



KEVIN
MARTIN
OGWEMOH
LEGAL

LEGAL INSIGHTS



**EXECUTION OF CONTRACTS IN THE FACE OF
MOVEMENT RESTRICTIONS AND PHYSICAL DISTANCING:
THE POSITION OF NIGERIAN LAW**

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1.0 Introduction

It is no longer news that the current COVID-19 pandemic ravaging the world has created a "new normal" in doing business in Nigeria and indeed the whole world, following the enactment of new laws and executive orders for the enforcement of movement restriction, lockdown and social/physical distancing in order to curb the continued spread of the dreaded pandemic. In light of the current realities in the world and in Nigeria, and to ensure continuity of commercial activities, business owners, private and public enterprises and government agencies have resorted to the use of technology in conducting business meetings and even in the execution of contractual documents.

However, the question that agitates the minds of all and sundry is whether there exists adequate protection under Nigerian law for contracts and documents, and other businesses negotiated and executed with the aid of modern technology and/or electronically without the parties meeting physically to negotiate and ultimately execute those contracts. This article will attempt to discuss the various issues that have been thrown up by what is now termed the "new normal" vis-à-vis the current position of Nigerian law.

2.0 Formation/Formalities of an Electronic Contract

Generally, under Nigerian law, a contract may be created electronically by online communications and electronic data interchange, and the electronic record of that transaction satisfies any legal requirement that a contract be "in writing." As the Court succinctly puts it in *U.B.N. Plc. v. Ogunsiji*; "*It is elementary law that a contract may be*

demonstrated by the conduct of the parties as well as by their words and deeds or by the documents that have passed between them."¹

The Evidence Act 2011, in fact, defines "document" admissible under it "to include any device by means of which information is recorded, stored or retrievable including computer output."² Therefore, once the basic elements of a contract -offer, acceptance, consideration, capacity to contract and intention to create legal obligation³ - are evident in the record of an online transaction, such qualifies as an electronic contract enforceable under Nigerian law.

2.1 Execution of Online Contracts – Electronic/Digital Signatures

As can be seen above, parties are generally free to form and execute contracts electronically in Nigeria. Documents executed electronically satisfy the requirements of a properly signed document under the Evidence Act and so escapes the worthlessness usually attached to unsigned documents.⁴ The Act provides that "where a rule of evidence requires a signature or provides for certain consequences if a document is not signed; an electronic signature satisfies that rule of law or avoids those consequences."⁵ As such, once an electronic contract has been electronically signed by way of, for example, DocuSign, Adobesign etc., it becomes as valid and enforceable as a paper document physically signed.⁶ In furtherance of this position, the Cybercrimes Act 2015 provides that electronic signatures in respect of purchases of goods and any other transactions are valid and binding⁷ and that the burden of proof of invalidity of an electronic signature is on the contender.⁸

2.2 Evidential Issues/Admissibility of Electronic Contracts in Evidence

In case of a breach or any dispute as to the terms and conditions of an electronic contract entered into between parties, recourse can be conveniently had to the courts for adjudication.

Even before the enactment of the Evidence Act 2011 and the Cybercrimes Act 2015, Nigerian courts have very well recognized the admissibility in evidence of electronic data in proceedings before the courts. This approach was given judicial stamp of authority in the case of *Esso West Africa Inc. v. T. OyegboIa* ⁹ decided as far back as 1969, where the Court took the position that "*the law cannot be and is not ignorant of the modern business methods and must not shut its eyes to the mysteries of the computer.*" See also *Anyaebosei & Ors v. R.*



*T. Briscoe Nig. Ltd*¹⁰ and *IJBA Plc v. Sani Abacha Foundation for Peace and Unity*.¹¹ Therefore, in the event of a dispute or a breach of an electronic agreement, the computer printout of the content of the electronic contract – commonly known as “computer-generated evidence” - can be tendered in Court or in any alternative dispute resolution forum as proof of the agreement between the parties.

The Court will, however, require that those electronic documents sought to be tendered pass the admissibility tests.¹²

3.0 Contracts already concluded physically but not executed before lockdown?

There may be situations where parties have concluded negotiation of contracts but have not been able to physically execute the contract documents before the lockdown and restriction of movement was enforced. In such a case, the parties can improvise with the proto-conventional means of signing, scanning and sending for the other parties’ signature which is midway between traditional physical execution and electronic execution - it is still as valid as physically signing. The rationale for this position is the provision of the Evidence Act that a signed copy of an agreement shall be primary evidence in favour of the person who has signed it and secondary to the one who has not.¹³ Therefore, once signed, scanned and sent to the counterparty, the scanned copy sent becomes for them secondary evidence of the original primary evidence of the agreement still in the possession of the sender and signed by them.¹⁴ More so, the Evidence Act also provides that copies of originals made by mechanical or electronic process which ensures the accuracy of the original are admissible as secondary evidence of that original.¹⁵ Therefore, the agreement that was signed, scanned and sent will be primary evidence in favour of the sender but the scanned copy sent to the counterparty will be secondary evidence in their own favour.¹⁶ When counter-signed, scanned and returned by the counterparty, that copy (now signed by both parties) becomes on behalf and in favour of both parties, a secondary evidence of the copy

(primary evidence) only signed by the original sender.

Even more so, where the basic elements of a contract as explained in (2.0) above are present, those contracts are legally enforceable despite the fact that they have not been signed by either party and even if they end up not being signed by both parties.¹⁷ The Supreme Court of Nigeria has held that an unsigned agreement is valid and binding where such an agreement and intention to be bound by it are not in doubt; there is no contrary statutory provisions¹⁸ and the signing of the agreement itself was not a condition for the existence of the agreement.¹⁹ This is because there is generally no specific form in which a contract may be entered into under Nigerian law. As explained above, a contract may be demonstrated by the conduct of the parties as well as by their words and deeds or by the documents that have passed between them.²⁰ Thus, a contract may be entered into either orally, in writing or indeed by conduct.²¹ See for example section 3 of Lagos State Arbitration Law on what constitute an arbitration agreement. Consequently, the Court will infer the existence of a contract if, from the interaction and conduct of the parties, they have shown an intention to be bound by a contract the terms of which are clearly ascertainable or contained in a document. In this instance, therefore, the existing negotiated contracts may still be binding on the counterparty irrespective of the fact that it has not been signed by them.

4.0 Conclusion

Although the coronavirus pandemic had seemingly threatened to put an abrupt stop to all human activities during its ravenous reign, Nigerian law, as has been aptly summarised above has adequate provisions to cater to the needs of (existing and prospective) contractual parties amidst the lockdown and movement restriction. Parties can legally enter into and execute their contracts electronically and remotely. And contracts entered into but not yet physically executed before lockdown and restriction on movement may also be executed remotely under the relevant provisions of the law or may nevertheless be valid and enforceable at law even if they remained unsigned provided that they meet the basic requirements of a contract under Nigerian law.



References

1. [2013] 1 NWLR (Pt. 1334) 1 at p. 13 para. F. See also *Ajagbe v. Idowu* [2011] 17 NWLR (Pt. 1276) 422 at p. 442 paras. D – G, per Mukhtar JSC.
2. Section 258 of the Evidence Act 2011
3. *Metibaye v. Narelli International Ltd.* (2009) 16 NWLR (Pt. 1167) 326. See also *B.F.I.G. v. B.P.E* (2008) ALL FWLR (Pt.416) 1915
4. The position of the law in Nigeria generally is that an unsigned document is a worthless document and is inadmissible by the court to resolve disputes before it. See *Brewstech Nigeria Limited v Folageshin Akinnawo* (2016) LPELR-40094(CA); *Gbadamosi & Anor. v. Biala* (2014) LPELR 24389 (CA); *Garuba v. Kwara Investment Co. Ltd.* (2005) 5 NWLR (Pt. 917) 160, and *Omega Bank (Nig.) Plc v. O.B.C Ltd* (2005) 8 NWLR (pt.928) 547 at 581 para. D, per Niki Tobi JSC.
5. Section 93 (2) of the Evidence Act 2011. Even more so, the Evidence Act in supra note (2) expands the traditional meaning of "document" to include "any device by means of which information is recorded, stored or retrievable including computer output".
6. Section 93(3) of the Act further provides that:" All electronic signatures may be proved in any manner, including by showing that a procedure existed by which it is necessary for a person, in order to proceed further with a transaction to have executed a symbol or security procedure for the purpose of verifying that an electronic record is that of the person."
7. Section 17(1) of the Cybercrimes Act.
8. Section 17(2) of the Cybercrimes Act.
9. (1969) NMLR 19.
- 10.(1987) 3NWLR (Pt. 59) 108 where the Appellant tendered and the trial court admitted in evidence his bank statement of account which was stored in a computer to prove the Respondent's indebtedness to him upon certain conditions being met.
- 11.(2004) 3 NWLR (Pt. 861) 516. See also *Yesufu v. ACB Ltd.* (1976) 1 All NLR (Pt. 1) 328
- 12.Sections 84(4)(c) and 84(2) (a) - (d) of the Evidence Act on computer-generated evidence. See also *Kubor v. Dickson* (2013) 4 NWLR (Pt. 1345) 534 and *Omisore v. Aregbesola* (2015) 15 NWLR (Pt. 1482) 205-416.
- 13.S. 86 (1) (c)
- 14.S. 87 (1) (c)
- 15.Ibid
- 16.The scanned agreement is admissible in favour of the counterparty as secondary evidence in line with S. 89 and 90 of the Evidence Act once they lay foundation that the original (primary evidence) is in the possession of the "adverse party."
- 17.*Metibaye v. Narelli Int'l Ltd.* supra note (3)
- 18.For example, s. 4 of the Statute of Frauds 1677 with regards to landed properties etc.
19. See *MTN (Nig.) Communications Ltd. v. Corporate Communications Ltd.* (2019) 9 NWLR (Pt. 1678) 427; (2019) LPELR-47042 (SC); *Ogudo v. The State* (2011) LPELR-860 (SC) and *Awolaja & Ors. v. Sea Trade G.B.* (2002) LPELR-615 (SC). This position held by the courts is based on the cardinal maxim: "Equity looks to the intent rather than the form."
- 20.U.B.N. Plc. v. Ogunsiiji supra note (1)
- 21.*Metibaye v. Narelli Int'l Ltd.* Supra note (3)

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For further enquiries or assistance please contact us at:

Address:

**The Trinity Centre
Plot 14A Block 139A
Nike Art Gallery Road, Lekki
Peninsula Scheme 1, Lagos
Nigeria.**

Email:

info@kmo.legal

Phone:

**+234(0)8033014162
+234(0)8059006522
+234(0)8023636083
+234(0)8033083445
+23412714388**

Website:

www.kmo.legal