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**ELECTRONIC SIGNATURES IN  
CAPITAL MARKET TRANSACTIONS:  
MOVING FORWARD**

## ELECTRONIC SIGNATURES IN CAPITAL MARKET TRANSACTIONS: MOVING FORWARD

### Introduction

The globalization of commercial transactions amongst parties in different countries of the world and the impact of technology in negotiating the terms and concluding the transaction in real time have resulted in an upsurge in electronic communication and Ecommerce which have made the use of electronic signatures (“**E-Signatures**” or “**electronic signatures**”) in business transactions very pertinent. There is also an increasing need for the use of E-Signature to execute contracts that are time bound mostly in cases where getting wet-ink or manual signatures of counterparties to a contract may occasion delay due to physical distance. Parties have always sought more flexible and convenient means of executing agreements within the confines of existing legal and regulatory frameworks. The use of electronic signature therefore affords parties to an agreement the opportunity to execute their agreements even while sitting in the comfort of their homes.

### Necessity

A written unsigned contract or agreement is not binding on parties and may not be legally enforceable. Indeed, parties would not commit to an agreement or honour an instruction that has not been finalised by signing – particularly with wet ink.<sup>i</sup> Presently, restrictions on movement across the world necessitated by the coronavirus disease pandemic (COVID-19 pandemic) have heightened the need to work remotely and execute agreements using E-Signatures.

Situations have arisen where parties need to conclude existing transactions, initiate new transactions, and file documents with government agencies or regulators which all require signing of various types of documents by parties to the transaction. Similarly, there remains the need to continue to engage services of advisors, professionals, artisans, contractors; to renew or amend agreements; and perform a variety of contractual obligations. It is therefore imperative for individuals to seek alternative methods of carrying out business activities and accomplishing business goals by leveraging on technology.<sup>ii</sup>

### Insistence on Wet-Ink Signatures by Regulators

The need for E-Signatures is quite obvious and its benefits enormous. However, regulators and government agencies are yet to accommodate the shift by permitting, with appropriate regulation, the use of E-Signatures. For example, the Securities and Exchanges Commission (“**SEC**”) and the Corporate Affairs Commission only accept documents signed/executed in wet ink. Indeed, with the outbreak of COVID-19 pandemic, the SEC has required provisions in transaction documents of indemnities for loss or liabilities that may arise as a result of the electronic signing of transaction documents under alternative arrangements and protocol. This stance is correctly aimed at protecting investors by ensuring that the transaction documents are approved and executed by authorised persons.

However, to encourage innovation and foster business continuity, the SEC and other regulators should welcome the use of E-Signatures and remote signing protocols within the confines of existing legal framework, establish necessary measures and rules to ensure authenticity of electronically signed documents, and explore the use of technology to prevent

incidences of fraud in electronically executed agreements and documents. This would dispense with the need for an indemnity and enable a focus on more critical matters. This article critically analyses the use and sufficiency as well as the legality of E-Signatures under Nigerian law.

### Meaning of Electronic Signatures

It is noteworthy that the phrase “electronic signatures” or “E-Signatures” has not been defined by any statute or in the judgement of any superior courts in Nigeria. However, the United Nations’ UNCITRAL Model Law on (the “**UN Model Law**”) defines E-signature as “*data in electronic form in, affixed to or logically associated with, data message, which may be used to identify the signatory in relation to the data message and to indicate the signatory’s approval of the information contained in the data message.*”<sup>iii</sup> The UN Model Law further defines a signatory as “*a person, that holds signature creation data and acts either on its own behalf or on behalf of the person it represents.*”<sup>iv</sup>

From these definitions, E-Signatures come in various forms however its association with a message or document should identify the signatory and indicate the signatory’s approval of the contents of the signed message or document. The definition indicated in the USA’s Electronic Signatures in Global and National Commerce (“ESign”) Act (2000) s. 106(5) also reiterates the emphasis as follows: “*electronic sound, symbol, or process, attached to or logically associated with a record created, generated, sent, communicated, received or stored electronically and adopted by a person with the intent to sign that record.*”

With respect to electronic submissions to USA’s Securities and Exchange Commission (the “**US SEC**”), rule 302 of the USA’s General Rules and Regulations for Electronic Filings (Regulation S-T) provides: ‘*the term “signature” means an electronic entry in the form of a magnetic impulse or other form of computer data compilation of any letters or series of letters or characters comprising a name, executed, adopted or authorized as a signature.*’ According to the European Union’s eIDAS Regulation (EU) NO. 910/2014 (the “**EU Regulation**”), basic level electronic signature is “*data in electronic form which is attached to or logically associated with other data in electronic form and which is used by the signatory to sign.*”<sup>v</sup>

The form of E-Signatures includes copying and pasting an electronic image of the signature on the signature block, signing an electronic document on a computer touchscreen with a stylus or finger, e-mailing a scanned copy of the signed executed page of the document, typing out the name of the signatory on the signature block, or using web-based platforms like DocuSign<sup>vi</sup>. Thus, E-signatures in this article are contrasted with related but narrower phenomena such as advanced electronic signatures, qualified electronic signatures, digital signatures and biometric signatures.

Despite the absence of a statutory definition for E-signature in the Nigerian legal orbit, its validity is not in doubt. In Nigeria, E-signatures are just as valid as wet-ink signatures in respect of all transactions, unless otherwise expressly excluded by law.<sup>vii</sup> The authenticity of an E-signature and confirmation of approval by the person purporting to sign the document can be proved by evidence that such a person (with same name, address, business or occupation) exists.<sup>viii</sup> Indeed, whenever the authenticity of an E-signature is contested in any

legal proceeding, the burden is on the contender to prove the E-signature is inauthentic.<sup>ix</sup> Forging the E-signature of another person is punishable by a term of imprisonment of not more than 7 years or a fine of not more than ₦10 million or both.<sup>x</sup>

Interestingly, the foregoing statutory provisions on E-Signatures are yet to be interpreted and applied by the courts. However, suffices to say that electronic signatures are statutorily recognised under Nigerian laws as taking various forms including a symbol, a scan of a wet-ink signature, personal identification number, the click of ' I consent' or ' I accept' button, a typed name at the end of an email or signature generated using an app or digital signature.<sup>xi</sup> In the United Kingdom (UK) case of *Golden Group Ltd. v. Salgaocar Mining Industries PVT Ltd.*<sup>xii</sup>, the UK court held "*that the signature block at the end of an e-mail may be sufficient to constitute an E-signature for the purposes of section 4 of the Statute of Frauds, 1677*". What is important therefore is that the signature identifies the signatory and evidences knowledge of and the intention to approve the contents of the document being signed and to be bound by it. The flexibility in form is essential to keep technology evolving, though special rules are indispensable to prevent uncertainty as to what is acceptable electronic signature.<sup>xiii</sup>

### Proof of Validity

Even before Nigeria had any legislation on E-Signatures, the courts had long, broadly speaking, become comfortable and familiar with the notion that contracts can be concluded electronically. As long ago as *Esso West Africa Inc. v. T. Oyegbola* (1969) NMLR 19, for example, the court stated 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.*" Under Nigerian law, there is no doubt that electronic signatures are binding and admissible in court.<sup>xiv</sup> Therefore, whenever the issue of validity and admissibility of electronic signatures come before the courts in Nigeria, its admissibility is not in issue. The concern therefore is what constitutes a valid and enforceable electronic signature and how such can be proved. This is because, unlike the traditional paper-based contracts where the wet ink signature could be proved with the use of a handwriting expert or simply by comparing it with the other signature of the person, the law with respect to electronic signature has however not been very helpful on establishing the validity of an electronic signature.

There is no specific legislation prescribing the requirements of proving the validity of electronic signature. The Evidence Act 2011 provides that an electronic signature may be proven by any means, including 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.<sup>xv</sup> This has been argued to be typical for the security steps involved in digital signatures authenticating online payments.<sup>xvi</sup> On the issue of validity, an Electronic Transactions Bill (the "**Bill**") is currently undergoing the legislative process at the National Assembly. In February 2020, the Bill scaled the second reading at the Senate. If passed, the Bill would provide stronger validity to E-Signatures.

With respect to the proof of electronic signature, Section 17 (1) (b) of the Cybercrimes (Prohibition, Prevention, etc) Act, 2015 (the "**Cybercrimes Act**") provides in effect that when



the authenticity or otherwise of electronic signature is in question, the burden of proof, that the signature does not belong to the purported originator of such electronic signatures but shall be on the contender. In the first place, this provision is only concerned with who should prove and not how it should be done. Secondly, the provision attempts to place a strict burden of proof on the person who denies the execution of an electronic transaction.<sup>xvii</sup>

### Limitations on the use of electronic signatures

In Nigeria, electronic signature is valid in respect of all transactions, unless otherwise expressly excluded by law.<sup>xviii</sup> Section 17(2) of the Cybercrimes Act excludes certain transactions from electronic signatures. Some of the exempted transactions include (a) the creation and execution of testamentary dispositions and documents, (b) death certificate, (c) birth certificate, (d) family law related matters, (e) court papers, (f) the cancellation of utility services, (g) any instrument required to accompany any transportation or handling of dangerous materials, and (h) any document ordering the withdrawal of chemical substances on grounds of such substances being fake or dangerous by an authority duly empowered to make the order (the “**Ineligibles**,” each an “**Ineligible**”).<sup>xix</sup>

### Recommendations on Rules for the Use of E-Signatures

To integrate microeconomic interests of individuals and businesses in a way that fosters economic growth without compromising protection for investors, it is necessary at this present time for regulators like the SEC, to write rules and regulations for the acceptance and use of E-Signatures. In determining the content of such rules and regulations, regulators must consider the basis for the validity of E-Signatures, technological developments, the business practice on the use of E-Signatures in Nigeria, and the relevant confines of the rulemaking powers of the regulator.

The Financial Conduct Authority (“**UK’s FCA**”), which regulates, inter alia, the registration and issuances of securities in the United Kingdom, does not explicitly require wetink signatures and does not reject the use of electronic signatures for all interactions. Indeed, UK’s FCA requires firms to review the risks and harms of using E-Signatures and makes clear that the validity and use of electronic signatures is a matter of law.<sup>xx</sup> In the United Kingdom, an electronic signature can be validly used to execute a document provided that “(i) *the person signing the document intends to authenticate the document and (ii) any formalities relating to execution of that document are satisfied. Such formalities may be laid down in a contract or other private law instrument under which a document is to be executed.*”<sup>xxi</sup> Such forms include that the signature be witnessed or be in a specified form.

In the United States of America, General Rules and Regulations for Electronic Filings (Regulation S-T) governs the electronic submission of documents to the US SEC. According to Rule 302 of Regulation S-T, (i) signatures in any electronic submission must be in typed form rather than manual form, and (ii) each signatory must manually sign a signature page or other document authenticating, acknowledging or otherwise adopting his or her signature that appears in typed form within the electronic filing. The filer must have, prior to the date of electronic filing, aggregated the manually signed documents from each signatory. The manually signed document(s) must be retained by the filer for a period of 5 years and upon request, would be furnished to the US SEC.<sup>xxii</sup> Therefore, for electronic filings with US SEC,

manually signed documents must be obtained prior to electronic submission. In this regard, on April 15, 2020, a rulemaking petition to the US SEC requested that the US SEC amend relevant rules to permit electronic signatures that can be authenticated in 9 alternative ways depending on the formalities customarily used by the signatories.<sup>xxiii</sup>

In writing rules and regulations for the use of E-Signatures in Nigeria, having regard to the issues of authenticity and confirmation of approval by signatories of documents or agreements, regulators should among other things require as follows:

- (a) the structure and arrangement of documents and agreements to be electronically signed and filed should ensure separate signature pages for each signatory;
- (b) each signature on the document must be witnessed;
- (c) the remote signing ceremony should be conducted on real-time video conferencing platform amongst or between parties or their representatives and authorised signatories during which (i) each signatory takes turns to execute and declare its intention to be bound and its approval of the contents of the document, and (ii) the meeting is recorded and a copy of the recorded video submitted along with the executed transaction documents;
- (d) real-time pictures of remote signing of transaction documents must be taken and retained by the filer;
- (e) corporate authorisations (board and/or shareholder resolutions) recommending and authorising the transaction and appointing signatories for the transaction must include the authority to sign transaction documents remotely including in remote ceremonies using and accommodating E-Signatures;
- (f) scanned copies of signature blocks and signature pages signed in accordance with (a) to (e) above would be sufficient to bring the signed document into effect without the need to submit wet-ink or manually signed documents; and
- (g) upon delivery, submission or filing of such transaction documents, the presenter or filer of the electronically signed documents should be required to provide copies of pictures, recorded video of the electronic signing ceremony, and a scanned copy of the execution pages transmitted via e-mail or other secure internet messaging system.

## Conclusion

Electronic signatures are for all intents and purposes valid under the Nigerian legal framework. Subject to exceptions set out in the Cybercrimes (Prohibition, Prevention, etc) Act, 2015, E-Signatures are sufficient proof of execution of all agreements or documents. Because the use of E-Signatures cannot and should not be stifled, regulators, government agencies and parties to contracts may stipulate terms, rules and regulations defining the form of acceptable electronic signature and the manner of their use in order to ascertain authenticity and approval of executed documents. The use of technology including the blockchain technology waits to be explored for this purpose.

<sup>i</sup> Ochuko Odekuma, ‘Remote working and incidental matters-virtual contracts and electronic signatures’ Available at <https://www.pwc.com/ng/en/assets/pdf/remote-wroking-incidental-matters.pdf> assessed June 23, 2020

<sup>ii</sup> Ibid <sup>iii</sup> Art. 2 of the Model Law. <sup>iv</sup> Art. 2 of the Model Law. <sup>v</sup> Art. 2 of the Regulation <sup>vi</sup> <http://docusign.com>

<sup>vii</sup> S. 17(1)(a) of the Cybercrimes (Prohibition, Prevention, etc) Act, 2015. S. 93(2) of the Evidence Act, 2011; <sup>viii</sup> S. 94(1) of the Evidence Act, 2011 <sup>ix</sup> S. 17(1)(b) of the Cybercrimes (Prohibition, Prevention, etc) Act, 2015. <sup>x</sup> S. 17(1)(c) of the Cybercrimes (Prohibition, Prevention, etc) Act, 2015. <sup>xi</sup> Elvis Asia, Covid-19: Dealing with the challenges of Definition and proof of Electronic Signature under Nigerian Law. Available at <https://dnlegalandstyle.com/2020/covid-19-dealing-with-the-challenge-of-definition-andproof-of-electronic-signature-under-nigeria-law-elvis-asia/> accessed June 23, 2020 <sup>xii</sup> (2012) EWCA Civ 265

<sup>xiii</sup> Ibid

<sup>xiv</sup> See sections 41, 51, 84 and 93(2) of the Evidence Act, 2011. Please note that the Evidence Act 2011 is strictly speaking not supposed to contain substantive law. If any given rule is truly a rule of evidence, it will have only evidence-law consequences: consequences as to admissibility, burden of proof, weight and so forth — rather than consequences going to validity or other substantive matters. <sup>xv</sup> Section 93(3) of Evidence Act, 2011

<sup>xvi</sup> See Ochuko Odekuma above <sup>xvii</sup> See Elvis Asia above <sup>xviii</sup> S. 17(1)(a) of the Cybercrimes (Prohibition, Prevention, etc) Act, 2015. <sup>xix</sup> S. 17(2) of the Cybercrimes (Prohibition, Prevention, etc) Act, 2015. <sup>xx</sup> <https://www.fca.org.uk/news/statements/expectations-wet-ink-signatures-coronavirus-restrictions> accessed June 29, 2020 <sup>xxi</sup> <https://www.lawcom.gov.uk/project/electronic-execution-of-documents/> accessed June 29, 2020 <sup>xxii</sup> <https://www.ecfr.gov/cgi-bin/text-idx?amp;node=17:3.0.1.1.14&rgn=div5> accessed June 29, 2020 <sup>xxiii</sup> <https://www.sec.gov/rules/petitions/2020/petn4-760.pdf> accessed June 29, 2020

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