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The Nigerian Electronic Commerce Act:

**An Act to Incorporate the UNCITRAL Model Law on Electronic Commerce 1996
as Amended into the Nigerian Laws, for the Facilitation and Recognition of
Electronic Documents in Commercial Transactions in Nigeria**

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requirements for the award of the Degree of Master of Laws (LL.M.) in
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Introduction

The era of an increasing trend of electronic communication technology brought about the need for the regulation of international affairs because of the problems that arose to hinder and discourage the global commercial growth. There was therefore a need to call more openly for international solutions in order to prevent the possibility and the emergence of lawlessness in the developing electronic commercial world as against the “isolated domestic initiative”.¹

The United Nations Commission on International Trade Law (UNCITRAL) was one of the first organizations which Governments used as a forum to develop uniform private law standards for Electronic Commerce (e-commerce).² UNCITRAL was aware that the carriage of goods was the context in which electronic communications were most likely to be used in which a legal framework facilitating the use of such communication was most urgently needed.³ UNCITRAL therefore over the years enacted laws for the regulation of e-commerce e.g. the UNCITRAL Model Law on Electronic Commerce 1996 with additional Article 5 bis as adopted in 1998 (Model Law on Electronic Commerce),⁴ (hereinafter called the Model Law), the subject of this drafting project, the UNCITRAL Model Laws on Electronic Signature With Guide to Enactment 2001 (Model Law on Electronic Signature) and The United Nations Convention on the Use of Electronic Communication in International Contracts 2005 (UNCITRAL Electronic International Contracts).

The Model Law was the first step in achieving international harmonization on electronic transactions which focused on the problems associated with the use of computer-to-computer communication.⁵

¹ Estrella Faria, Jose Angelo; drafting and Negotiating History of the Electronic communication convention; in Boss, Amelia H, and Kilian, Wolfgang; United Nations Convention on the Use of Electronic Communications in International Contracts (An In-depth Guide and Source Book); Kluwer Law International; Walters Kluwer Law & Business; 2008; p. 17.

² Ibid.

³ Jim-Mi-Jimmy, NG; UNCITRAL Model Law on Electronic Commerce in Relation to Maritime Operations in the Pearl River Delta China; The Journal of International Maritime Law; Volume 14; Issue 4; July-August 2008; p. 348.

⁴ Ibid.

⁵ Carr Indira; International Trade Law; 4th Edition; Routledge-Cavendish; Taylor & Francis Group; London and New York; 2010; p. 108.

A brief overview of the Model Law

The main aim of the Model Law was to modernize State laws in order to accommodate e-commerce in a harmonized way.⁶ It highlighted and made recommendations for States with the aim of removing legal uncertainties which hindered the use of electronic means of communication in commerce e.g. the writing requirements and signatures for the purpose of validity and enforceability of contract.⁷

UNCITRAL made suggestions that Governments review existing legal rules that required paper documentation or signatures as conditions for the validity or enforceability of a transaction with the view to amending them suitably to permit documents in computer readable form.⁸

The Model Law served as a pacesetter educating countries about the issues surrounding the use of electronic communication and provided common solutions and consistency. The Model Law was adopted in order to sensitize nations on the need for uniformity and a sensible and workable solution to adapt their laws to e-commerce.⁹ The Model Law was intended to be customized to fit within each country's legislative scheme.¹⁰

The Model Law is a good international standard for preparation of domestic laws dealing with the legal value of electronic communication¹¹ for the Federal Republic of Nigeria.

The Uniform Electronic Transaction Act (UETA) was modeled after the Model Law and has been enacted in nearly all Provinces and Territories of the United States of America and Canada. The Electronic Signatures in Global and National Commerce Act (E-SIGN) 1999¹²

⁶ Boss, Amelia, op. Cit., P. 3.

⁷ Carr Indira, *op. cit.*, p. 108.

⁸ Ibidem.

⁹ Boss, Amelia loc. cit.

¹⁰ Ibid.

¹¹ Ibid. p. 18.

¹² Boss, Amelia; United Nations Perspective on the Convention on the Use of Electronic Communication in International Contracts; in Boss, Amelia H and Kilian, Wolfgang; United Nations Convention on the Use of Electronic Communications in International Contracts (An In-depth Guide and Source Book); Ibid. p. 263.

was also drafted using the UNCITRAL Model Law 1996 as a standard. Such Laws govern e-commerce both in the Federal and State levels in the United States.

The UNCITRAL Model Law also influenced directly the enactment of the **2003 Rules on Electronic Transactions of Guangdong Province (Guangdong Rules) of China**. The enactment of the Guangdong Rules in China meant that for the first time maritime and logistics could formally use electronic contracts in transacting business in the Guangdong province.¹³

Several other countries have enacted their domestic laws with the Model Law as a specimen.¹⁴

From the above, it is shown that the Model Law is placed on the long and successful track record in the area of e-commerce.¹⁵ The Federal Republic of Nigeria like the above countries may also enjoy the many advantages of the Model Law by incorporating the same into its Laws.

Among the many anticipated advantages of the incorporation of the Model Law into the Nigerian legal system, the Model Law will be advantageous to individuals because it has the effect of broadening the principle of party autonomy.

The freedom of contract between contracting parties will be enhanced in the sense that parties can choose between the paper documentation of commercial transactions and/or the electronic means of communication as a binding mode of communication and documentation in their transactions.

The Model Law adopts the concept of party autonomy adopted by the Convention on the International Sale of Goods (CISG) which allows the parties to exclude the application of the Convention and derogate from or vary its effect.¹⁶ The Model Law similarly recognizes and supports the concept of party autonomy as a vital part of contractual negotiations which should be broadly recognized.

¹³ Jim-Mi-Jimmy op. cit. p. 263.

¹⁴ See http://www.unescap.org/tid/projects/ecom04_s4sorieul.pdf.

¹⁵ Boss, Amelia; op. cit., p. xxvii

¹⁶ Ibid., p. 83.

The principle of party autonomy is expressly provided for in Article 4(1) of the Model Law which expressly states that:

“As between parties involved in generating, sending, receiving, storing or otherwise processing data messages, and except as otherwise provided, the provisions of chapter III may be varied by agreement”.

It also follows that the parties to the contract are effectively given the ability to alter the scope and application of the law by express agreement either by expanding, narrowing or opting out of the application of the Model Law in its entirety.

The principle of party autonomy also extends to the fact that parties may decide not to use electronic communication at all. The choice of the applicability or otherwise of the Model Law on the transaction between parties is left open to the parties to decide by their express agreement.

The law provides for certainty and predictability for parties who use electronic communication but it does not place on them any burden to use them.¹⁷ If parties choose to opt out of the applicability of the Model Law, same will not apply and in such a case there will be no need to rely upon the ability of the parties to derogate from its applicability. However the agreement to opt out must be express and unambiguous in order to be enforceable.

This expansion of the doctrine of party autonomy will enhance trade connections by allowing new access opportunities for previously remote parties and markets in Nigeria.

The ability to vary the effects of the Model Law is however limited to the sets of communications under Chapter III of Part One of the Model Law. The reason for such a limitation is that the provisions regarding writing, signature, and originals contained in Chapter II of Part One may, to some extent, be regarded as a collection of exceptions to well-established rules regarding the form of legal transactions.¹⁸ Such well-established rules are normally of a

¹⁷ Ibid., p. 133.

¹⁸ http://www.uncitral.org/pdf/english/texts/electcom/05-89450_Ebook.pdf ; accessed on 15th December, 2011.

mandatory nature since they generally reflect decisions of public policy.¹⁹ For example the doctrines of fraud, duress, unconscionability and other existing creations of domestic laws cannot be derogated from on the grounds of public policy. It follows that party autonomy under the Model Law does not extend to the ability to vary the provisions of State laws. Whether the agreement will be recognized will depend on whether the State deems its requirements to be mandatory or variable.²⁰ This is so in order to preserve the existing legal rules and requirements of a valid transaction.

The Model Law will also benefit the State as a whole by automatically extended the legal framework of Nigeria. This will be achieved through the development of the principle of functional equivalence which entails that electronic transactions will be given equal legal effect as the paper documents.

Paper documents have been the basis for rules on form of evidence of legal acts in Nigeria, as it is in most other countries. Electronic communication is intangible in nature and due to this characteristic is not supported or enforceable by the law. The Model Law however recognizes that the basic philosophy and principle of the law need not be replaced by entirely new ones due to one of many distinctions between Electronic Data Interchange (EDI) messages and paper-based documents, namely, that the latter is readable by the human eye, while the former is not so readable unless reduced to paper or displayed on a screen.²¹ UNCITRAL noted that the prudent thing to do is to identify the circumstances under which the same functions envisaged by the law may be fulfilled by electronic communication. The new functional equivalence approach involves an analysis of basic functions fulfilled for example by writing, signature, or an original in the world of paper documents in order to determine how those functions could be transposed, reproduced or imitated in a dematerialized environment.²²

The functional equivalence theory also addresses the issue of technology neutrality which holds that the law should not discriminate between different forms of technology (i.e. the rules should

¹⁹ Ibid.

²⁰ Boss, Amelia, op. cit., p. 92.

²¹ <http://www.uncitral.org>, op. cit.

²² Estrella Faria, Jose Angelo; op. cit. p. 22.

neither require nor assume a particular technology) in order not to stifle the development of any technology or unfairly favouring one technology over another.²³

The theory of functional equivalence is embodied in articles 6 to 8 of the Model Law which single out basic functions of paper-based form requirements, (“writing”, “signature” and “original) in electronic data form with a view to providing criteria which, once they are met by data messages, enable such data messages to enjoy the same level of legal recognition as corresponding paper documents performing the same function.²⁴

The Model Law permits States to adapt their domestic legislation to developments in communications technology applicable to trade law without necessitating the wholesale removal of the paper-based requirements themselves or disturbing the legal concepts and approaches underlying those requirements.²⁵

The functional equivalence approach of the Model Law will also achieve, to a large extent, the elimination of statutory barriers on e-commerce in any legal system by offering a possible solution for some of the legal obstacles to e-commerce. The Model Law recognizes that legal requirements prescribed for the use of traditional paper-based documentation constitute the main obstacle to the development of modern means of communication. The Model Law removes these statutory barriers to electronic communication by allowing electronic media that fulfill the purposes intended by each paper-based requirement.

The basic writing requirements, for example, translate fairly easily to their electronic equivalents. Where a statute simply requires something “in writing” an electronic record must simply be “accessible for future reference” to comply.²⁶ Similarly, where the law requires a document to be signed, the Model Law contemplates the use of electronic signatures rather than setting stringent reliability standards. Thus, the Model Law simply allows electronic signatures

²³ Smedinghoff, Thomas; Form requirements; in Boss Amelia; op. cit., p. 139.

²⁴ <http://www.uncitral.org> loc.cit

²⁵ Ibid.

²⁶ <http://unpan1.un.org/intradoc/groups/public/documents/apcity/unpan003546.pdf> 17th December, 2011.
See also Article 6(1) of Model Law.

where they achieve the same purposes as their pen-and-ink counterparts²⁷ since the basic function of a signature is simply to link a person with a document.²⁸

However, in certain cases, the public interest may demand a higher standard of reliability for certain classes of documents. In such cases, the Model Law shows its flexible nature by allowing the State to alter its provisions by expanding or narrowing its regulation to meet whatever reliability standard as required to adapt the laws to the circumstances.

Flexibility, which is one of the most important characteristic of the Model Law, makes it the most suitable for the Nigerian legal system. This is so because the Model Law allows for States to alter the scope either by expanding or narrowing its scope in order to ensure its continuing usefulness and applicability.²⁹

UNCITRAL has historically understood the need for flexibility, diplomacy and patience in its law reform projects. This innovative mechanism employed by the UNCITRAL is to ensure that the law is able to accommodate future developments and does not quickly become outdated.

The provisions of the Model Law are responsive to the particular needs of States. The Model Law implicitly permits the exclusion or modification of some provisions. For example the Model Law contains a number of articles (articles 6, 7, 8, 11, 12, 15 and 17) that allow a degree of flexibility to enacting States to limit the scope of application of specific aspects of the Model Law.

The objectives of flexibility of the Model Law are best served by the widest possible application of the Law. The Model Law does not prevent the State from extending the scope of the Model Law to cover uses of e-commerce outside the commercial sphere. States are therefore free to determine the appropriate scope of the Model Law to extend beyond the commercial sphere.³⁰

²⁷ Ibid.

²⁸ Ibid.

²⁹ Estrella Faria, Jose Angelo; in Boss, Amelia op. cit., p. 30.

³⁰ <http://www.uncitral.org> loc. Cit .

Another example of the flexibility of the Model Law, which is of immense benefit to the Nigerian legal system, is embodied in Article 5 *bis* of the Model Law. Article 5 *bis* gives room for the “incorporation by reference” which is essential for the widespread use of Electronic Data Interchange (EDI) and other forms of e-commerce. It is intended to provide guidance as to how legislation aimed at facilitating the use of e-commerce might deal with the situation where certain terms and conditions, although not stated in full but merely referred to in a data message, might need to be recognized as having the same degree of legal effectiveness as if they had been fully stated in the text of that data message.³¹ This is achieved, for example, by validating incorporation by reference in an electronic environment “to the extent permitted by law”, or by listing the rules of law that remain unaffected by article 5 *bis*.³² Such recognition is acceptable under the laws of many States with respect to conventional paper communications.

The Model law has been systematically divided into two parts (Part I and Part II). Part I of the Model Law contains the basic rules applicable to e-commerce in general. Considering that the focus of the Model Law is on “paperless” means of communication, the approach used in the Model Law in Part I is to provide in principle for the coverage of all factual situations where information is generated, stored or communicated, irrespective of the medium on which such information may be affixed. Except to the extent expressly provided by the Model Law, the Model Law is not intended to alter traditional rules on paper-based communications.³³

Part I of the Model Law also provides in Articles 6, 7, and 8 for the basic principles governing documents i.e. writing, signature and originals. These provisions have always been upheld with utmost importance by statute (the Evidence Act 2011) and cannot be derogated from by agreement between contracting parties. The Model Law has made equivalent provisions by which the basic requirements may be satisfied by electronic documentation.

³¹ [ibid](#) “The expression “incorporation by reference” is often used as a concise means of describing situations where a document refers generically to provisions which are detailed elsewhere, rather than reproducing them in full.”

³² *Ibid*.

³³ *Ibid*.

Part II contains rules of a more specific nature.³⁴ Such rules dealing with specific uses of e-commerce reflect both the specific nature of the provisions and their legal status, which are the same as that of the general provisions contained in Part One of the Model Law. The adoption of a specific set of rules dealing with specific uses of e-commerce, such as the use of EDI messages as substitutes for transport documents does not imply that the other provisions of the Model Law are not applicable to such documents. In particular, Article 16, which establishes the scope of Chapter 1 of Part II of the Model Law, is broadly drafted. It encompasses a wide variety of documents used in the context of the carriage of goods, including, for example, charter-parties and all other transport documents, whether negotiable or non-negotiable.

However States are free to alter the application of the Model Law to certain kinds of documents or contracts. If, for example the inclusion of such documents as charter-parties in the scope of that Chapter is regarded as inappropriate under the legislation of an enacting State, that State could make use of the exclusion clause contained in paragraph (7) of article 17.

Part II of the Model Law does not, in any way, limit or restrict the field of application of the general provisions of the Model Law.³⁵

The guide to enactment, provided by UNCITRAL is a measure to assist the Nigerian drafters as it sets out background information, explanations of decisions, and information on various policy options to enable legislators to make informed decisions.³⁶

Why should Nigeria make use of the Model Law?

The incorporation of the Model Law into the Nigerian legal system will achieve certainty and transparency of the law with respect to electronic transactions. The domestication of the Model Law will improve the level of predictability on the issue of electronic communication. This will in turn keep Nigerian legal practitioners fully abreast of what the current law is and how the law

³⁴ Ibid.

³⁵ Ibid.

³⁶ Ibid.

is likely to evolve in an otherwise lawless area of law (predictability and transparency of the law).

The incorporation of the Model Law will also serve as a stepping stone for the adoption or ratification of other international instruments, particularly trade-related instruments, for example the United Nations Convention on the use of Electronic Communication in International Contracts (2005) and the UNCITRAL Model Law on Electronic Signatures (2001), United Nations Convention on International Carriage of Goods Wholly or Partly by Sea (The Rotterdam Rules) 2008.

In light of the provisions of the Rotterdam Rules, Article 3 of the Rotterdam Rules has recognized the use of electronic communication with direct focus on the documents for the carriage of goods wholly or partly by sea. The Rotterdam Rules have not yet come into force; however the incorporation of the Model Law will be of great significance. The incorporation of the Model Law will serve as a stepping stone upon which the provisions of the Rotterdam Rules will become more easily practicable under the Nigerian laws in the event that the Rules enter into force in future. This will in turn allow Nigeria to gain access to the modern trade routes.

The incorporation of the Model Law will eliminate disparities among, and uncertainty about, national legal regimes governing the use of electronic communication techniques; the latter contributing to a limitation to the extent businesses may access international markets.

It is noteworthy that the former President of the Federal Republic of Nigeria, Olusegun Obasanjo, between the years 2001 and 2007 promoted and facilitated the importation of mobile technology into Nigeria. The advent of the said development was followed by a major increase of electronic transaction in Nigeria. Since then, electronic communication and transactions have become common trend in Nigeria. Nowadays commercial transactions are carried out over the internet with ease from any country in the world.

Since the year 2001 when electronic communication became more popular in Nigeria, e-commerce in Nigeria has operated in a legal void, a situation similar to the days before the

intervention of the UNCITRAL. There is therefore a dire need for the enactment of Law(s) to govern and facilitate the relatively new sector of electronic commercial activity in order to prevent the possibility and the emergence of electronic lawlessness in Nigeria.

Nigerian legislature has made a welcome progress in the year 2011 by taking its first step towards growth by amending the Evidence Act, which now provides that electronic evidence is admissible in Nigerian courts.³⁷ The new development in the Evidence Act is welcomed by Nigerian lawyers³⁸ as the Act marks the first step to the legal recognition and regulation of electronic transactions in Nigeria.

Although the amendment to the Evidence Act bears the assurance that Nigeria will witness a new era in her legal and judicial system, it is not advisable for the Nigerian legislature to stop at this point. It is pertinent that the Nigerian legislature goes the extra mile to enact a domestic law expressly aimed at regulating electronic commercial activities in Nigeria; and what better specimen of law to incorporate than the Model Law.

While the Model Law sets a global standard, neither its conditions of formulation are as demanding nor its conditions of implementation as severe as a conventions.³⁹ The standard itself is an encouragement for a greater number of countries to adopt the Model Law for the inducement of unification or harmonization.⁴⁰ Because conventions can limit drafters' room to maneuver, lead to the exclusion of issues on which delegates cannot reach consensus or, worse still, be conducive to reliance on compromise language that leaves an issue either unresolved or muddier than before, the Model Law provides the best route toward modernization. The domestication of the Model Law will open a world of endless possibilities.

Legislative Process

³⁷ Section 84 of the Evidence Act of the Nigeria (as amended) 2011.

³⁸ <http://www.nairaland.com/nigeria/topic-755078.0.html>; accessed on October 25, 2011- the writer Stated that "The Nigerian Evidence Act has been amended to incorporate the admission of computer and electronic evidence. I wonder what took them so long to make this amendment but this is a great development all the same".

³⁹ <http://www.tilj.org/journal/42/block-lieb-halliday/BlockLiebHalliday%2042%20Tex%20Int%20LJ%20475.pdf>; accessed on, 16th December, 2011.

⁴⁰ Ibid.

The Act will be incorporated into the laws of Nigeria by way of adoption of the provisions of the Model Law into a new draft law by the legislature. The Model Law will serve as a mere guide to the drafter in the drafting of the Act. This is the main purpose intended by UNCITRAL as depicted in the guide to enactment of the model law.

In order for the Act to be recognized it must be incorporated into the laws of Nigeria by the National Assembly by passing through the Nigerian legislative process.

The most appropriate bodies to author the law include the Ministry of Commerce, in consultation with Ministry of Transport and the Ministry of Justice.

The Bill will go through its first second and third reading on the floor of the National Assembly, after which it will be presented to the President for his assent. The Act will be published in the National Gazette for public recognition and enforceability in Nigerian courts.

Although the provisions of the Model Law serve mainly as a guide line to which the provisions of the Act follow very closely, the author has also taken advantage of the flexibility of the Model Law and has introduced few amendments that would best suit the Nigerian context.

Part one of the Act relates to e-Commerce in General;

Section 2 is the definition section. The definitions provided in this section follow very closely the definitions provided in the Model Law. However a few other definitions have been included in the Act for the purpose of the expansion beyond the scope of application provided by the Model Law.

The terms Agreement, Automated message system, Government, Record and transaction have been included and defined by the Act, thereby expanding the definitions provided for by the Model Law

Section 3 of the Act provides that the Act will apply to any kind of information in the form of a data message used in the context of commercial activities. This provision is quite clear and straight

forward. It presupposes that any transaction which is not of a commercial nature will not fall within the ambit of the Act.

Section 4 of the Act is an exemption section which provides for circumstances under which the provisions Act will not apply. The inclusion of the exemption section limits the scope of application as against the general scope of application of the Model Law. It has been considered that the exemption of such activities and documents are necessary as they are already governed by existing laws in Nigeria. The exemption of such activities is within the spirit of the provisions of the Model Law which provide for the exemption of any activity or documentation which may suit the enacting country.⁴¹ The issue of exemption will be discussed under the relevant subheading below.

Section 5 follows closely the wording of the Model Law. It provides that application of the act is not obligatory upon parties. Parties are allowed to agree on the use of e-commerce or otherwise. Such agreement can be made either by government or by private individuals.

The Act provides that the consent for the use of electronic methods of communication does not necessarily have to be expressly indicated in the case of transactions between individuals. In such a case the law will infer consent of the parties from all surrounding circumstances including the conduct of the parties. However in the case of government authorities, the intention for the use of electronic communication must be expressly made by the contracting government authority.

On the other hand the decision not to use electronic means of communication must be expressly stated by the parties in order to be recognised by the Act.

Section 6 is equivalent to article 4 of the Model Law. The Act provides that contracting parties may vary the provisions of the chapter III of the Act by Agreement unless the Act expressly provides otherwise. This section is the embodiment of the principle of party autonomy discussed above.

Chapter II of the Act deals with the application of legal requirements to data messages.

⁴¹see Article 6(3), 7(3), 8(4), 11(2), 12(2), 15(5) and 17(7) of the Model Law.

Section 7 embodies the principle of technological neutrality by providing that information will not be denied validity or enforceability solely on the grounds that it is in the form of a data message.⁴²

Sections 8, 9 and 10 of the Act cover the functional equivalence approach. The provisions refer to means by which electronic communication may achieve the legal requirements of paper documentation such as Writing, signature and original. This provision is in line with article 6, 7 and 8 of the Model Law respectively.

Section 11 deals with the Admissibility and Evidential Weight of Data Messages. It provides that electronic documentation will not be admissible in legal proceedings on the sole ground that it is a data message. Any such data message will be given due evidential weight with due regard to the provisions of the Act. This provision is in line with article 9 of the Model Law.

Section 12 deals with the retention of data messages. The provision of this section follows verbatim the provision of article 10 of the Model Law. It provides that the requirement for retention of a data message is satisfied provided the information contained is accessible, accurate and enables the identification of the origin and destination of a data message and the date and time when it was sent or received.

Chapter III relates to the communication of data messages. Under this Chapter, section 13 provides that a contract may be formed by data messages exclusively if agreed by parties, and such contracts so formed will be valid and enforceable.

The Act also provides for the use of Automated Message Systems (AMS) which are used to initiate or to respond to electronic communication without intervention by a natural person

Section 17 of the Act provides that a contract will not be void based on the sole fact that it was formed through the use of automated message system.

Although there is no equivalent provision on AMS under the Model Law, Nigeria increased the scope of application of the law to cover contracts which are formed through the use of AMS.

⁴² See Article 5 of the Model Law.

This decision is due to the fact that the use of AMS has become common place in Nigeria and no known law has been enacted to regulate such forms of electronic communications.⁴³

Section 18 of the Act which relates to the general rules concerning the Time and Place of Dispatch and Receipt of Data Messages follows the provision in article 15 of the Model Law.

Part II of the Act follows very closely the provisions Part II, Article 17 of the Model Law. This section provides specifically for the application of electronic communication in carriage of goods by sea. Section 19 provides expressly that the provisions of Part I still apply to Part II of the Act.

Under this Part the functional equivalence approach has been extended to contracts of carriage of goods by sea. It provides that the use of one or more data messages will satisfy the requirement of writing in order for any carriage document to be recognized. Therefore all form of communication which is incidental to the contract of carriage by sea and is listed under Section 19 will be legally recognized even if such communication is done through electronic means.

Section 20 goes further by providing that where one or more data messages are used to effect any action in subparagraphs (f) and (g) of Article 16, no paper document used to effect any such action is valid unless the use of data messages has been terminated and replaced by the use of paper documents. A paper document issued in these circumstances shall contain a statement of such termination. The replacement of data messages by paper documents shall not affect the rights or obligations of the parties involved. This provision is in line with article 17 of the Model Law.

Exemptions

In light of article 4 of the Model Law, the laws of other countries have been closely examined in order to make a well reasoned decision on the limitation of the scope of application of the Act in Nigeria. Some of the laws examined include The **Uniform Electronic Transaction Act (UETA)** the **Uniform Electronic Commerce Act (UECA)**, The **Electronic Signatures in Global and**

⁴³ See section 14 of UETA, http://www.law.upenn.edu/bll/archives/ulc/ecom/ueta_final.pdf, see also Section 20 of UECA, Article 12 of the ECC.

National Commerce Act (E-SIGN), Federal UAE Electronic Commerce Act and the Electronic Transaction Policy of Jamaica, Guangdong Rules of China.

In response to the provisions of article 4 of the Model Law, certain types of transactions have been excluded from the application of the Act. Section 4 of provides a list of transactions which will be excluded from the application of the Act.

Documents based on personal status such as Wills, death, birth and marriage certificates are excluded from the application of the law.⁴⁴ The exclusions of such personal documents can be largely based on religious and ceremonial basis.⁴⁵ The ceremonial basis for exclusion is not farfetched as such documents are required by law to be concluded by execution or by other stringent requirements such as attestation, sealing in order to be legally enforceable. There are no electronic equivalents of such ceremonial requirements to the best of the author's knowledge.

Furthermore, the exclusion of such personal documents is also based on the ground that such matters are regulated by existing applicable national laws. The relevant respective Laws may be amended to expand their scope to include the electronic version.

Another important reason for such exclusions by the Act is that such matters are not commercial in nature and therefore will not be within the scope of the e-commerce law.

Documents of title and other documents of conveyance of interest in land such as title deeds, trusts, powers of attorney, mortgages and charges are also exempted from the application of this Act.⁴⁶ This provision entails the exclusion of documents relating to transactions of sale and purchase of immovables and any other disposition of immovable. The exclusion of transfer of documents of title related to immoveable property is related to the formality required by the law for these kinds of documents, especially when they are to be executed by deed, and powers of attorney. In addition, such title documents are also governed by the relevant existing Property and Conveyance Acts of Nigeria.

⁴⁴ See article 2 of the Federal UAE Electronic commerce, <http://slconf.uaeu.ac.ae/papers/PDF%201%20English/e%201.pdf>; accessed on 6th March, 2012.

⁴⁵ For example the UAE law.

⁴⁶ Ibid.

Government documents such as immigration and citizenship documents, election documents are also excluded from the application of this Act. Such documents do not fall under the scope of commercial activities and will require a higher standard of security and technology standards than provided for by this law. Such flexible standard will not provide the appropriate level of security required for such documents.⁴⁷

In order to enhance the flexibility of the law, article 4(2) provides that the list of exemptions may be modified by the minister of commerce upon consultation with the Ministry of Justice and the Ministry of Transport. Modification of the list of exemptions may entail the enlargement by adding more exemptions or reduction by deleting any of the exemptions from the list of depending on the circumstances.

Conclusion

This new legal framework for e-commerce, takes a minimalist approach. It does not grant special benefits to certain classes of electronic information, but rather sets out the simple rule that information in electronic form should not be prejudiced.

To achieve this result with greater certainty, the Act addresses specific concepts in contract law, easing their translation into the electronic realm by specifically allowing electronic information to satisfy statutory writing requirements that were never intended to exclude electronic information.

This barrier-removing approach achieves greater certainty in the e-commerce realm while allowing parties the freedom to use whatever channels of communication they find most desirable. This system will open the door to the growth of e-commerce in Nigeria.

The enactment of this Act is a stepping stone to the growth of the Nigerian e-commerce regime; for instance the Act will make the ratification of other conventions relating to e-commerce a much easier endeavor. In a situation where Nigeria ratifies e-commerce related conventions such as the ECC, such ratification will further contribute to the participation of the Nigerian economy

⁴⁷see section 11(5) ETA, <http://unpan1.un.org/intradoc/groups/public/documents/apcity/unpan025623.pdf> see also schedule 1 of ETA.

in the global development of e-commerce. Participation in global development of e-commerce will also improve the Nigerian economy based on the rise in IT know how, provision of job opportunities, and most importantly global recognition of the nation.

Arrangement of sections

Part One: Electronic Commerce in General

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The Nigerian Electronic Commerce ACT.

An Act to Incorporate the UNCITRAL Model Law on Electronic Commerce 1996 as Amended into the Nigerian Laws, for the Facilitation and Recognition of Electronic Documents in Transactions in Nigeria

Commencement: _____

Enacted by the National Assembly of the Federal Republic of Nigeria.

Part One. Electronic Commerce in General

CHAPTER I. GENERAL PROVISIONS

Section 1: Short title.

This Act may be cited as the Nigeria Electronic Transactions Act.

Section 2: Definitions

For the purposes of this Act:

- (a) “**Addressee**” of a data message means a person who is intended by the originator to receive the data message, but does not include a person acting as an intermediary with respect to that data message;
- (b) “**Agreement**” means the bargain of the parties in fact, as found in their language or inferred from other circumstances and from rules, regulations, and procedures given the effect of agreements under laws otherwise applicable to a particular transaction.
- (c) “**Automated message system**” means a computer program or an electronic or other automated means used to initiate an action or respond to data messages in whole or in part, without review or intervention by a natural person each time an action is initiated or a response is generated by the system.

- (d) **“Data message”** means information generated, sent, received or stored by electronic, optical or similar means including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy;
- (e) **“Electronic data interchange (EDI)”** means the electronic transfer from computer to computer of information using an agreed standard to structure the information.
- (f) **“Government”** means the Government of the Federal Republic of Nigeria
- (g) **“Information system”** means a system for generating, sending, receiving, storing or otherwise processing data messages.
- (h) **“Intermediary”**, with respect to a particular data message, means a person who, on behalf of another person, sends, receives or stores that data message or provides other services with respect to that data message;
- (i) **“Originator”** of a data message means a person by whom, or on whose behalf, the data message purports to have been sent or generated prior to storage, if any, but it does not include a person acting as an intermediary with respect to that data message;
- (j) **Record”** means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.
- (k) **“Transaction”** means an action or set of actions occurring between two or more persons relating to the conduct of business, commercial, or governmental affairs.

Section 3: Sphere of Application

This Act applies to any kind of information in the form of a data message used in the context of commercial activities.

Section 4: Exemptions

(1) This Act shall not apply to:

- a) the creation or execution of a will;
- b) the creation, performance or enforcement of an indenture,
- c) declaration of trust or power of attorney with the exception of constructive and resulting trusts;
- d) any contract for the sale or other disposition of immovable property, or any interest in such property;
- e) the conveyance of immovable property or the transfer of any interest in immovable property;
- f) documents of title related to conveyance and transfer of immovable property;
- g) documents related to marriage;
- h) immigration documents;
- i) documents relating to birth;
- j) documents relating to death;

(2) The Minister may by order modify the provisions of subsection (1) by adding, deleting or amending any class of transactions or matters.

Section 5: Agreement Required

(1) Nothing in this Act shall be construed as imposing an obligation on any person to create, give, store or receive any information in a data message.

(2) This Act applies to any transaction between parties each of whom has agreed to conduct the transaction by a data message.

(3) The fact as to whether or not a party agrees to conduct a transaction by a data message shall be determined:

- (a) where the party is the Government, by express stipulation of the Government;
- (b) in the case of any other party, by the context and surrounding circumstances including the party's conduct.

(4) A party that agrees to conduct a particular transaction by a data message may refuse to conduct other transactions in the same manner.

Section 6: Variation by Agreement

- (1) As between parties involved in generating, sending, receiving, storing or otherwise processing data messages, and except as otherwise provided, the provisions of Chapter III may be varied by agreement.
- (2) Paragraph (1) does not affect any right that may exist to modify by agreement any rule of law referred to in Chapter II.

CHAPTER II: APPLICATION OF LEGAL REQUIREMENTS TO DATA MESSAGES

Section 7: Legal Recognition of Data Messages

- (1) Information shall not be denied legal effect, validity or enforceability solely on the grounds that it is in the form of a data message.
- (2) Information shall not be denied legal effect, validity or enforceability solely on the grounds that it is not contained in the data message purporting to give rise to such legal effect, but is merely referred to in that data message.

Section 8: Writing

- (1) Where the law requires information to be in writing, that requirement shall be satisfied by a data message if:
 - (a) the information contained therein is accessible so as to be usable for subsequent reference;
 - (b) where the information is to be given to the Government and the Government requires:
 - (i) that the information be given in a particular way in accordance with particular technology requirements; or
 - (ii) that particular action be taken to verify the receipt of the information, the Government's requirement has been met; and
 - (c) where the information is to be given to a person other than the Government, that person consents to the information being given by a data message.

- (2) Paragraph (1) applies whether the requirement therein is in the form of an obligation or whether the law simply provides consequences for the information not being in writing.
- (3) For the purposes of this section, "the giving of information" includes:
- (a) making an application;
 - (b) making or lodging a claim;
 - (c) serving a notice;
 - (d) lodging a return;
 - (e) making a request;
 - (f) making a declaration;
 - (g) lodging or issuing a certificate;
 - (h) lodging an objection;
 - (i) giving a statement of reasons.
- (4) Where a law referred to in paragraph (1) requires more than one copy of the information to be submitted to a person, that requirement shall be taken to have been satisfied by giving the information to the person by in a data message accordance with the provisions of this section.

Section 9: Signature

- (1) Where the law requires a signature of a person, that requirement shall be satisfied in relation to a data message if:
- (a) a method is used to identify the person and to show the person's approval of the information contained in the data message;
 - (b) having regard to all the relevant circumstances when that method was used, including any relevant agreement, the method was as reliable as was appropriate for the purposes for which the information was communicated;
 - (c) if the signature is required to be given to the Government and the Government requires that the method used be in accordance with particular information technology requirements, the Government's requirement has been met; and
 - (d) if the signature is required to be given to a person other than the Government, that person's consents to that requirement being satisfied by using the method mentioned in paragraph (a) .

Section 10: Original

- (1) Where the law requires information to be presented or retained in its original form, that requirement shall be satisfied by a data message if:
 - (a) there exists a reliable assurance as to the integrity of the information from the time when it was first generated in its final form, as a data message or otherwise; and
 - (b) where it is required that information be presented, that information is capable of being displayed to the person to whom it is to be presented.
 - (c) where the information is to be produced to the Government and the Government requires that:
 - (i) an electronic form of the document be produced in a particular way, in accordance with particular information technology requirements; or
 - (ii) particular action be taken to verify receipt of the document, the Government's requirement has been met; and
 - (d) where the document is to be produced to a person other than the Government, that person consents to the document being produced by a data message.
- (2) For the purposes of subsection (1) (a), the criteria for assessing integrity are:
 - (a) that the information has remained complete and unaltered, apart from the addition of any endorsement and any change which arises in the normal course of communication, storage and display;
 - (b) the purpose for which the information is produced; and
 - (c) any other relevant factor.

Section 11: Admissibility and Evidential Weight of Data Messages

- (1) In any legal proceedings, nothing in the application of the rules of evidence shall apply so as to deny the admissibility of a data message in evidence:
 - (a) On the sole ground that it is a data message; or,
 - (b) If it is 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.
- (2) Information 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:

- (a) the reliability of the manner in which the data message was generated, stored or communicated;
- (b) the reliability of the manner in which the integrity of the information was maintained;
- (c) the manner in which its originator was identified; and
- (d) any other relevant factor.

Section 12: Retention of Data Messages

- (1) Where the law requires that certain documents, records or information be retained, that requirement shall be satisfied by retaining data messages, provided that the following conditions are satisfied:
 - (a) The information contained therein is accessible so as to be usable for subsequent reference; and
 - (b) The data message is retained in the format in which it was generated, sent or received, or in a format which can be demonstrated to represent accurately the information generated, sent or received; and
 - (c) Such information, if any, retained enables the identification of the origin and destination of a data message and the date and time when it was sent or received.
- (2) An obligation to retain documents, records or information in accordance with paragraph (1) does not extend to any information the sole purpose of which is to enable the message to be sent or received.
- (3) A person may satisfy the requirement referred to in paragraph (1) by using the services of any other person, provided that the conditions set forth in subparagraphs (a), (b) and (c) of paragraph (1) are met.

CHAPTER III: COMMUNICATION OF DATA MESSAGES

Section 13: Formation and Validity of Contracts

- (1) In the context of contract formation, unless otherwise agreed by the parties, an offer and the acceptance of an offer may be expressed by means of data messages.

- (2) 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.

Section 14: Recognition by Parties of Data Messages

As between the originator and the addressee of a data message, a declaration of will or other statement shall not be denied legal effect, validity or enforceability solely on the grounds that it is in the form of a data message.

Section 15: Attribution of Data Messages

- (1) A data message is that of the originator if it was sent by the originator itself.
- (2) As between the originator and the addressee, a data message is deemed to be that of the originator if it was sent:
 - (a) By a person who had the authority to act on behalf of the originator in respect of that data message; or
 - (b) By an information system programmed by, or on behalf of, the originator to operate automatically.
- (3) As between the originator and the addressee, an addressee is entitled to regard a data message as being that of the originator, and to act on that assumption, if:
 - (a) In order to ascertain whether the data message was that of the originator, the addressee properly applied a procedure previously agreed to by the originator for that purpose; or
 - (b) The data message as received by the addressee resulted from the actions of a person whose relationship with the originator or with any agent of the originator enabled that person to gain access to a method used by the originator to identify data messages as its own.
- (4) Paragraph (3) does not apply:
 - (a) As of the time when the addressee has both received notice from the originator that the data message is not that of the originator, and had reasonable time to act accordingly; or
 - (b) In a case within paragraph (3)(b), at any time when the addressee knew or should have known, had it exercised reasonable care or used any agreed procedure, that the data message was not that of the originator.

- (5) Where a data message is that of the originator or is deemed to be that of the originator, or the addressee is entitled to act on that assumption, then, as between the originator and the addressee, the addressee is entitled to regard the data message as received as being what the originator intended to send, and to act on that assumption. The addressee is not so entitled when it knew or should have known, had it exercised reasonable care or used any agreed procedure, that the transmission resulted in any error in the data message as received.
- (6) The addressee is entitled to regard each data message received as a separate data message and to act on that assumption, except to the extent that it duplicates another data message and the addressee knew or should have known, had it exercised reasonable care or used any agreed procedure, that the data message was a duplicate.

Section 16: Acknowledgement of Receipt

- (1) The provisions of this section apply where, on or before sending a data message, or by means of that data message, the originator has requested or has agreed with the addressee that receipt of the data message be acknowledged.
- (2) Where there is no agreement between the originator and the addressee as to the form or method of acknowledgment, the addressee may give the acknowledgment by any means of communication, automated or otherwise, or by any conduct that is reasonably sufficient to indicate to the originator that the electronic document has been received by the addressee.
- (3) Where the originator has stated that the data message is conditional on receipt of the acknowledgement, the data message is treated as though it has never been sent, until the acknowledgement is received.
- (4) Where the originator has not stated that the data message is conditional on receipt of the acknowledgement, and the acknowledgement has not been received by the originator within the time specified or agreed or, if no time has been specified or agreed, within a reasonable time, the originator:
 - (a) May give notice to the addressee stating that no acknowledgement has been received and specifying a reasonable time by which the acknowledgement must be received; and
 - (b) If the acknowledgement is not received within the time specified in subparagraph (a), may, upon notice to the addressee, treat the data message as though it had never been sent, or exercise any other rights it may have.

- (5) Where the originator receives the addressee's acknowledgement of receipt, it is presumed that the related data message was received by the addressee. That presumption does not imply that the data message corresponds to the message received.
- (6) Where the received acknowledgement states that the related data message satisfied technical requirements, either agreed upon or set forth in applicable standards, it is presumed that those requirements have been satisfied.
- (7) Except in so far as it relates to the sending or receipt of the data message, this article is not intended to deal with the legal consequences that may flow either from that data message or from the acknowledgement of its receipt.

Section 17: Use of Automated Message Systems for Contract Formation—Non-intervention of Natural Person

A contract formed by:

- (a) the interaction of an automated message system and a natural person; or
- (b) the interaction of automated message systems;

is not invalid, void or unenforceable on the sole ground that no natural person reviewed or intervened in each of the individual actions carried out by the automated message systems or the resulting contract.

Section 18: Time and Place of Dispatch and Receipt of Data Messages

- (1) Unless otherwise agreed between the originator and the addressee, the dispatch of a data message occurs when it enters an information system outside the control of the originator or of the person who sent the data message on behalf of the originator.
- (2) Unless otherwise agreed between the originator and the addressee, the time of receipt of a data message is determined as follows:
 - (a) If the addressee has designated an information system for the purpose of receiving data messages, receipt occurs:
 - (i) at the time when the data message enters the designated information system; or
 - (ii) if the data message is sent to an information system of the addressee that is not the designated information system, at the time 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.
- (3) Paragraph (2) applies notwithstanding that the place where the information system is located may be different from the place where the data message is deemed to be received under paragraph (4).
- (4) Unless otherwise agreed between the originator and the addressee, a data message is deemed to be dispatched at the place where the originator has its place of business, and is deemed to be received at the place where the addressee has its place of business.

For the purposes of this paragraph:

- (a) if the originator or the addressee has more than one place of business, the place of business is that which has the closest relationship to the underlying transaction or, where there is no underlying transaction, the principal place of business;
- (b) if the originator or the addressee does not have a place of business, reference is to be made to its habitual residence.

Part Two: Electronic Commerce in Specific Areas

CHAPTER I: CARRIAGE OF GOODS

Section 19: Actions Related to Contracts of Carriage of Goods

Without derogating from the provisions of **Part One** of this Act, this Chapter applies to any action in connection with, or in pursuance of, a contract of carriage of goods, including but not limited to:

- (a) (i) furnishing the marks, number, quantity or weight of goods;
 - (ii) stating or declaring the nature or value of goods;
 - (iii) issuing a receipt for goods;
 - (iv) confirming that goods have been loaded;
- (b) (i) notifying a person of terms and conditions of the contract;
 - (ii) giving instructions to a carrier;
- (c) (i) claiming delivery of goods;
 - (ii) authorizing release of goods;
 - (iii) giving notice of loss of, or damage to, goods;
- (d) giving any other notice or statement in connection with the performance of the contract;
- (e) undertaking to deliver goods to a named person or a person authorized to claim delivery;
- (f) granting, acquiring, renouncing, surrendering, transferring or negotiating rights in goods;
- (g) acquiring or transferring rights and obligations under the contract.

Section 20: Transport Documents

- (1) Subject to paragraph (3), where the law requires that any action referred to in article 16 be carried out in writing or by using a paper document, that requirement shall be satisfied if the action is carried out by using one or more data messages.
- (2) Paragraph (1) applies whether the requirement therein is in the form of an obligation or whether the law simply provides consequences for failing either to carry out the action in writing or to use a paper document.
- (3) If a right is to be granted to, or an obligation is to be acquired by, one person and no other person, and if the law requires that, in order to effect this, the right or obligation must be conveyed to that person by the transfer, or use of, a paper document, that requirement shall be satisfied if the right or obligation is conveyed by using one or more data messages, provided that a reliable method is used to render such data message or messages unique.
- (4) For the purposes of paragraph (3), the standard of reliability required shall be assessed in the light of:
 - (a) the purpose for which the right or obligation was conveyed;
 - (b) of all the circumstances, including any relevant agreement.

- (5) Where one or more data messages are used to effect any action in subparagraphs (f) and (g) of **Article 16**, no paper document used to effect any such action is valid unless the use of data messages has been terminated and replaced by the use of paper documents. A paper document issued in these circumstances shall contain a statement of such termination. The replacement of data messages by paper documents shall not affect the rights or obligations of the parties involved.
- (6) If a rule of law is compulsorily applicable to a contract of carriage of goods which is in, or is evidenced by, a paper document, that rule shall not be inapplicable to such a contract of carriage of goods which is evidenced by one or more data messages by reason of the fact that the contract is evidenced by such data message or messages instead of by a paper document.