

TEXT OF PAPER ON ELECTRONIC EVIDENCE IN ADMIRALTY PRACTICE - BANKING PERSPECTIVE. PRESENTED AT THE 14TH INTERNATIONAL MARITIME SEMINAR FOR JUDGES, 31ST MAY TO 1ST JUNE 2016.

The objective of this paper is to review the operation of electronic evidence in admiralty practice and highlight the banking perspective in Nigeria. The following approach will be adopted in doing this review.

- ❖ Status of electronic evidence.
- ❖ Concept of admiralty practice.
- ❖ Involvement of banks in admiralty practice/international transactions.
- ❖ Potential/likely issues with electronic evidence in admiralty practice.
- ❖ The banking experience/perspective.
- ❖ Conclusion.

Status of electronic evidence:

What is electronic evidence- Electronic or digital evidence is any probative information stored or transmitted in digital form that a party to a court case may use at trial of such case. Generally, before accepting or admitting digital evidence a court will determine if the evidence is relevant, whether it is authentic, if it is hearsay and whether a copy is acceptable or the original is required.

Globally, the use of digital evidence has increased in the past few decades as courts have allowed the use of electronic mails (e-mails), electronic signatures, video conferencing, numerical information, digital photographs, ATM transaction logs, word processing documents, instant message histories, files saved from accounting programs, spreadsheets, databases, the contents of computer memory, computer backups, computer printouts, logs from a hotel's electronic door locks, and digital video or audio files.

The use of electronic evidence in proof of cases in Nigeria is provided for in Section 84 of the Evidence Act 2011 CAP E.14 (the 'Evidence Act'). For ease of reference in the course of this paper, the above section of the Evidence Act is reproduced hereunder.

SECTION 84: Admissibility of Statements in Documents Produced by Computers.

“84 (1) In any proceeding a statement contained in a document produced by a computer shall

be admissible as evidence of any fact stated in it of which direct oral evidence would be admissible, if it is shown that the conditions in subsection (2) of this section are satisfied in relation to the statement and computer in question.

(2) The conditions referred to in subsection (1) of this section are -

(a) that the document containing the statement was produced by the computer during a

period over which the computer was used regularly to store or process information

for the purposes of any activities regularly carried on over that period, whether for profit or not, by anybody, whether corporate or not, or by any individual;

(b) that over that period there was regularly supplied to the computer in the ordinary course of those activities information of the kind contained in the statement or of the kind from which the information so contained is derived;

(c) that throughout the material part of that period the computer was operating properly or, if not, that in any respect in which it was not operating properly or was out of operation during that part of that period was not such as to affect the production of the document or the accuracy of its contents; and

(d) that the information contained in the statement reproduces or is derived from information supplied to the computer in the ordinary course of those activities.

(3) Where over a period the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in subsection (2) (a) of this section was regularly performed by computers, whether -

(a) by a combination of computers operating over that period;

(b) by different computers operating in succession over that period;

(c) by different combinations of computers operating in succession over that period; or

(d) in any other manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers.

all the computers used for that purpose during that period shall be treated for the purposes of this section as constituting a single computer; and references in this section to a computer shall be construed accordingly.

(4) In any proceeding where it is desired to give a statement in evidence by virtue of this section,

a certificate -

(a) identifying the document containing the statement and describing the manner in which it was produced;

(b) giving such particulars of any device involved in the production of that document as may be appropriate for the purpose of showing that the document was produced by a computer;

(c) dealing with any of the matters to which the conditions mentioned in subsection (2) above related, and purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities, as the case may be,

shall be evidence of the matter stated in the certificate; and for the purpose of this subsection it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.

(5) For the purpose of this section -

(a) information shall be taken to be supplied to a computer if it is supplied to it in any appropriate form and whether it is supplied directly or (with or without human intervention) by means of any appropriate equipment;

(b) where, in the course of activities carried on by any individual or body, information is supplied with a view to its being stored or

processed for the purposes of those activities by a computer operated otherwise than in the course of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to in the course of those activities;

(c) a document shall be taken to have been produced by a computer whether it was produced by it directly or (with or without human intervention) by means of any appropriate equipment.”

The effect of the above section/provision of the Evidence Act is;

- The Evidence Act has expanded the rule to include the admission of electronically generated documents such that documents produced or made by computer has become admissible provided direct oral evidence of such statement is admissible and the conditions expressed in Section 84(2) of the Evidence Act are satisfied.

The potency of Section 84 of the Evidence Act has been tested in the following cases.

(i) DR. IMORO KUBOR & ANOR. V. HON. SERIAKE HENRY DICKSON & 2 ORS. (2012) LPELR-15364 (CA)

The appeal in this matter arose from a judgement of the Governorship Election Tribunal. The Court of Appeal Port-Harcourt Division considered among other issues admissibility of documents produced by a computer and affirmed the provision of Section 84 of the Evidence Act. The Court held that an internet printout of the Punch Newspaper of 13th February, 2012 where scores of some of the candidates at the election were published is a computer printout and that it falls under Section 84(1) and (2) of the Evidence Act 2011. That a party that seeks to tender in evidence a computer generated document needs to do more than just

tendering same from the bar. Evidence in relation to the use of the computer must be called to establish the conditions set out under Section 84(2) of the Evidence Act. Per TSAMIYA, J.C.A. (at pages 50-51, paragraphs D-F).

**(ii) P.D. HALLMARK CONTRACTORS NIGERIA LIMITED
& ANOR. V. GLORIA
KANROTMWA GOMWALK (2015) LPELR-24462 (CA)**

The appeal emanated from the judgment of the High Court of Justice Plateau State on a property related matter. The Court of Appeal Jos Division considered the issue of admissibility of computer generated or processed statement; foundation or procedure to be laid for tendering a computer-generated or processed statement in evidence specifically, the issue of whether pictures pleaded and tendered along with Memory Card, as the evidence by which the pleaded pictures are to be proved by the appellants are not admissible in evidence because the Memory Card was not specifically pleaded. In its decision, the Court held thus. “Therefore a party who seeks to tender documentary evidence in Court to prove or disprove a fact in issue has to plead whether such document was processed or generated by “one uniform process, as in the case of printing, lithography, photography, computer or other electronic or mechanical process,” for “each shall be primary evidence of the contents of the rest” of the document. Per TUR, J.C.A. (at pages 69-71, paragraphs B-C). The photographs were rejected because the memory card was not pleaded.

**(iii) SENATOR IYIOLA OMISORE & ANOR. V. OGBENI RAUF
ADESOJI
AREGBESOLA & ORS. (2015) LPELR-24803(SC)**

The Supreme Court considered the issue of admissibility of electronic documents; whether only internet-generated documents are caught by the

admissibility requirements of Section 84 of the Evidence Act. The Court dismissed the argument of the cross respondents that only internet-generated documents are caught by the admissibility requirements of Section 84 of the Evidence Act. Per Nweze, J.S.C. (at pages 97-98, paragraphs E-D).

One thing that is constant in the above judicial decisions is that different forms or species of electronic evidence are admissible in evidence under Section 84. However, the mode or manner of presenting such electronic evidence to the court does not seem very well settled.

For the purpose of compliance with Section 84(4) of the Evidence Act, I've crafted a template of certificate in support of reliance on computer generated documents to assist the courts in the administration of electronic evidence in matters concerning or relating to banks and which is annexed to this paper.

Concept of admiralty practice:

In this paper, admiralty practice incorporates and/or is synonymous with shipping, maritime, international transactions involving all forms of shipment.

Suffice it to state that ship is in the centre of maritime. This is because if there is no ship there cannot be the associated maritime activities.

The world today has moved towards the greater use of electronic means of communication and payment in business transactions and for other uses including but not limited to ship financing, international trade, etc. These electronic means include the use of internet e-mails, facsimile, electronic data interchange, internet, telex, on-line payment platforms, etc.

It is therefore a safe conclusion that the major mode of communication in admiralty practice is by electronic means.

Involvement of banks in admiralty practice/international trade.

As stated above admiralty practice extends to cover shipping, maritime, international transactions involving all forms of shipment. It is also stated that ship is the centre of maritime. The question therefore is; how is bank connected with admiralty practice? Banks are involved in admiralty practice in a number of ways to the extent that bank provide financing for various maritime and international trade/transactions. A case study of ship financing will be done to illustrate the nature of involvement of bank in admiralty practice.

A typical ship financing transaction is ordinarily a cross border transaction involving persons in different jurisdictions or countries. A purchaser will usually request a bank to provide finance and/or financial services towards purchase of an identified ship or vessel. The primary mode of communication or negotiating such transaction is by electronic means that is, electronic mails, facsimiles, telex, etc. Indeed transaction documents for ship financing are often exchanged or transmitted through electronic means. The reason for this is simply because time is always the essence of such transactions. Payments are also made through electronic transfers, etc. The bank as a financier in a ship purchase transaction is really involved in the entire negotiation to actual purchase and delivery of a ship/vessel to a designated location. Often time, such ship is used as collateral given to the bank by the customer in consideration of the bank providing the funds for purchase of such ship. Suffice it to mention that banks establish Letters of Credit (LCs) on behalf of the customers in the course of admiralty practice/international trade/transactions and these letters of credit are normally transmitted electronically. The Supreme Court in the case of **UNION BANK OF NIGERIA PLC V. EMOLE (2001) 12 S.C. (PART 1) 106** acknowledged the use of LCs in international trade/transactions. This was a matter that arose from banker-customer relationship. The respondent requested the appellant

bank to open some letters of credit in favour of his overseas suppliers of goods. One of such letters of credit was LC No. 72/84 for Ninety-Nine thousand three hundred and ninety one Pounds, seventy eight Pence. At the request of the appellant bank, the respondent deposited a sum of N99,793.15 as the full cover for the said letter of credit, based on the exchange rate prevalent at the material time. The letter of credit was opened by the bank. The respondent subsequently went to the bank to collect the shipping documents relating to the letter of credit and was then informed by the bank that due to foreign fluctuations at the time, the appellant bank's correspondent bank *cabled instructions* that the supplier had been paid and that the respondent had to pay an extra amount of N16,224.28 before he could collect the shipping documents. The respondent paid the said extra sum, cleared the goods and sold them. The respondent thereafter challenged certain debits made by the bank in his account which resulted in the commencement of this matter. It is expedient to highlight here that reference to this case is for the purpose of illustration of use of letters of credit in international trade/transaction. The letters of credit were not in issue per se. Perhaps if they were in the light of today's Section 84 of the Evidence Act, it would have been necessary to admit the letters of credit in evidence in proof of the matter.

Imagine a situation where for any reason at all, an issue arises between the parties in relation to the ship purchase transaction highlighted above and the parties are unable to resolve the issue amicably. Recourse will be had to litigation. In a litigation situation, evidence is critical because the claimant will win or lose principally on the strength of the evidence placed before the court or lack of it. It is also material that such piece(s) of evidence is presented to the court in its admissible form to enable the court arrive at a meritorious decision/judgment one way or another on the issue.

Please recall that the primary mode of communication or negotiating the ship purchase transaction in issue is electronic means. Thus the proof or otherwise of the claim in the situation highlighted above will largely depend on the electronic evidence placed before the admiralty court adjudicating on such matter which is enabled by the extant provision of Section 84 of the Evidence Act. It follows therefore that if the electronically generated documents which would have been exchanged by the parties and which expectedly would be sought to be relied on by the claimant satisfy the conditions specified in Section 84(2) of the Evidence Act, and appropriate evidentiary foundation laid by the party seeking to rely on such electronic evidence, and such evidence therefore admitted, it is probable that the court would be persuaded to give judgement in favour of the claimant.

Potential/likely issues with electronic evidence in admiralty practice:

Arising from the very nature of electronic medium, the increasing use of these electronic means in business transactions particularly in ship financing and related transactions are inherently fraught with potential challenges. These may include;

- Electronic system security and integrity - there is a continued issue of information systems security and authenticity allowing for periodic hacking and information interception by fraudulent third parties or unauthorized persons. Though there are codes created between parties using electronic communication but there are still potential threats and possibilities of such codes being cracked and perhaps actual crack of such codes which could consequentially result in damages being suffered by either or both parties and perhaps resort to litigation.

- Absence of adequate laws governing and regulating the use of electronic communication and electronic documents. Even the subsisting laws on cybercrime and anti-social media are inadequate.
- For electronic Bills of Lading, used in shipping of cargo, there are constant challenges of negotiability and non-negotiability of instruments. Example; for transfer of ownership from seller to buyer by delivery. Various scholars have expressed concerns as to whether Section 84(4) of the Evidence Act made adequate provision for the mode of tendering electronic bills of lading. For example, who is to depose to the witness statement on oath regarding an electronic bill of lading? In attempting to provide an answer to this question, I refer to the case of **SENATOR IYIOLA OMISORE & ANOR. V. OGBENI RAUF ADESOJI AREGBESOLA & ORS.** (supra) where the Supreme Court gave a decision on “When will a Court act on the statement of a witness.” The Court stated thus; “The law is well settled that a Court will act only on a written deposition of a witness which is his evidence in chief, if it is found to be, credible and reliable upon proper evaluation.” Per OGUNBIYI, J.S.C. (at pages 158, paragraphs C-D).

It would seem however, that this issue does not seem to be settled as it could be argued either way depending on which side of the divide the issue emanates from.

- For typical electronic documents, there can be issues and difficulties creating security interests in an electronic document itself or the underlying goods.
- Absence of Registries where security interests granted with respect to electronic documents can be registered and recorded.

Suffice it to mention that the foregoing is not intended to be exhaustive.

The banking experience/perspective.

This is an appraisal of impact of electronic evidence on the business of banking vis-à-vis admiralty practice, challenges and excitement thereof.

As it is commonly said, time is money! This is particularly the case for banks and even more so in admiralty practice where the issue of delay directly translates to cost and penalty by way of demurrage, etc. Such cost or penalty will be borne by someone and which certainly will adversely impact on the bottom line of a party bearing such cost or penalty. Clearly no rational person wants to lose money!

It is opined that the introduction of the provision on admissibility of electronic evidence in the Evidence Act is a positive development in the Law of Evidence, business of banking and indeed the admiralty practice in Nigeria. In contemporary times, banks' operations are largely dependent on a range of banking and information technology generally and use of computers and related or associated equipment. It is manifest that the rule on electronic evidence would aid timely determination of a matter before an admiralty court in which a bank is involved. It is to be noted that there seem to be paucity of cases where issue was joined on the admissibility of electronic evidence sought to be tendered or actually tendered by a bank in an admiralty matter thus far. No doubt there are gaps in the provision regarding electronic evidence as has been variously highlighted by eminent scholars/jurist for the time being, regardless, the excitement about electronic evidence is that it is a progressive development which can only get better with positive application and in fullness of time.

Conclusion:

It is expedient to remind us that law is not an end in itself but a means to an end, which according to Roscoe Pound, is a tool of social engineering. This view was reiterated by Pats-Acholonu, JSC, in the case of **Muhammadu Buhari & 2 Ors., and Chief Olusegun Obasanjo & 266 Ors.**

(2004) NWLR Pt. 191, pages 1487, 1532 paragraphs B-C thus; *“The beauty of the law in a civilized society is that... “It should be progressive and act as a catalyst to social engineering. Where it relies on mere technicality or out-moded or in-comprehensible procedures and immerses itself in a jacket of hotchpotch legalism that is not in tune with the times, it becomes anachronistic and it destroys or desecrates the temple of justice it stands on”.*

Thank you for your attention.

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