NEWSLETTER MARCH 2012

Nigeria's Proposed Electronic Commerce Legislation: An Overview

Content:

Background

With the advent of electronic means of communication and information transfer, many businesses and individuals have become accustomed to the speed and efficiency of electronic technologies and have reorganized their operations to take advantage of the resulting cost benefits derived therefrom. This development has paved way for increasing number of transactions to be accomplished and effected through various electronic media, including electronic data interchange, electronic mail, telex, fax and the like. Despite the benefits, these developments are constantly plagued by existing legal barriers to the validity and enforceability of the records and documents which exist solely in the electronic media.

In 1996, the United Nations Commission on International Trade Law (UNCITRAL) adopted a Model Law on Electronic Commerce (UNCITRAL Model Law) with a set of internationally accepted rules aimed at removing legal obstacles and increasing certainty in electronic commerce. Other instruments also adopted by the UNCITRAL include the 2001 Model Law on Electronic Signatures which is aimed at facilitating the use of electronic signatures, and the 2005 United Nations Convention on the Use of Electronic Communications in International Contracts which is focused on ensuring that contracts concluded and other communications exchanged electronically

are as valid and enforceable as their traditional paper-based equivalents.

Several countries have since the adoption of the UNCITRAL Model Law implemented national legislation to remove the barriers to electronic commerce, including the United States via the Uniform Electronic Transactions Act 1999 (UETA); New Zealand via the Electronic Transactions Act 2002; Australia via the Electronic Transactions Act 1999;[1] and Malaysia via the Electronic Commerce Act 2006 (Act 658). These countries have also adopted separate laws to validate the use of electronic signatures in commercial transactions.[2] Similarly, the European Union ("EU") has adopted a number of directives on electronic commerce (e-commerce)[3] and electronic signatures (e-signatures)[4] which have been variously implemented by EU Member States including the United Kingdom.[5]

Nigeria, like many of the countries mentioned in the preceding paragraph, now wishes to remove the barriers to electronic commerce through a proposed legislation currently before the Nigerian National Assembly, the Electronic Commerce (Provision of Legal Recognition) Bill 2011 (the "Bill"). Whilst most of the countries mentioned above, including Australia and the United States seem to have modeled their respective national legislation in line with the recommendations of the UNCITRAL Model Law on Electronic Commerce with necessary modifications, the drafters of the proposed Nigerian legislation appear to have made a wholesale adoption of the provisions of the Electronic Commerce Act 2006 of Malaysia (ECA), which regrettably failed to make necessary modifications to the UNCITRAL Model Law.

This newsletter thus examines the provisions of the proposed Bill alongside the ECA with a view to determining the efficacy of the proposed legislation in removing existing legal barriers to e-commerce. For a comprehensive review of issues, appropriate references will be made to the UNCITRAL Model Law on Electronic Commerce, the UN Convention on the Use of Electronic Communications in International Contracts and where necessary, UETA.

Scope of the Bill

Like the ECA of Malaysia, the Bill upon passage, will apply to commercial transactions conducted through electronic means including those of the Federal and State Governments in Nigeria.[6] Under the

[1] Recent amendments to this legislation are contained in the Electronic Transactions Amendment Act 2011 of Australia.

[2] See for instance the United States Electronic Signatures in Global and National Commerce Act of 2000 and Malaysian Digital Signature Act of 1997 (Act 562).

[3] Directive 1999/93/EC on a Community Framework for Electronic Signatures.

[4] Directive 2000/31/EC on Certain Legal Aspects of Information Society Services, in particular Electronic Commerce, in the Internal Market (Directive on electronic Commerce).

[5] The United Kingdom implemented these Directives through the Electronic Commerce (EC Directive) Regulations 2002 and Electronic Signatures Regulations 2002 respectively.

[6] See section 1 of the E-Commerce Bill 2011.

Bill, "commercial transactions" is defined as any single communication or multiple communications of a commercial nature, whether or not contractual, including any matters relating to supply or exchange of goods and services, agency, investments, finance, banking and insurance.[7]

It seems, however, that the proposed legislation would be prohibited from applying to certain matters included in a schedule to the ECA, which unfortunately was not included in the Bill. If the inclusions in the schedule to the ECA of Malaysia are anything to go by given the wholesale adoption of that law by the drafters of the Bill, it would seem that the prohibited transactions referred to in Section 1(2) of the Bill relate to: a) power of attorney; b) the creation of wills and codicils; c) the creation of trust; and d) negotiable instruments.

The scope of the proposed Nigerian legislation seems clear in some respects, especially as it relates to the requirement of interaction between two or more persons before a transaction can be described as a covered transaction; a transaction within the ambit of the proposed legislation. So that unilateral acts which do not involve another party, such as execution of will, trust or power of attorney could be removed from the scope of the Act when implemented. Nevertheless, the Bill failed to set forth a clear framework for covered transactions in many other respects.

It will be difficult to ascertain for instance, what matters are covered under the phrase *"matters relating to supply or exchange of goods and services, agency, investments, finance, banking and insurance"* as used in the definition of "commercial transactions". Parties may rely on that ground to extend the scope of the Act to every conceivable electronic record, document or communication, especially in banking and financial activities, including audit and accounting records. In this regard, it is important to realize that the definition of the term "commercial" in Article 1[8] of the UNCITRAL Model Law on E-Commerce is merely intended to serve as a guide and should not be strictly followed to give the broadest interpretation to such terms.

Legal Recognition of Electronic Messages

One of the objectives of the law on e-commerce is the need to ensure that records and documents are not considered invalid solely by the reason of the fact that

[7] See section 24 of the E-Commerce Bill. This definition is a replica of that contained in section 5 of the ECA 2006 of Malaysia.

[8] The term "commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road.

they exist in electronic form. The UNCITRAL Model Law on E-Commerce proposes in Article 5 that *"Information shall not be denied legal effect, validity or enforceability solely on the grounds that it is in the form of a data message."* Similarly, Section 6 of the ECA provides that *"Information shall not be denied legal effect, validity or enforceability solely on the grounds that it is not contained in the electronic message purporting to give rise to such legal effect, but is merely referred to in that electronic message."*

Even though they are used in the 1996 Model Law, it is difficult in practice to reconcile the use of the term *"information"* in relation to *"validity and enforcement."* Little wonder therefore that the 2005 UN Convention on E-Commerce in International Contracts chose instead to state that *"a communication or a contract shall not be denied validity or enforcement on the sole ground that it is in the form of an electronic communication."*

The drafters of the UETA in the United States must have also recognized the ambiguity inherent in the provisions of the Model Law when they stipulated that *"[a] record or signature may not be denied legal effect or enforceability solely because it is in electronic form."*[9] The Electronic Transactions Act 1999 of Australia also provides that *"… a transaction is not invalid because it took place wholly or partly by means of one or more electronic communications."*[10]

Notwithstanding the obvious error, both Malaysia via the ECA 2006 and Nigeria via the proposed legislation adopted the provisions of Article 5 of the 1996 Model Law without modifications. It is thus submitted that the adoption of the phrase "*[i]nformation shall not be denied … validity or enforceability solely on the grounds that it is in the form of a data message"* in the E-Commerce Bill 2011 is inappropriate, hence should be modified.

Formation and Validity of Electronic Contract

The provisions relating to formation and validity of contracts under the Bill are contained in Section 5. Though short and concise, the Section contains salient provisions worthy of consideration.

a) Formation and Validity of Contracts

Section 5 of the Bill permits formation of contracts through electronic messages. It stipulates in subsection (2) that *"a contract shall not be denied legal effect, validity or enforceability on the ground that an electronic message is used in its formation."* Though this Section appears to have been couched in terms similar to Section 7 of the

[9] See section 7(a) of UETA. See also section 7(b) of UETA.

[10] Section 8.

ECA 2006 of Malaysia, the drafters appear to have given some consideration to the recommendations contained in Article 8 of the 1996 Model Law[11]. Thus, even though the two provisions were couched differently, the intent appears to be identical, that is a contract shall not be invalidated by the mere fact that it was formed through an electronic medium.[12] Such contracts may nevertheless be invalidated on other grounds.

In relation to formation, Section 5(1) of the Bill starts out with the phrase *"in the formation of a contract,"* thus, giving an indication that a contract or agreement existing in an electronic form is protected only at the time of formation. That section simply states that:

> *"[i]n the formation of a contract, the communication of proposals, acceptance of proposals, and revocation of proposals and acceptances or any related communication may be expressed by an electronic message."*

The above provision poses questions such as; what happens after the contract has been formed? Would the parties' electronic exchanges at the time of performance, such as any notices of defective performance, offers to pay or recognition of debt, still be enforceable under the Bill? Is there any possibility that the phrase *"or any related communication"* could be interpreted to mean communication made during performance. This does not seem likely as the intention of the drafters to restrict the provision to the contract formation stage is clearly evident in the provision. However, even if such a possibility could be inferred, one question that still remains is why the need for the ambiguity and uncertainty? It is submitted that given the place of electronic communications in development, the legislature ought to use the opportunity of this piece of legislation to resolve uncertainties and not add to it.

Similarly, the use of the term *"proposal"* in Section 5(1) of the Bill adds to the uncertainty surrounding certain portions of the proposed legislation. Admitted, *"proposal"* could be interpreted to mean the same thing as *"offer,"* but why subject a proposed legislation as important to commercial development as this piece of legislation to such a rigorous interpretation when the term *"offer,"* which has been given definite interpretations by courts in Nigeria, can be used?[13] It is important to point out that in this instance the Bill failed to adopt the guide proposed by the 1996 Model Law.[14] Rather, Section 5(1) of the Bill

[11] Where any law requires information to be in writing, the requirement of the law is fulfilled if the information is contained in an electronic message that is accessible and intelligible so as to be usable for subsequent reference

[12] See also Article 8 of the 2005 UN Convention on Use of Electronic Communications in International Contracts.

[13] See the recent Nigerian Supreme Court decision per ***J.A. Fabiyi, JSC*** in ***Bilante International Ltd v. Nigerian Deposit Insurance Corporation (2011) LPELR-SC 177/1996***

[14] Article 11 provides that in the context of contract formation, unless otherwise agreed by the parties, an

contains exactly the same provisions as Section 7(1) of the ECA 2006 of Malaysia. This suggests that the drafters of the Bill adopted substantially, the provisions of the ECA 2006 of Malaysia without modification and due regard to the implications of such adoption in a country where such terms were previously non-existent. A simple research into the history of the Malaysian contract law would have revealed that that the term "proposal" was used in relation to "offer" as far back as 1950 under the Contracts Act 1950 (Act 136) of Malaysia and has since been the subject of several court interpretations. Incorporation of such a term into a Nigerian legislation with no history of previous use may therefore cause more harm than good. Thus, the Section of the Bill should be redrafted to align the terms with the practice currently applicable in Nigeria.

b) Requirements as to Form

This is another important area with the potential to be most beneficial to members of the business community, as well as individuals engaged in commercial transactions. The 1996 UNCITRAL Model Law recommends adoption of provisions that would confer validity on electronic records when in practice national laws require such records to be in writing, signed by the parties and in the original form.

offer and the acceptance of an offer may be expressed by means of data messages. Where a data message is used in the formation of a contract, that contract shall not be denied validity or enforceability on the sole ground that a data message was used for that purpose.

i) Writing

Article 6 of the 1996 Model Law recommends that:

> *"[w]here the law requires information to be in writing, that requirement is met by a data message if the information contained therein is accessible so as to be usable for subsequent reference."*

Rather than adopt this recommendation, the drafters of the E-Commerce Bill chose to adopt a provision similar to Section 8 of the ECA 2006 of Malaysia which provides that:

> *"[w]here the law requires information to be in writing, the requirement of the law is fulfilled if the information is contained in an electronic message that is accessible and intelligible so as to be usable for subsequent reference."*[15]

A careful read of Article 6 of the 1996 Model Law and the subsequent 2005 UN Convention[16] will reveal the intent behind the provision, which is to ensure that electronic communications are accessible and not necessarily comprehensible. Thus, the inclusion of the word *"intelligible"* in Section 6 of the Bill is unnecessary.

[15] See section 6 of the E-Commerce Bill 2011 which contains exactly the same provision as the Malaysian Law.
[16] Article 9(2).

ii) Signature

The guide to drafting a national legislation in this regard is contained in Article 7 of the 1996 UNCITRAL Model Law.[17] Yet again, the Bill contains provisions similar to ECA 2006 of Malaysia. However, while Malaysia and most other countries, including the US and UK have implemented separate and comprehensive digital signature statutes, Nigeria has none.[18] It is submitted that rather than adopt a piecemeal approach to electronic communications, the legislature should work on implementing a digital signature statute in the nearest future.

iii) Seal

Section 8(1) of the Bill sought to make a provision to substitute the requirement for seal in electronic documents. It specifies that:

> *"[w]here any law requires a seal to affixed to a document, the requirement of the law is fulfilled, if the document is in the form of an electronic message."*

It is submitted that not only is that section incomplete, it also makes no logical sense whatsoever. This submission is given more credence where Section 8(1) of the proposed legislation is read alongside section 8(2) which provides that:

> *"[n]otwithstanding subsection (1), the Minister may, by order in the Gazette, prescribe any other electronic signature that fulfills the requirement of affixing a seal in an electronic message."*

It is possible that in the bid to avoid reference to digital signature as provided under a digital statute (which is nonexistent under the Nigerian law), the drafters of the Bill deleted more than necessary from Section 10(1) of the ECA 2006 of Malaysia which states that:

> *"[w]here any law requires a seal to affixed to a document, the requirement of the law is fulfilled, if the document is in the form of an electronic message,* ***by a digital signature as provided under the Digital Signature Act 1997.****"*

Section 8(2) of the Bill adopted the provisions of section 10(2) of the Malaysian law.

iv) Retention of Records; Originals

Provisions relating to these are contained in Articles 8 and 10 of the 1996 UNCITRAL Model Law.[19] Here, as in the entire Bill, the drafters adopted provisions of the ECA 2006 of Malaysia.[20] Section 10 of the Bill provides that:

[17] See also Article 9(3) of the 2005 UN Convention.
[18] Please note the recent inclusions in section 93(2) of the Nigerian Evidence Act 2011.
[19] See also Article 9(4) and (5) of the 2005 UN Convention.
[20] See sections 12 and 13 of the ECA 2006 of Malaysia.

"[w]here any law requires any document to be in its original form, the requirement of the law is fulfilled by a document in the form an electronic message if –

a) There exists a reliable assurance as to the integrity of the information contained in the electronic message from the time it is first generated in its final form; and
b) The electronic message is accessible and intelligible so as to be usable for subsequent reference."

This provision has the potential to become extremely useful to people engaged in commercial transactions in Nigeria. This is because when an electronic message is sent, what the recipient receives is a copy of the message. The copy may subsequently be stored, read or sent, but in most situations, only the copy of the original message is used. The implementation of the proposed E-Commerce legislation would complement the recent inclusions in Section 84 of the Nigerian Evidence Act of 2011,[21] for such records to be used in court so long as the requirements in (a) and (b) above, as well as Section 10(2) are met. Nevertheless, nothing in the Bill relieves a party from the duty to adduce the necessary foundation for admission of the electronic record.

It is pertinent to note that as previously submitted the word *"intelligible"* as used in (b) above, as well as under the provision relating to retention of documents in Section 10 of the Bill may need to be deleted.

c) Admissibility and Weight of Evidence

Even though Article 9 of the 1996 UNCITRAL Model Law made effective recommendations for inclusion of provisions on admissibility of data messages in national legislation, the Bill, like the ECA 2006 of Malaysia failed to adopt the recommendation. Article 9(1) of Model Law suggests inclusions as follows:

"[i]n any legal proceedings, nothing in the application of the rules of evidence shall apply so as to deny the admissibility of data message in evidence:

a) On the sole ground that it is a data message; or
b) If it is in the best evidence that the person adducing it could reasonably be expected to obtain, on the grounds that it is not in its original form."

The Model Law continued in Article 9(2) to make recommendations on the weight of evidence to be attached to data existing solely in electronic form as follows:

[21] The section contains provisions on admissibility of statements in documents produced by computers.

> *"[i]nformation in the form of a data message shall be given due evidential weight. In assessing the evidential weight of a data message, regard shall be had to the reliability of the manner in which the data message was generated, stored or communicated, to the reliability of the manner in which the integrity of the information was maintained, to the manner in which its originator was identified, and to any other relevant factor."*

Quite surprisingly, these provisions were omitted from the Bill. It is imperative that the legislature ensures that relevant provisions of the 1996 UNCITRAL Model Law are reflected in proposed legislation.

d) Time of Dispatch and Receipt

With respect to the time of dispatch of electronic communications, Section 18 of the Bill provides as follows:

> *"Unless otherwise agreed between the originator and the addressee, an electronic message is deemed sent when it enters an information processing system outside the control of the originator."*

Again, this is a direct adoption of the provisions of the ECA 2006 of Malaysia.[22] However, in adopting the Malaysian provision, S.18 of the Bill failed to include provisions contained in the second part of Article 15(1) of the UNCITRAL Model Law which envisages that an electronic message may in some cases be sent by a person other than the originator. Article 15(1) states as follows:

> *"Unless otherwise agreed between the originator and the addressee, an electronic message is deemed sent when it enters an information processing system outside the control of the originator* ***or of the person who sent the data message on behalf of the originator****."*

It is pertinent to note that the provision included in the UNCITRAL Model Law would more appropriately take care of situations where the originator, such as a director of a company, directs another such as a secretary to send communications on his behalf. Where the clarification is not made, as in S.18 of the Bill, an electronic message emanating from the secretary on behalf of the originator for instance, would not be covered under the Bill, since the secretary cannot acquire the status of the originator of the electronic message.

Similarly, with respect to the time of receipt of electronic messages, S. 19 of the Bill merely covers situations where the addressee has designated an information processing system for the purpose of retrieving electronic messages and where he (the addressee) has not designated a system. In the former situation, an electronic message is deemed received when it enters into the designated information processing

[22] See section 20 of the ECA.

system, whereas in the latter situation, it is deemed received when it comes to the knowledge of the addressee.

That provision fails to reflect the provision of Article 15(2) of the UNCITRAL Model Law which is more comprehensive. Article 15(2) covers three important scenarios as follows: a) if the addressee has a designated information system for receiving data messages, receipt occurs – i) when the data message enters the designated system; or ii) if sent to a system that is not the designated information system, when the data message is retrieved by the addressee; b) if the addressee has not designated an information system, receipt occurs when the data message enters an information system of the addressee.

Not only is Article 15(2) more comprehensive, it also ensures that a party does not have to wait indefinitely for an electronic message to come to the knowledge of the addressee with no designated information system. Thus, under the Model Law, time of receipt would begin to count when the data message enters any information system of the addressee whether or not he is aware of same..

The Legislature may also need to take note of Article 10(2) of the 2005 UN Convention which provides that the time of receipt of an electronic communication would be the time when it becomes capable of being retrieved by the addressee at an electronic address designated by him. Where the addressee did not designate the address, the time of receipt is the time when the communication becomes capable of being retrieved and the addressee is aware that the communication was sent to that address.

Conclusion

This newsletter gives a brief overview of some of the salient provisions of the Bill worthy of further consideration before enactment. Given the importance of this piece of legislation to economic development in Nigeria, efforts should be made towards ensuring that each provision is carefully analyzed and possibly modified for applicability to the Nigerian context.

In conclusion, care should be taken when analyzing the statute to ensure that all forms of ambiguities and uncertainties are removed.

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