

## **ELECTRONIC EVIDENCE IN ADMIRALTY PRACTICE**

***By Olumide O. Sofowora Esq. SAN, LL.M. (London), B.L., FCI Arb. (UK)***

As far back as 2002, the Supreme Court of Nigeria in its judgment in the case of **MR. P. A. AWOLAJA & ORS. v. SEATRADE GRONINGEN B.V. (2002) 4 NWLR (Part 758) 520** recognised that the exchange of contracts of affreightment by telex, facsimile, the internet and modern forms of information technology were the order of the day. This was what his Lordship **Belgore J.S.C.** stated at page 535 of the judgment.

More recently in the case of **CONTINENTAL SALES LIMITED v. R. SHIPPING INC (2013) 4 NWLR (Part 1343) 67**, the Court of Appeal (Lagos Division) held at page 85 per Ogunwumiju J.C.A. that:

**“E-mail is a form of communication that is set down in writing. It is not oral. The fact that it is electronic is immaterial. It is not in thin air. It can be downloaded and as real as a hard copy of a letter or mail in your hand”.**

As such the use of electronic mails has over the years taken deep root not only in transactions leading to contracts of affreightment worldwide but also in the litigation process. Bills of lading, charter parties and other shipping documents are now signed and exchanged by e-mails which are then downloaded from computers and tendered in Court without necessarily producing the originals themselves.

However, in view of the recent promulgation of the 2011 Evidence Act, Section 84 thereof makes specific provisions for the admissibility of statements in documents produced by computers.

**Section 84** states thus:

- (1)** In any proceedings 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;
  - (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 combination 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 proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate -
- (a) identifying the documents 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 -

(i) dealing with any of the matters to which the conditions mentioned in subsection (2) above relate; 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 it 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.

#### **EFFECT OF SECTION 84 ON ADMISSIBILITY OF ELECTRONIC DOCUMENTS**

By virtue of the provisions of Section 84, the following conditions must be proved before electronic documents can be admissible in evidence viz:

(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 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 these 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.

(Underlined words show the characteristics of a computer)

Section 84(3) of the Evidence Act talks about a situation where you have a network of computers in an office. The section states that for the purpose of admissibility of documents produced from any of those computers, they will be treated as one computer.

Section 84 (4) of the Evidence Act states that a Certificate must be produced;

- (a) by a person occupying a responsible position in relation to the operation of the computer and the management or the responsibility for which the computer is used
- (b) identifying a document containing the statement and how it was produced, and
- (c) giving particulars of the computer sufficient for it to show that a document was produced from the computer.

The provisions of Section 84 of the Nigerian Evidence Act 2011 are *in pari materia* with the provisions of Section 65(B) of the Indian Evidence Act 1872. Sections 65A and 65B of the Indian Evidence Act 1872 were inserted into the Act by virtue of the provisions of the Information Technology Act 2000 (In India, the Evidence Act 1872 has been amended several times either by a Repealing Act repealing certain section(s) or an Amending Act inserting certain section(s). It is not usually by a wholesale repeal of the entire Act as we have in Nigeria). The Indian Information Technology Act 2000 defines what a Computer is and contains the definitions of a wide range of several other electronic devices and terms like “computer system” as distinct from “computer”, “access”, “electronic form”, “electronic record”, “digital signature”, “computer network”, “computer resource”, “Electronic Gazette”, etc. Whilst those electronic devices and terms are not defined in the Nigerian Evidence Act, the Act in its Section 258, which is the Interpretation section of the Act, defines a computer in the broadest possible way as follows:

**““Computer” means any device for storing and processing information, and any reference to information being derived from other information is a**

**reference to its being derived from it by calculation, comparison or any other process.”**

The Supreme Court and High Courts in India have had cause to consider issues of evidential foundation and admissibility of electronic evidence under the provisions of Section 65B of the Indian Evidence Act in **M/S SOCIETE DES PRODUCTS NESTLE v. ESSAR INDUSTRIES** decided 4<sup>th</sup> September, 2006 by the High Court of Delhi; **STATE v. MOHD AFZAL** 107 (2003) DTL 385 also decided by the High Court of Delhi; and **STATE v. NAVJOT SANDHU** (2005) 11 SCC 600 decided by the Supreme Court of India. In the decision of the High Court of Delhi in **STATE v. MOHD AFZAL** supra, the Court observed that Section 65(B)(2) of the Indian Evidence Act (which is equivalent to our own Section 84 (2)) can be regarded as one method of proof of electronic records, whilst compliance with the provisions of Section 65(B)(4) (which is equivalent to our own Section 84(4)) relating to the issuance of a certificate by a responsible person described in that section as another alternative method of proof of electronic records. That kind of distinction however does not appear to exist in Nigeria.

In the recent case of **DR. IMORO KUBOR & ANOTHER v. HONOURABLE SERIAKE HENRY DICKSON & OTHERS** [2013] 4 NWLR (Pt. 1345) 534 the Supreme Court of Nigeria had to consider the issue of the admissibility of a newspaper publication (a public document) which was downloaded from the internet and which document had been tendered and rejected by the lower Court.

His Lordship Onnoghen J.S.C. while interpreting the provisions of Section 84 of the Evidence Act limited it only to the provisions of Section 84(2) of the Evidence Act. After setting out the section *in extenso*, he held further:

**“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 above conditions. In the instant case there was no evidence on record to show that the appellants in tendering Exhibits “D” and “L” satisfied any of the above conditions. In fact, they did not, as the documents were tendered and admitted from the bar. No witness testified before tendering the documents so there was no opportunity to lay the necessary foundations for their admission as e-documents under section 84 of the Evidence Act 2011. Since the appellants never fulfilled the pre-conditions laid down by the law Exhibits “D” and “L” were inadmissible as computer generated evidence/documents.”**

In the more recent case of **SENATOR IYIOLA OMISORE & ANOTHER v. OGBENI RAUF ADESOJI AREGBESOLA & 2 OTHERS** [2015] 15 NWLR (Part 1482) 205 the

Supreme Court sitting as a Full Court confirmed and referred to its previous decision in **KUBOR v. DICKSON** (supra) in holding that the admissibility of both internet-generated and computer-generated documents were subject to the provisions of section 84 of the Evidence Act. His Lordship, Nweze, J.S.C. who read the Leading Judgment held at page 295 thus:

**“As noted above, the main plank of the argument of the first and second cross respondents, with regard to the second issue above, was that only internet-generated documents are caught by the admissibility requirements of section 84 of the 2011 Evidence Act. With profound respect, this argument is untenable. S. Mason (ed), *Electronic Evidence: Disclosure, Discovery and Admissibility* (London: Lexis Nexis, Butterworths, 2007) passim; H.M. Malek (ed), *Phipson on Evidence* (London: Sweet and Maxwell, 2010) (Seventeenth Edition) passim; *R. v. Shepherd* (1993) 1 All E.R. 225, 231 (a decision of the defunct House of Lords); *Kubor v. Dickson* (2013) 2 NWLR (Pt. 1345) 534, 577-578.**

**Even the very chapeau or opening statement in section 84(1) contradicts this submission. The relevant phrase here is “a statement contained in a document produced by a computer...” Interestingly, the drafts person did not leave the meaning of the word “computer” to conjecture. In section 258(1), the Act defines “computer” to mean “any device for storing and processing information, and any reference to information being derived from other information is a reference to its being derived from it by calculation, comparison or any other process”.**

**In effect, exhibits 243 and 342, being computer-generated documents, could only have been admissible in evidence upon compliance with the requirements of section 84 (supra), *Kubor v. Dickson* (supra). The lower court was, therefore, in error in this regard. I resolve this issue in favour of the cross appellant.”**

That in effect means that the provisions of Section 84(4) of the Evidence Act relating to the production of a certificate must be complied with along with the provisions of Section 84(2).

What then happens in the following scenarios which counsel often encounter in the litigation process?

- (1) The Plaintiff seeks to tender in evidence an e-mail exchanged with the Defendant which the Plaintiff produced or downloaded from the Plaintiff's computer.

Being an original document, the Plaintiff must of necessity comply with the provisions of Sections 84(2) and 84 (4) of the Evidence Act.

- (2) A Plaintiff seeks to tender an e-mail sent to his lawyer and downloaded from the Plaintiff's computer.

The document will not be admissible as an original since it was produced from the Plaintiff's computer and not from the Plaintiff's Lawyer's computer. It is the Plaintiff's Lawyer that can tender the original and it is he who must comply with the provisions of Section 84(2) and 84(4) of the Evidence Act. Being a copy, it may however be tendered as secondary evidence under Section 87(b).

- (3) The Plaintiff seeks to tender an e-mail sent to him by the Defendant which he forwarded to his Lawyer but which was produced from the Lawyer's computer.

Since the Lawyer was not the intended recipient of the Defendant's message to the Plaintiff, what the Lawyer got is a copy and not the original, that document can only be admissible under Section 87(b) of the Evidence Act dealing with secondary evidence provided it is tendered by the Lawyer or a witness from his Office who must have produced it from his own computer. Reference may have to be made to Sections 83, 86(4) and 87(b) of the Evidence Act in the event of an objection.

- (4) The position in (3) above appears to be the same where the Plaintiff sends the e-mail to the Defendant and copies his Lawyer or indeed anyone else, either as a visible copy or a blind copy. Again in that situation, reference may have to be made to Sections 83, 86(4) and 87(b) of the Evidence Act in the event of an objection.

The relevant parts of those sections are set out below:

### **Section 83 – Admissibility of documentary evidence as to facts in issue**

- (1) In any proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document which seems to establish that fact shall on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied-
- (a) if the maker of the statement either
    - (i) had personal knowledge of the matters dealt with by the statement, or

- (ii) where the document in question is or forms part of a record purporting to be a continuous record made the statement (in so far as the matters dealt with by it are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have personal knowledge of those matters;

### **Section 86 – Primary evidence**

- (4) Where a number of documents have all been made by one uniform process, as in the case of printing, lithography, photography, computer or other electronic mechanical process, each shall be primary evidence of the contents of the rest, but where they are all copies of a common original, they shall not be primary evidence of the original.

### **Section 87 – Secondary evidence**

Secondary evidence includes

- (a) certified copies given under the provisions hereafter contained in this Act;
- (b) copies made from the original by mechanical or electronic processes which in themselves ensure the accuracy of the copy, and copies compared with such copies;
- (c) copies made from or compared with the original;
- (d) counterparts of documents as against the parties who did not execute them;
- (e) oral accounts of the contents of a document given by some person who has himself seen it.

Apart from the issue of the procedure for the tendering of an e-document as stated above, Section 153(2) of the Evidence Act allows the Court to presume certain facts as far as electronic messages are concerned. The section states:

### **Section 153 – Presumption as to telegraphic and electronic messages**

- (2) The court may presume that an electronic message forwarded by the originator through an electronic mail server to the addressee to whom the message purports to be addressed corresponds with the message as fed into his computer for transmission; but the court shall not make any presumption as to the person to whom such message was sent.

That section clearly confirms the basis of proof as set out in the scenarios above. As stated in the said scenarios, the originator of an e-mail must prove that the e-mail was

sent to and meant for the particular person to whom same was addressed. Whilst the court can presume that what was sent corresponds to what the originator fed into his computer, the Court cannot presume that the e-mail was sent to that particular recipient.

In conclusion therefore, the new position of the Law of Evidence in Nigeria on the admissibility of computer generated or e-documents has no doubt introduced a new vista which has placed an additional burden on the litigating parties. Parties are now required to lay proper foundations before the documents to be put in evidence can be admitted. This is most especially as the certificate required to be produced in accordance with Section 84(4) of the Evidence Act 2011 appears to be one that must of necessity be in writing. It need not be a certificate that must be produced by an expert (See **R v. SHEPHERD** [1993] 1 All E.R. 225), but by someone responsible enough to vouch "to the best of his knowledge and belief" that the computer from which the document was produced was in proper working condition at the time the document was produced. Further on the issue of the production of the certificate, certain Nigerian Judges have expressed opinions in and out of court that there is nothing wrong in the certification being made orally once the e-documents have been pleaded and/or the witness has stated the conditions to be met in Sections 84(2) and 84(4) in his Witness Statement on Oath or even orally in the witness box before the e-documents are tendered. Well it is clear that until there is a judicial pronouncement on the matter, parties may have to rely on foreign judicial decisions to resolve that issue.

Finally, in view of modern business methods and the increasing growth and advancement on a daily basis of information technology in terms of its principles, systems, devices and applicability, there is the need for the Nigerian National Assembly to promulgate an Act similar to the Indian Information Technology Act 2000 so that issues that may arise on account of the interpretation of other electronic devices and/or electronic terms like "computer system" as distinct from "computer", "access", "electronic form", "electronic record", "digital signature", "computer network", "computer resource", "Electronic Gazette" etc. which are not presently covered by the Nigerian Evidence Act may be appropriately dealt with when they do arise. This is most especially as the Indian Information Technology Act, 2000 adopted the Model Law on Electronic Commerce which Law was adopted by the United Nations Commission on International Trade Law following resolution A/RES/51/162 passed by the United Nations General Assembly on 30<sup>th</sup> January, 1997. The resolution recommended that all States (signatories to the resolution) give a favourable consideration to the said Model Law in the enactment or revision of their laws in view of the need for uniformity of the law applicable to alternatives to paper based methods of communication and storage of information. It was because the Indian Parliament considered it necessary to give effect to the said resolution and to promote efficient delivery of Government services by

means of reliable electronic records that it enacted the Information Technology Act, 2000. It is about time Nigeria does the same.

**References:**

1. **MR. P. A. AWOLAJA & ORS. v. SEATRADE GRONINGEN B.V. (2002) 4 NWLR (Part 758) 520**
2. **CONTINENTAL SALES LIMITED v. R. SHIPPING INC (2013) 4 NWLR (Part 1343) 67**
3. **DR. IMORO KUBOR & ANOTHER v. HONOURABLE SERIAKE HENRY DICKSON & OTHERS [2013] 4 NWLR (Pt. 1345) 534**
4. **SENATOR IYIOLA OMISORE & ANOTHER v. OGBENI RAUF ADESOJI AREGBESOLA & 2 OTHERS [2015] 15 NWLR (Part 1482) 205**
5. **R v. SHEPHERD [1993] 1 All E.R. 225**
6. **Electronic Evidence – Disclosure, Discovery & Admissibility**  
by Stephen Mason (With Specialist Contributors) First Edition 2007 Lexis Nexis Butterworths Wadhwa Nagpur
7. **Sarkar – Law of Evidence in India, Pakistan, Bangladesh, Burma, Ceylon, Malaysia & Singapore** 16<sup>th</sup> Edition, Reprint 2008 by Sudipto Sarkar & V.R. Manohar, Wadhwa Nagpur