

LEGAL AND INSTITUTIONAL FRAMEWORK FOR E-COMMERCE IN NIGERIA¹

*"Financial Institutions have applied technology to their payment services in a variety of ways. Automated Data Processing, computers and Telecommunication systems have made Electronic Banking a reality"*²

1.0 INTRODUCTION

With the advent of the Computer Age, it is common knowledge that the worldwide adoption of Information and Communication Technology (ICT) has immensely altered and enhanced human interaction and our way of life for the past three decades. Thus, the world is now a global marketplace as a result of the application of Information and Communication Technology (ICT) in business.

However, the emergence of Electronic Commerce (e-Commerce) as a result of the development of the internet has brought with it a number of legal and socio-economic issues.

Since the law of every society ought to be a veritable tool for social engineering, this paper will attempt to give an overview of international e-commerce and its guiding principles as well as examine Nigerian legislation on the subject, the institutional framework and the legal issues and challenges encountered by the Nigerian legal system in the regulation of e-Commerce in Nigeria. The paper would end with a few recommendations. This paper is intended merely to provoke discussion so nothing is cast in stone notwithstanding the conclusions and recommendations so that at the end we look forward to a lively discussion.

1.1 WHAT IS E-COMMERCE?

Electronic commerce commonly known as e-Commerce or e-Business consists of buying and selling of products or services over electronic systems such as the internet and other computer networks.³ It has also been defined as the exchange of information across electronic networks at any stage in the supply chain, whether within an organization, between businesses, between businesses and consumers or between the public and private sectors whether paid or unpaid.⁴ E-Commerce involves Electronic Funds Transfer (EFT), Supply Chain Management, Internet Marketing, Online Transaction processing, Electronic Data Interchange (EDI), Inventory Management Systems, and Automated Data Collection systems.

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² Budnit, M., "The Finicky Computer, The Paperless Telex and The Fallible Swiss: Bank Technology and the Law", (1984) Vol. XXV No. 2 Boston College Law Review, 259

³ http://en.wikipedia.org/wiki/Electronic_Commerce

⁴ United Kingdom Cabinet office, 1999

It is important to understand that the scope of e-Commerce is wide as all electronically mediated transactions fall under its ambit. In other words, it is not restricted solely to the buying and selling of products, but includes pre-sale and post-sale activities.⁵

The objectives of e-Commerce are numerous as it:

1. Facilitates international co-operation through trade
2. Makes goods and services available to consumers all over the world.
3. Expands the consumer/customer base for manufacturers and producers and goods and services
4. Increases the speed of delivery of goods and services to customers.

2.0 General overview of Electronic Commerce internationally and guiding principles

Internationally, the development of e-commerce led to the following realization: with the development of Information technologies as alternatives to paper based businesses, new types of contracts and new types of goods were created, to wit, virtual goods, digital contracts, on-line transactions. Certain things lost their relevance, such as the medium of the transaction or the geographic location of the parties. However, the essence of those businesses remained the same (ordering and paying whether online or offline.

But businesses need confidence and trust in trading electronically. They need to be certain that transmitted orders or invoices have not been altered, and that they are from whom they appear to be from. They need to be able to trust that others cannot access confidential or personal information.

The lack of the usual and traditional physical medium used for off line transactions in online transactions therefore required adaptation of the existing legal framework to avoid the legal hurdles of having to satisfy the requirements of legal concepts that were based on tangible medium and geographic location such as “signature”, “instrument” “document”, “receipt”, “delivery”, etc. Rather new concepts such as data messages, digital signatures, authentication etc come into play with a view of giving online transactions the requisite certainty that is needed for business to thrive.

In an electronic environment, the original of a message is indistinguishable from a copy, bears no handwritten signature, and is not on paper. The potential for fraud is considerable, due to the ease of intercepting and altering information in electronic form without detection, and the speed of processing multiple transactions. The evidentiary issue arising as to admissibility of electronic data or information as evidence has also been to a certain extent a Chinese conundrum especially having regard to the fact that it is difficult to determine what is an original electronic document and what is a copy; when

⁵ Kalakota and Whinston, Electronic Commerce, 69

the nature of the evidence itself is ethereal. The purpose of various techniques currently available on the market or still under development is to offer the technical means by which some or all of the functions identified as characteristic of handwritten signatures can be performed in an electronic environment. Such techniques may be referred to broadly as “electronic signatures”.

2.1 The international legal framework under the UNITED NATIONS Commission on International Trade Law (Uncitral)

Accordingly, with these considerations in mind, by 1996 the UNCITRAL Model law on E- commerce was adopted at the UN level and in 2001, the UNCITRAL Model Law on e-signatures was also adopted.

Article 7 of the UNCITRAL Model Law on Electronic Commerce is based on the recognition of the functions of a signature in a paper-based environment reads as follows:

“(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.

(2) 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.”

These model laws have been largely accepted by the majority of developed countries or adapted to meet with their local features. So use of identification mark, usernames, passwords, certification, box ticking, etc., are now enough to establish proof of electronic signature depending on the system.

But generally it is indeed viewed as a Uniform and Harmonising Law internationally. The Model Law is meant to facilitate rather than regulate electronic e-commerce, In Europe, the EC directive on E- commerce and e-signatures is essentially to the same effect. In other words it implements the UNCITRAL Model Law on e-commerce.

2.2 The UK legal framework for e-commerce

The Electronic Communications Act (ECA) 2000 and the Electronic Signatures Regulations 2002 constitute the legal framework for e-commerce and e-framework in UK and implement the EC Directive of 1999. Part II of the ECA 2000 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. AES are secured by a Certification Authority who provides qualified certificates. Regarding admissibility of the e-signature, Section 7 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.

Since an e-signature in UK is any electronic data attached or logically connected to other electronic data, it could be inferred from this definition that e-signatures apply not only to e-mail communications but to any electronic communication from those based on email exchanges to those based on cryptography or biometric techniques (scanned iris of the eye or fingerprint). For instance, in the UK case of ***PNC Telecom Plc v. Thomas and another***, ([2002] EWHC 2848 (Ch)), the court held that a fax transmittal and its incorporated signature were valid as shareholder notification under the Companies Act 1985 and the Electronic Communication Act 2000.

Validity of e-signatures in e-commerce not only involves the traditional buyer/seller situation but sometimes more complex commercial situations. For instance, the UK case of ***PNC Telecom Plc v. Thomas*** involved the validity of a fax shareholder notification (requisition) under the s 368 Companies Act 1985. The first analysis was to determine whether a fax is an electronic communication; second, whether this electronic communication was authorized by the specific set of law at hand, in this case, the Companies Law 1985. After the two above questions were answered, the validity of the e-signature was clear. In the above case, the court held that a fax was an approved electronic communication under the Companies Act 1985 according to its respective amendment incorporating principles of the Electronic Communications Act 2000.

The case is an example of the multiple ramifications that a legal claim involving e- signatures may take in terms of validity of e-signature, the proper certification authority, whether the document incorporating the e-signature is an electronic communication, whether the set of rules applicable allow that type of e-communication.

The court will decide whether an e-signature was correctly used and the weight to be given to it where there is a dispute as to its creation (fraud) or use (denial of having signed payments).

3.0 E-COMMERCE IN NIGERIA

The e-commerce industry in Nigeria began in the mid-nineties when the internet and telecommunications industry started becoming popular. Its growth was slow until the advent of internet banking at the beginning of the 21st Century. This is because an e-commerce service is dependent on people's ability to make use of this brand new technology.

Services like the Electronic Cash Transfer have to a very large extent enhanced the development of e-commerce in Nigeria with packages like Western Union, Moneygram, etc. This enables people to send and receive money from different parts of the world.

The aspect of e-commerce in Nigeria that has expanded the most is e-banking. Banks now offer online banking services to consumers who can enjoy these services in the comfort of their homes and offices. Automated Teller Machines (ATMs), Credit and Debit Cards all provide comfortable and speedy services for consumers.

3.1 BUSINESS MODELS

There are two major business models under e-commerce transactions in Nigeria. They are:

- a) **Business to Business (B2B):** This occurs between two organizations. It is characterized by large volumes of products and a small price margin.
- b) **Business to Consumer (B2C):** It occurs between an organization and an individual. It is characterized by small volumes of products and a large price margin.

A few others are: Business to Affiliate Model (B2A), Business to Portal Model (B2P) and Consumer to Consumer (C2C). In the e-commerce market, the abbreviations are what is used to classify these models.

3.2 PAYMENT MODELS

Today in Nigeria, there is a need to know the suitable payment method(s). These are based on key factors such as security and ease of use. Three common payment models are:

- 1) **Digital Cash:** It entails the use of a digital wallet where invoice or receipt of payment is kept and cash is withdrawn. Transaction is completed immediately and the parties remain anonymous. There is no exchange of personal details.
- 2) **Credit Card:** This is a card whose holder has been granted a revolving credit line. The holder has a limit to which he can spend. He usually settles his credit at the end of an agreed period of time.
- 3) **Online Check/Electronic Fund Transfer:** After the buyer enters the digits on the check, a clearing house is responsible for transferring the money from the buyer's account to the seller's account on completion of the transaction. The clearing house is called Automated Clearing House (ACH).

Other payment methods include: Debit Card, Micropayment and Money Orders.

3.3 TYPES OF BANKING E-COMMERCE METHODS

They are as follows-

- 1) **Electronic Banking (e-banking):** This is a system where all banking transactions are conducted via electronic medium. It includes transfer of funds, withdrawals and checking of account balances. The banks connect with their other branches through private networks and customers can also communicate with the banks and transact business on the bank's website.
- 2) **Internet Banking:** It involves a network through which the bank employees in all branches communicate with each other and their headquarters using Very Small Aperture Terminal (VSAT) satellite network. This is called Intranet.
- 3) **Mobile Banking (m-banking):** The bank account is based on the phone number of the customer. He can use his GSM phone to transfer cash to anyone anywhere in Nigeria

Another transaction method is the use of Automated Teller Machines (ATM) which is linked to a person's account. He can withdraw cash from his account with a card and can perform transactions using that card. Yet again, other methods of e-commerce transactions are:

- a) **Web Merchants:** They are those organizations that conduct transactions through their websites. People buy goods and they render services on their website. The buyer purchases a card with which they buy the goods.
- b) **The pre-paid package** is a method of e-commerce which a lot of organizations make use of to transmit information to consumers. These consumers pay through the use of cards to access this information. Examples of such organizations are, JAMB, NECO to mention a few. Mobile Telecommunication Operators and Pay Television Operators like DSTV use this package to render their services.
- c) **Payment Gateway Providers:** Gateway providers process card information used online or at Points of Sale Terminals (P.O.T). They act as interface to the banking system. There are 3 approved payment gateways in Nigeria. Interswitch and ETranzact are the two most popular ones in Nigeria.

3.4 E-commerce in the intermediated system in the capital market

There is no doubt that Information Technology has tremendously transformed the traditional transactions in securities in Nigeria and seen the advent of electronic transactions in an increasingly dematerialized environment.

The Nigerian capital market has also embraced e-commerce fully as the Nigerian capital market strives at integrating into global exchanges. Accordingly, investors operate on the capital market as account holders using

intermediaries such as custodians or other depositories to transact on securities on a virtual platform, to wit, the Central Securities and System Clearance (CSCS). Investors are simply put holders of virtual accounts with their intermediaries (custodians, registrars, stockbrokers) who themselves are also account holders on a central systems depository, the CSCS, and transact on the exchange on that basis by way of debiting and crediting of such accounts. In other words they do not own shares by the traditional documentary method of having share certificates. Instead ownership is by entry in the record of the custodian/depository such as CSCS and proof is by CSCS transaction slip.

This has helped to reduce costs created by paper work, facilitate and streamline the process of mass turnover of securities and the channeling of certain business information/communications between the company issuer of the securities and the investor. But on the other hand it has created more complex legal issues arising from departing from the traditional concept of company law to the law of intermediated securities, where the issuer – investor relationship is substituted by a **set of legal relationships or *ménage a trois* which include securities account providers or depositories also known as intermediaries** (relationship between the issuer and account providers, and between the account providers and the investors /account holders)⁶. One of the legal issues arising from that relationship is who is to be held liable and pay when there is a loss, a shortfall or something goes wrong in the e-transaction which is initiated by an instruction from the account holder to the intermediary? Is it the investor or the intermediary?

Briefly, it suffices to state that the ISA has given recognition to e-commerce and particularly developed various rules which are applicable to investors and intermediaries in the capital market and guide the conduct of securities transactions in the capital market and on the exchange as well as allocation of liabilities⁷. It is arguable that there is conflict between ISA and CAMA on proof of share ownership. Though the courts are yet to have opportunity to formally pronounce on legal efficacy of electronic proof of ownership of shares, our experience shows that frequently shareholders attach their CSCS slip as proof of shareholding to sustain various court action, no one has yet raised an objection.

At the international level on the other hand, SEC is driving the Nigerian Government's support for the UNIDROIT Draft Convention on Substantive Rules regarding Intermediated Securities which is the result of about seven years of international harmonization work towards the creation of a

⁶ However, a discourse on these issues and the legal challenges posed by e-commerce in intermediated securities environment is discussed extensively by the author in his paper "the Nigerian insolvency law and the rights of creditors and account holders of intermediated securities **vis-à-vis the insolvent intermediary**" delivered at SEC's & UNIDROIT Workshop on Intermediated Securities held in Nicon Hotel, Abuja, FCT Nigeria in May 2009 preparatory to adoption of draft Convention on Substantive Rules regarding Intermediated Securities.

⁷S.55 under Part VIII of ISA allows electronic and other means of issuing and transferring securities. SEC Rules & Regulations created a basic domestic framework for electronic offer/transfer of securities, regulation of CSCS and intermediaries, etc

substantive framework for dealings in intermediated securities in international capital markets. This is because there is need to canvass sound legal framework to avoid current legal uncertainty as to the law governing the perfection, priority and other effects of transfers.

4.0 CHALLENGES IN NIGERIA

The way and manner in which ICT has been deployed and assimilated by financial institutions and companies in everyday business transactions is not only commendable but overwhelming. However, same cannot be said of our existing laws which have not kept pace with technology and business practices. The Law currently does not seem to adequately provide for the electronic element in e-transactions which automatically necessitates the modification of the laws to accommodate this element. Also, since the primary vehicle for e-Commerce is the Internet and ICT, the legal framework must not only address the commercial aspect of the transaction but also the technological issues.⁸ E-commerce in Nigeria is not without challenges ranging from technological problems to crime.

Consumers are faced with a number of risks arising from the general lack of understanding of the operations of the internet. Also legal issues which have already been taken care of in more developed countries are still being grappled with in developing countries like Nigeria where internet trading is fairly new. These issues include Data Protection, Formation of Contracts on Internet, and Legal means of effecting payment, Jurisdiction of Court and Cyber crime.

4.1 Data Protection:

Vast amounts of information about everyone are stored on computers. Such information is capable of instant transmission to anywhere in the world and is accessible at the touch of a keyboard. The right to keep oneself to oneself, to tell other people that certain things are none of their business is under technological threat.⁹ In view of the openness and accessibility of the internet the protection of such data has been a constant source of concern for internet users and consequently has remained a threat to e-commerce.

Nigeria has absolutely no privacy and personal information laws. This lacuna is even more material in an Internet world where information published on the web is open to a global audience. Different countries have laws that restrict release of personal information e.g.

- a) Data subjects' consent is required;
- b) Data must be used for purposes for which they were compiled;
- c) Data user may request, free of cost, for blocking or rectification of inaccurate data or enforce remedy against breach of confidentiality;

⁸ www.paulusoro.com. "E-Commerce in Nigeria: How to move forward"

⁹ R v Brown [1996] 1 All ER 545, 556 per Lord Hoffman

- d) Processing of children's data must have the consent of the parents and there must be verification of such consent through regular mail; and
- e) Strict criminal and pecuniary sanctions are imposed in the event of default.

This kind of legislation needs to be enacted in Nigeria for improved security.

4.2 Formation of Contract¹⁰:

This issue talks about how to determine when a contract can be said to have come into existence in an electronic environment. It also deals with the problem of offer and acceptance in online deals and the difference between an offer and an invitation to treat on online goods. The impact of development of electronic commerce is in bargains concluded by e-mail or contracts concluded via the internet.

In the case of contracts concluded by e-mail one of the major issues is timing i.e. to ascertain when the contract has been concluded i.e. "accepted", this would in turn foreclose the possibility for the offeror to retract his offer. One position which follows a rule known as the postal rule is to say that the contract is deemed to have been formed once the email has been sent. The other rule known as the communication rule makes receipt of email the touchstone. The second rule in particular gets more complicated because emails travel to a server before being sent onward and could be delayed. Again, would receipt be the time of receipt by the server, the time of delivery from the server to the addressee's email account or the opening of the email by the addressee. It must be remembered that a sender may be able to retrieve an email sent to a person which mail is yet to be opened by the addressee.

Another challenge is to answer the question whether emails can be categorized as species of contract in writing within the meaning of our Nigerian Statute of Fraud, 1677 or Lagos State Law Reform (Contract) Law and our various statutes on real property and landed instruments, all of which require certain contracts to be in writing and be duly executed. The question then is would an electronic mark or sign constitute a valid sign off of a contract by emails and be binding?

Many of these issues are still not quite settled even in the UK although some decisions incline favourably towards interpreting electronic signatures or marks in emails as satisfying the traditional requirement of writing and due execution. This was the decision in *Pereira Fernandes SA v Mehta* [2006] 1 WLR 1543 @ para. 29 per the judgment of Pelling J.

For contracts concluded via the internet by consumers, one of the issues is whether online advertisement constitutes an invitation to treat as opposed to

¹⁰ For further reading, please see lecture notes on Legal systems and Contract Law, Robert Gordon University 2009

an offer. If it is the former, then the offer is made by the consumer who selects the product advertised and seeks to pay for it, and it is accepted by the supplier who delivers/ships the product to the consumer. In that case the term “order” by a consumer is actually an offer that is made to the supplier who advertised his products online. On the other hand, the issue of a confirmation of an order placed online by a consumer may mean an “acceptance” of the offer made by a supplier. The determination of the nature of such confirmation is guided by the EU inspired EC Directive Regulations 2002 SI 2002/2003, particularly Regulations 11 and 12.

The issue of what constitutes an offer and what constitutes and acceptance in those circumstances is very important as it may assist in determining which terms and conditions are applicable when there is a dispute between the parties as to the quality of the product supplied and when the terms on the buyer’s order conflict with the terms of the seller’s delivery notes.

4.3 Payment System in e-commerce and cyber crimes:

Payment of goods over the internet poses unique problems because of the fact that the parties may be thousands of miles apart. There is no guarantee of the safety of the payment for goods over the internet. Transactions done online with digital cash face the risk of being duplicated by computers or diverted. In a country like Nigeria that is not very advanced technologically, a lot of loopholes often exist ranging from PIN theft to outright manipulation of software programmed for criminal purposes.

Thus, cyber crimes pose many challenges to electronic commerce and have indeed made internet transactions insecure and vulnerable to manipulation by persons who are not parties to such transactions.¹¹ The extent to which internet crime has ravaged the commercial world was succinctly captured by learned authors as follows:

....It is also predictable that the proliferation of commerce on the internet will be matched by an expansion of crime on the internet. The rise in the use of digital cash and credit cards over the internet provides a greater incentive to hack than ever before¹²....

Cyber crime means the commission of unlawful acts using the computer or devices with internet connectivity either as a tool or a target, or as both. However, since cyber crime is not contained in any statute in Nigeria, it cannot be said to be a crime¹³. We must always distinguish between cybercrime *strictu sensu* and the substantive crime itself. Cybercrime is the unauthorized use of a computer or device. The substantive crime may be stealing, OBT obtaining by false pretense AKA 419, identity theft, etc.

¹¹ Akomolede T.I., Contemporary Legal Issues in Electronic Commerce in Nigeria, **PER/PELJ 2008(11)3**

¹² Gringas and Nabarro *Laws of the Internet* 211

¹³ Section 36 (12) 1999 Constitution of the Federal Republic of Nigeria

The motives for cyber attack depend on the type of attack i.e. either passive or active. A passive attack is one where the attacker only monitors the communication channel, copies the requisite data and makes no alterations whatsoever. Active attacks on the other hand is one in which the attacker attempts to delete or in some manner alter the content of stored data. Cyber Crimes include cyber-squatting, hacking, data diddling, copyright infringement, web jacking, salami attack, worm, trojan horse, cyber warfare and virus manufacturing.

This has greatly affected or compromised payment systems. Since popular methods of effecting payments for goods bought through the internet include the use of credit cards, smart cards, digital or electronic cheques or cash, and debit cards, the more vulnerable they are to attack and the more unreliable the payment system would be.

In Nigeria, the prevalence of ATM fraud raises a lot of issues for Nigerian Bankers and customers alike? This issues centre around:

- i. The duty of care and skill in handling and securing customer funds by bankers.
- ii. The inadequacy of present legislation to properly prosecute Cyber criminals.
- iii. Relief/remedies for helpless consumers/customers who are victims of Cyber crimes since perpetrators are usually faceless.

Since the traditional definition of stealing does not adequately cover electronic Industrial espionage and certain cyber crimes, it is important for us to enact legislation to curb this menace.

The Draft Bill which is the solution to Cyber crimes is presently before the National Assembly. The Draft Bill addresses most of the issues that have been identified as constituting crimes in cyberspace, and which consequently threaten electronic commerce. It contains provisions that are similar to or the same as the relevant provisions of the laws on this subject matter in the advanced jurisdictions. The problems and general trepidation associated with cyber crimes will be reduced when the Draft Law is eventually enacted into law to pave way for the emergence of a more friendly and protective cyberspace.

4.4 Jurisdiction & Choice of Law Issues:

The issue of jurisdiction and choice of law is a very important one in e-commerce. The problem is which court assumes jurisdiction in a dispute between parties arising from an e-commerce transaction. Further, which law is to be applied by that court? This is due to the fact that the parties may reside at different locations with different legal systems. Again the issue of timing that was mentioned earlier under formation of contract may determine the issue of jurisdiction or choice of law if the sender and addressee reside in two different countries.

Complex issues of conflict of laws arise here. 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 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 centre in Ghana, 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.

5.0 Evidential Issues in E-commerce in Nigeria:

In Nigeria, financial institutions and companies have employed the use of ICT in the provision and delivery of services. Point of Sale (POS) machines and Automated Teller Machines (ATM) are now basic tools for financial transactions. Thus, the records of transaction are no longer in ledgers, but computers and other storage devices.¹⁴ The emergence of e-commerce and its growing popularity has provoked fundamental evidential issues especially in relation to the proof of transactions conducted through the internet. The peculiarity of these issues has exposed the inability of the Nigerian Law on Evidence to cope with the avalanche of electronically-generated evidence that is the hallmark of electronic commercial transactions.

5.1 Lack of recognition of electronic evidence

Simply put, the Evidence Act, Cap. E14 LFN 2004 does not in any way recognise electronic evidence in any of its provisions. This is not surprising because all the legal concepts and indeed evidence envisaged under the Evidence Act are based on a tangible medium e.g. “document”, “object”, picture, etc. Section 2 of the Evidence Act defines a document by reference to a tangible medium. It in fact defines a fact as being anything capable of being perceived by the senses. In particular, Section 2 provides-

"bankers books" - the expressions relating to bankers' books include ledgers, day books, cash books, account books and all other books used in the ordinary business of a bank;...

"document" includes books, maps, plans, drawings, photographs and also includes any matter expressed or described upon any substance by means of letters, figures or marks or by more than one of these means, intended to be used or which may be used for the purpose of recording that matter;...

"fact" includes -

(a) any thing, state of things, or relation of things, capable of being perceived by the senses;

(b) any mental condition of which any person is conscious;

¹⁴. Omiunu O. Aniyie I. A., ICT and the Nigerian rules of Evidence.

It follows from the above very clearly that the Evidence Act does not in any way take into consideration intangible or electronic medium of communications such as emails, internet, telegrams, fax, EDI.

5.2 Lack of recognition of electronic signature

Another area of deficiency of our Evidence Act is the lack of recognition of electronic signatures and the issue of execution of contracts online. Sections 100 to 108 of the Evidence Act deal with proof of execution of documents on the premise of same being done on a tangible medium as opposed to being a secured set of information data uniquely allocated to one individual.

For instance, section 100 EA provides a requirement of “writing” on a tangible medium and proof of the person’s handwriting or signature-

If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting. (Emphasis supplied)

Section 102 EA is also in the same vein and relates to proof of sealing of document by the person who signed same-

- (1) *Evidence that a person signed a document containing a declaration that a seal was his seal is admissible to prove that he sealed it.*
- (2) *Evidence that the grantor on executing any document requiring delivery expressed an intention that it should operate at once is admissible to prove delivery.*

Section 108 also develops further on the issue of means of proving that a signature, writing or seal belongs to a specific person including the fact that the court may direct any person in court to write or make finger impressions to enable the court compare the writings. It provides-

- (1) *In order to ascertain whether a signature, writing, seal or finger impression is that of the person by whom it purports to have been written or made, any signature, writing, seal or finger impression admitted or proved to the satisfaction of the court to have been written or made by that person may be compared with the one which is to be proved although that signature, writing, seal or finger impression has not been produced or proved for any other purpose.*
- (2) *The court may direct any person present in court to write any words or figures or to make finger impressions for the purpose of enabling the court to compare the words, figures or finger impressions so written with any words, figures or finger impressions alleged to have been written or made by such person: Provided that where an accused person does not give evidence he may not be so directed to write any words or figures or to make finger impressions.*
- (3) *After the final termination of the proceedings in which the court required any person to make his finger impressions such impressions shall be destroyed.*

In all these considerations, there is no room made for recognition of electronic signature and execution of contracts by email or via the internet. The Act does not contemplate any provisions regarding the evidentiary value of documents that are validated and singularized via electronic techniques such as cryptography, biometric technique, etc. This *lacuna* in our evidentiary framework poses a serious challenge for the prosecution of cases as electronic signature evidence is not generally said to be admissible under our laws.

5.3 The controversy over admissibility of electronically generated evidence by banks

Relevancy and admissibility are the foundations of the law of evidence in Nigeria. They are twin concepts central to the Nigerian law of evidence.¹⁵ However, one of the greatest challenges facing the courts in Nigeria is the admissibility of computer-generated evidence, in view of the rule that a party must give the best evidence of facts that are in issue before the courts.¹⁶

Section 6 of the Evidence Act (hereafter referred to as the Act) states that: “Evidence may be given in any suit or proceeding of the existence or non – existence of every fact in issue and of such facts as are hereinafter declared to be relevant.”

The Act also defines “fact in issue” as:

“... any fact which either by itself or in accordance or in connection with other facts the existence, non existence, nature or extent of any right, liability or disability asserted or denied in any suit or proceeding necessarily follows¹⁷ ...”

While stating that:

*One fact is said to be relevant to another when the one is connected with the other in any of the ways referred to in the provisions of this Act relating to relevancy of fact.*¹⁸

The foregoing means that for a piece of evidence to be admissible, it primarily must be shown that that piece of evidence is either a relevant fact and is in issue, or in the alternative, the fact must be that which is relevant to a fact in issue.¹⁹ This means that the admissibility of any evidence presupposes the fact that that evidence is relevant²⁰ i.e. that admissibility is a rule of evidence and it is based on relevancy. In determining the admissibility of a piece of evidence, the court will not occupy itself with the question of the source of the

¹⁵ Osipitan, T., “Admissibility of Computer Printout under Nigerian Law of Evidence” (Oct. 1995) Vol. 2 No. 2 Lawyers’ Bi-Annual, 236 at 239

¹⁶ This is known as “The Best Evidence Rule” and is contained in Section 77 of the Nigerian Evidence Act. See also *Subramanian v Public Prosecutor* [1956] WLR 965, 969.

¹⁷ Section 2 (1)(b), Evidence Act, Cap. E14, LFN 2004

¹⁸ Section 3, *ibid*

¹⁹ *Abubakar v. Chuku* (2008) 152 LRCN 1, 17, per Tobi, JSC, where the Supreme Court held that the provision of section 7 and 8 of the Evidence Act goes further to expand and illustrate the requirements of relevancy in section 6.

²⁰ Omiunu O. Aniyie I. A., ICT and the Nigerian rules of Evidence.

evidence or how it was obtained,²¹ rather the court is bound to determine whether what is to be admitted is relevant to the issue being tried.²²

Thus, it is the Act that determines whether a computer or electronically generated evidence is relevant and/ or admissible. Consequently, the evidence generated when a bank cashier enters into the institution's electronic data base, the records of deposits and withdrawals made by a customer; or the records created when a ATM card user interacts with a financial institution or when a video tape of a withdrawal by the camera or the records by the biometric reader incorporated into an ATM machine is made, insofar as it is connected with a fact in issue in any of the ways referred to in the Evidence Act relating to relevancy of fact, becomes a relevant fact and is therefore admissible. This position is basically premised on the principle that in determining admissibility of evidence, it is the relevancy of the evidence that is important and not how the evidence was obtained,²³ provided that the piece of evidence is not remote in relation to a matter into which the court has to inquire²⁴ or the evidence if a document is consistent with the pleadings filed in the suit.²⁵

Therefore, we would not be in error to say that any evidence of financial transactions and services whether electronically generated or created are relevant and admissible whenever there is a nexus between them and a matter before a court of law in Nigeria notwithstanding the fact that records of these transactions and services are nowadays being stored in electronic form or vide electronic means.

With this said, it is important to state that the major obstacle that electronic evidence has to surmount in court is the question of which method is to be used in the proof of the content of this specie of evidence; that is, whether the content of the aforementioned evidence is to be proved by either primary or secondary evidence. This is a dicey area as different schools of thought have canvassed different opinion on this point. Although, we have sought to show above that a liberal interpretation of the Evidence Act would make computer generated evidence relevant and therefore admissible, traditionally, the courts remain unwilling to interpret the relevant provisions of the Evidence Act liberally. Thus these sections have been found to be quite inadequate for the admissibility of computer generated evidence.²⁶

Basically, it has been said that computer generated evidence from bankers' "books" or records do not satisfy conditions of admissibility laid down by S.97²⁷ of the Evidence Act.

²¹ Abubakar v. Chuks (Supra)

²² Igbinoia v. The State (1981) 2 SC 5

²³ Elias v. Disu (1962) 1 All NLR 214

²⁴ Section 6(a), Evidence Act

²⁵ Abubakar v. Chuks (Supra)

²⁶ See the judgment of the Supreme Court in Yesufu v ACB [1976] 4 SC 1, 16, Anyeabosi v

RT Briscoe [1987] 3 NWLR 84. Also please consider the Court of Appeal case of U.B.A V.Sanni Abacha Foundation For Peace and Unity [2002] 50 WRN 137 or [2004] 3 NWLR (Pt. 861), 516

²⁷ Particularly S. 97 (1) (h), 2(1) and 2(e) EA

However, the Court of Appeal has recently tried to be progressive about the issue in an interlocutory appeal in respect of a criminal matter, to wit, charge no. FHC/L/C/523c/2008 **FRN v Femi Fani-Kayode**; where prosecution sought to tender electronic copies of bank electronic statements to the court. The defence objected to the evidence and the trial court found in favour of the defence. The prosecution appealed against the trial court's decision and asked for stay which was granted. The Court of Appeal on 27th May 2010 delivered its judgment on the issue and allowed the documents to be admitted in evidence at that stage in consonance with the Evidence Act. The Court of Appeal held that at best the issue should be as to the weight to be attached to the evidence. But this ruling itself is problematic as it seems to run counter of the doctrine of stare decisis, i.e. bindingness of hierarchy of the courts in that it purports to overturn a Supreme Court decision on the same issue.

To that extent, except there is a further appeal before the Supreme Court in which the apex court would overrule herself, the only viable recourse lies in legislative amendment, and there is still a very urgent need to either amend the Evidence Act to recognize electronic evidence which is not based on a tangible medium or for the National Legislator to produce a specific legislature on electronic communications, signatures etc as is obtainable in various other countries abroad.

Happily, the review of the Evidence Act made by the Nigerian Law Reform Commission is pending before the National Assembly. The draft law makes fundamental changes to the existing rules of evidence in relation to computer-generated evidence and will definitely chart the course for the thorough admission and application of electronic evidence in the Nigerian Legal system.

6.0 Developing a regulatory framework and enforcement process

Commerce is a constantly evolving medium of business in the world. Even though there is no elaborate legal and regulatory framework presently, certain enactments have indirectly governed certain transactions that border on e-Commerce.²⁸

In the institution of the appropriate regulatory framework, international best practices have to be complied with in order to keep the Nigerian model in line with International treaties like the UNCITRAL Model Law on Electronic Commerce which we have previously mentioned.²⁹ A cardinal aim of the Model Law was to ensure that the practices of Member States in the area of electronic commerce, as an emerging practice in commercial transactions, should be uniform and of acceptable standard. International best practices

²⁸ The Sale of Goods Act 1979 and laws in the states, Price Control Act 1990, Preshipment of Imports Act 1993, and Pre-shipment of Exports Act 1996, Trade Malpractices (Miscellaneous Offences) Act 1992, Weight and Measures Act 1977, etc.

²⁹ United Nations Commission for International Trade Law is an arm of the UN Organization and has a mandate to harmonize and promote International Trade Law. The Model Law on Electronic Commerce was adopted on 12 June 1996.

recommend self-regulation by industry practitioners with industry regulator exercising supervisory control.

In Nigeria, significant efforts at the regulation of e-commerce-related activities are still at the stage of Draft Bills before the National Assembly. The relevant bills are the Nigerian Bill on Cyber Crimes and the Electronic Transactions Bill, which is modeled on the UNCITRAL Model Law on e-commerce. The Bill provides for the validity of contracts, matters of evidence, electronic signatures and payment systems, amongst other issues. The Draft Bill on Cyber Crimes provides the legal and institutional framework for combating cyber crime in Nigeria and ensuring cyber security. Provisions are also made for payment of compensation to victims of cyber crimes. The Bill also makes provisions for the establishment of a Cyber Crime and Cyber Security Agency which is given wide powers to investigate, arrest and prosecute cyber crimes.

Several relevant bills currently before the National Assembly and include:

1. Cyber security & Information Protection Bill of 2010
2. Electronic Transactions Protection Bill of 2010
3. National Internal Security Bill of 2009
4. Security Communications Interception and Monitoring Bill of 2009
5. Critical Infrastructure Protection Bill of 2009
6. Computer Security & Protection Bill of 2009
7. Electric Commerce (Provision of Legal Recognition) Bill of 2008
8. Electronic Fraud (Prohibition) Bill of 2008
9. Nigerian Antitrust(Enforcement, Miscellaneous Provisions etc) Bill of 2008
10. Cyber security and Data Protection Agency (Establishment) Bill of 2008
11. National Information Technology Development Agency Bill of 2005 (now passed into law)

Industry fora in New Zealand and Britain have taken the initiative at the instance of the government to establish practice codes that would ensure fair business practices, privacy principles, and customer dispute resolution processes etc.³⁰ The Nigerian government has tried to tow this line. The National Information Technology Development Agency (NITDA), has mandate which includes the establishment of a National Electronic Commerce Council (NECC) to govern all electronic commerce affairs in Nigeria and to facilitate international trade through an e-commerce infrastructure and the implementation of the Nigerian National Policy on Information Technology (IT)³¹. It follows that CIBN as regulator for bankers on personal basis has to do more in laying down standards for its members by adoption of fair business practice standards and codes and by improvement of its dispute resolution mechanism by bringing in independent third party neutrals as arbiters.

With the foregoing policies and legislative strides taken by the Nigerian Government towards the regulation of e-Commerce it is obvious that the

³⁰ www.paulusoro.com. "E-Commerce in Nigeria: How to move forward"

³¹ The Nigerian IT policy was developed in 2005 in Nigeria and has a myriad of objectives which include the development and sustainability of electronic commerce in Nigeria.

challenges facing it may soon be properly dealt with from the legal frame work perspective if the politics of 2011 impending election allows that to happen. Even then the more daunting work of enforcement of codes and standards would need to be pursued.

CONCLUSION & RECOMMENDATIONS

Electronic commerce is a relatively new phenomenon in commercial transactions in Nigeria and as we have seen in this paper is full of technicalities. Nigeria being a developing country with a low level of technological awareness and expertise is still struggling with its numerous problems which have left consumers in e-commerce transactions crying out for protection.

We are depending more on the internet everyday and the speed at which it has influenced commercial transactions in Nigeria especially the banking and telecommunications sector emphasizes the urgent need to address the legal issues and problems presently confronting e-commerce in Nigeria. It is in the best interest of the teeming population of the Nigerian consumers that these problems are addressed directly and expeditiously.

To achieve this, the National Assembly should be pressurized into making bills concerning electronic commerce a top priority so that they can be enacted into law as quickly as possible. The whole world is getting smaller as a result of the internet and a huge bulk of our wealth is controlled electronically. CIBN as an umbrella organization for individual bankers is uniquely positioned play the role agenda setting for the National Assembly through its lobby work as its members are most adversely affected by e-commerce and also perhaps profit the most if the system is properly organized.

When this and other measures suggested in this paper have been taken, the country would have been well positioned to reap the huge benefits that would derive from the use of the internet for commercial transactions. As we cannot boast of better knowledge and insight than the greatest users of e-commerce themselves we look forward to a lively discussion and hope that we have managed to stimulate your palette with the few words we have said in this paper.

Thank you for listening.

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