services by traders at an extraordinary low price to allure consumers to offer to buy the product. Consumers will then be informed that the product offered was out of stock or not available for various reasons but they have other products (higher-priced one) to be offered<sup>37</sup>.

However, as technology advances, it is often a challenge for the law to keep pace with some existing developments. This has been the case for the caveat emptor and caveat vendor principles. In essence, e-commerce is like any existing commercial activity. The major difference lies in the fact that existing legal theories may no longer be adequate to deal with the problem that emerged with the development of e-commerce. In fact, the common law rule of caveat emptor only provides minimal protection for e-consumers. The nature of online shopping makes it difficult for e-consumers to exercise care in making purchases. They do not have the opportunity of examining the goods and of knowing the trader. They also lack the opportunity to ask questions about goods offered. In this sense e-consumers are more vulnerable compared to traditional buyers. In fact, the situation is worse with on-line auction. Since 1995, buyers and sellers have converged on eBay, the largest person-to-person online system, to bid on and auction off a variety of items<sup>38</sup>. The eBay brings people together in a

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<sup>35</sup>Oughton, D. & Lowry, J. (2000), *Textbook on Consumer Law*, 2nd edition, Oxford University Press, UK. p. 25.

<sup>36</sup> Ibid.

<sup>37</sup>Shuhaiza, A. & Izawati Wook (2010), *Bait and Switch tactics in advertising under Malaysian law*, (1) *MLJ* i

<sup>38</sup> The eBay is one of the internet-based venues that permit unprofessional sellers to enter goods into the flow of commerce. See eBay Home Page,

manner in which sellers are permitted to list items for sale, buyers can bid on items of interest, and all users can browse through the listed items with ease. The items are arranged by category; eBay boasts roughly 4,320 different categories of items to choose from<sup>39</sup>. These items include automobiles, toys, books, and computers among others. While these new faceless-distance transactions may be the logical outgrowth of the internet age, the system often leaves the e-consumer unprotected. With the effect that in most cases the e-consumer (buyer) has to rely on the seller's representations as there is no opportunity to examine the goods. Unfortunately however, most times, this is where the problem begins. For instance, a seller may sell what he describes as a "good" television on eBay. This television was in his possession for some time before he decided to sell it. Assuming the buyer places the highest bid for the television on eBay and he is notified by eBay that he won. The buyer then conducts the transaction with seller. Shortly thereafter, the buyer takes possession of the television. However, the television is not "good" as buyer understood the term to mean. Here, the seller may not be guilty of any fraud with respect to the sale because he used the term "good" as he honestly believed the term should be used.

This is one of the problems with on-line auction. Usually, the seller sends the goods to the buyer after having received payment. It is therefore possible that a seller can also, upon receipt of payment, deliver a good of lesser quality or may not deliver at all. On-line auctions create an unnecessary amount of uncertainty and complexity to e-consumers. The rules are fairly straightforward with respect to face-to-face transactions. For instance, regarding the quality of the goods, the CISG requires the buyer to inspect the goods and to give notice of any lack of conformity with the contract within a reasonable time after he has discovered it or ought to have discovered it<sup>40</sup>. Unlike on-line auction, in a face-to-face transaction, the buyer likely knows who the seller is. The buyer may also know whether the seller is truly in business of selling goods of this kind. In this case, the buyer can reasonably be assured that the seller has expertise in, and knowledge of, the

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available @ <http://www.ebay.com> (last visited 17<sup>th</sup> July, 2015) (offering statistics about eBay).

<sup>39</sup> Ibid.

<sup>40</sup> Article 38 and 39 CISG, 1980.

goods sold. Therefore, a reasonable buyer has certain justifiable expectations with regard to the transaction that goes beyond any representations the seller makes with respect to the goods sold.

### **Transfer of Property and Risk in On-line Sale of Goods**

Transfer of property in the goods is another essential of a contract of sale of goods. The aim of every domestic and international sales contract is to pass the property of goods from one party to the other upon consideration of payment of a certain price. The general obligations of the seller under the CISG are to deliver the goods, hand over any documents relating to them and transfer the property in the goods as required by the contract and the CISG<sup>41</sup>. A mere transfer of possession of the goods cannot be termed as sale. To constitute a contract of sale, the seller must either transfer or agree to transfer the property in the goods to the buyer<sup>42</sup>. The general rule about transfer of property is that unless the parties have otherwise agreed, risk passes with property. For instance, section 69 (1) of the CISG provides that the risk passes to the buyer when he takes over the goods or from the time when the goods are placed at his disposal<sup>43</sup>. Thus, the goods remain at the sellers risk until the property therein is transferred to the buyer. This is irrespective of whether delivery has been made or not. Where the contract relates to goods that are not yet identified, the CISG requires that the goods must first be identified to the contract before they can be placed at the disposal of the buyer, at which point risk would then pass to the buyer<sup>44</sup>. This can be likened to a sale of future or unascertained goods in which case property would only pass once the goods are ascertained and where they are unconditionally appropriated to the contract<sup>45</sup>.

As part of freedom of contract, parties to a contract of sale of goods are always free to insert terms that would regulate their transactions. Thus, parties are free to insert terms that can provide a direction exception to the general rule that risk passes with property. This strategy is particularly desirable in online sales or auction where in most cases the goods are transferred together with the risk to the buyer after payment. Thus, since the current legal

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<sup>41</sup>Ibid. Article 30.

<sup>42</sup> Paul, A. op. cit. p. 108.

<sup>43</sup> Article 69(1) of the CISG, 1980

<sup>44</sup> Ibid. Art. 69 (3)

<sup>45</sup> Paul, A. op. cit. p. 111.

framework governing on-line sale of goods is so sparse, the guiding principles in this sphere remains the terms and conditions agreed to by the parties. This will govern most, if not all, the parameters for on-line sale of goods and the delivery of the services. However, the issue is not as simple and straightforward as it appears. The challenge is that most on-line contracts for sale of goods are structured as standard form contract with all the terms and conditions prepared by the seller leaving the buyer with only the option of accepting them in their entirety. Consequently, in situations like these, if a term of sale stipulates that the risk passes with property on delivery, there is little the buyer can do to vary such a term. Example of the terms and conditions provided by Tally Weijl Online Store<sup>46</sup> readily comes to mind here. In Tally Weijl Online Store for instance, the term on payment clearly provides that: "Upon approval of the payment by Tally Weijl your account will be charged with dispatch of the delivery confirmation and delivery is effected usually within 5 working days after you received the delivery confirmation from Tally Weijl". On transfer of risk, the term provides that: "The risk of accidental loss or deterioration of the goods sold is transferred to you with the handover of the goods". In fact, the terms and conditions are provided in such a manner that no provision is made for e-consumer's input. The preamble to the general terms and conditions emphatically states that: "Any provisions which are in conflict or different from these conditions are not applicable. These Terms and Conditions also apply exclusively should Tally Weijl unconditionally provide services and supplies in deviation from the following Terms and Conditions". Though, e-consumers (buyer) has the right to cancel his declaration of acceptance of the contract without stating a reason, but this must be done within fourteen (14) days in written form (e.g. by fax, email, letter, electronic return process) or if he received the goods before expiry of the term, it includes also by returning the goods. Where goods are delivered, they could be returned if they have any defect or they are not of acceptable quality. Where goods are delivered in multiple lots or pieces, the withdrawal period expires after 14 days from the day on which the buyer acquires the physical possession of the last lot or piece.

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<sup>46</sup> Tally Weijl is an online trading company at Viaduktstrasse 42, CH-4051 Basel, with registration Number: CHE-104.296.780, see [www.tallyweijl.eu](http://www.tallyweijl.eu), accessed on 19<sup>th</sup> July, 2015.

However, the consequence of withdrawal is that, in the event of an effective cancellation, the mutually provided goods and services will be returned and, the buyer will have to bear the risk and cost of returning the goods. These terms are no doubt disadvantageous to the buyer. In the first place, the buyer bears the risk of any accidental loss or deterioration of the goods sold. In fact, such risk is transferred to him with the handover of the goods. If the buyer decides to reject the goods because of their deteriorating state (which he has the right to do without giving any reason according to one of the terms), he may still not be free from responsibility because he would still bear the risk if the goods got deteriorated in the course of transporting them back.

Obviously, buyers go through hardships like these due to lack of adequate legal framework governing on-line sale of goods. Thus, in situations where on-line contract for sale of goods or auction is structured like a standard form contract to the detriment of buyers, the guiding principle in this sphere remains caveat emptor and caveat vendor. The buyer should be provided with the opportunity to examine the goods before deciding whether he would buy them, and the seller should also make available to the buyer any information concerning any defect in the goods which can only be known by the seller.

### **Conclusion**

The aim of consumer protection law and policy are ostensibly for providing consumers with protection from, and rights against producers and sellers of faulty or defective goods and services. They are intended to protect the consumers most especially, the e-consumers who in most cases are unable to take care of themselves in a modern market economy. Unfortunately, modern laws on e-commerce seem to give more attention to perfection and proof of on-line contracts to the detriment of some aspects of on-line contract for sale of goods such as the right of the buyer to examine goods in on-line sale or auction to determine whether they are of acceptable quality before payment.

In essence, e-commerce is like any existing commercial activity, except for the fact that existing legal regime may no longer be adequate to deal with the problems that emerged with the development of e-commerce. New forms of abuse and threats to buyers call for new protective rules. Thus, it is imperative that United Nations Convention on Contracts for the International Sale of Goods as well as the United Nations Commission on

International Trade Law being the two major international instruments on contract should be developed to suit this new business environment and challenges. In Nigeria, the Sale of Goods Act also needs an urgent legislative attention. Being an Act enacted in 1893, there is the need for it to be amended to suit the 21<sup>st</sup> century challenges in both face-to-face and on-line sale of goods at least like the Malaysian Consumer Protection Act. In particular, the Sale of Goods Act should be amended to meet the needs of technological evolution and its implication on the consumers. It is indeed crucial to build consumers' trust and confidence in the information highways through legislative intervention. There is no doubt that adequate protection of e-consumer rights will have a positive impact on the development of e-commerce itself. Thus, a regulatory framework to ensure e-consumers protection is essential and necessary.