

## **E- BUSINESS AND MATTERS ARISING FROM SOME COMMERCIAL LAW PERSPECTIVES**

### **INTRODUCTION**

Without doubt, the sweeping changes in information and communication technology have left their massive effects in different fields not least of which is the field of law. Information and Communication Technology law has now left its previous academic characterization and taken on commercial attributes having become a specialized field of legal endeavor with tentacles reaching into other fields.

Globalization of business, the new economy and the development of the Internet (the Internet being described as a network of networks with no single authority in charge of its use or development and projected to be used for business worth more than US\$ 300 billion by 2002)<sup>1</sup> were added factors that aided the gargantuan technological and communication revolution. New frontiers were constantly being explored with the growth of electronic commerce and the internationalization of business. Initially dismissed as buzzwords or fads, globalization and digitalization have come of age and appear to have come to stay. Certain theories believed to be largely academic became practical economic realities. Conflicts of law, taxation, regulation etc became subjects of extensive national and international debates and working groups leading to framework documents expressing the consensus in the attitudes of governments towards regulation and promulgation of enactments and policy in the fields of electronic commerce and banking.<sup>2</sup>

Changing economic realities include factors such as the transnational operation of legal practice and business in several jurisdictions and the effects of information technology on national sovereignty itself eroded by the permeation of national boundaries which itself affects the ability of national governments to impose regulation in their national interest.<sup>3</sup>

In the light of the above, existing legal, marketing and payment methods inter alia had to be aggressively re-defined to have relevance and add value to the global phenomenon that became known as Electronic Commerce. Although there is no single acceptable definition of Electronic Commerce it has been construed as a broad concept covering any commercial transaction effected by electronic means including facsimile, telex, Electronic Data Interchange (EDI),<sup>4</sup> the Internet and the telephone<sup>5</sup>.

In some ways the lesson from the last two decades of the 20th century was that to take proper advantage of computerized technology businesses had to redesign their processes as a whole rather than doing the same things in a different way and much of the same now applies to making the most of e-business.<sup>6</sup>

E-business<sup>7</sup> has been noted as a way of improving the exchange of goods, services, information and knowledge through the use of network enabled technology to generate optimal output.

As the world becomes a global village due to the information and communication revolution, Nigeria though not a frontrunner is also not left behind in the pack. Infrastructural deficiencies<sup>8</sup> inter alia have impeded the development of digitalization in the Nation's body polity but satisfactory signals are emerging that Government intends to move from merely

paying lip-service to this revolution to actively promoting and supporting the required and relevant structures. It has been advocated that to leverage new communication capabilities and provide faster and more accessible and responsive services to constituents, government must adapt advances in E-Business in order to perform its responsibilities more effectively<sup>9</sup>.

Necessarily, the subject of electronic business is naturally very wide. There is a lot of literature on Electronic Commerce and payments, which no doubt are relevant, but beyond the scope of this paper. The paper will thus consider in a nutshell, the effects of digitalization on contracts, company law from the perspective of corporate governance and securities. Furthermore, the paper will approach the topics from the Nigerian perspective although there will be comparisons with the practice of other jurisdictions.

## **GENERAL**

A general theme, which pervades most of the sub-topics of this paper, is the rule on writing and signature requirements that are applicable in a substantial number of our body of laws and received common law principles. From the Air Force Act<sup>10</sup> through the Arbitration and Conciliation Act<sup>11</sup>, through the Companies and Allied Matters Act<sup>12</sup> and so forth, emphasis is laid on tangible forms of documentation specifically, documents in writing and duly signed.

This is perhaps understandable considering the antiquity of such laws and further considering that we have in our body of laws statutes of general application in England enacted before the year 1900 when writing was perhaps the most sophisticated form of communication<sup>13</sup>. It is said that statutory signature requirements are often put in place to protect the vulnerable and unwary.<sup>14</sup> Furthermore, it is contended that the requirement of signature in handwriting fulfills two purposes namely a) identification of the person signing and b) authentication of the content signed.<sup>15</sup>

“Signature” is defined as the act of putting one’s name at the end of an instrument to attest to its validity and may be written by hand, printed, stamped, type-written, engraved, photographed or cut from one instrument and attached to another.<sup>16</sup> In the United Kingdom, a signature has been held by the courts to include a rubber stamp with a facsimile signature, a thumb print and, more simply, initials and Canadian courts have also held that a reproduction of a signature sent by facsimile satisfied the requirement of a signed document under corporation law.<sup>17</sup> However, Canadian case law has focused thus far on the meaning of various marks on paper rather than the legal effect of an electronic or digital signature<sup>18</sup>. It is also pertinent to note the difference between an electronic signature and an electronic transmitted signature.

The Interpretation Act<sup>19</sup> defines “writing” and expressions referring to writing to include printing, lithography, photography, typewriting and other modes of representing or reproducing words or figures in a visible form.

Under the Evidence Act,<sup>20</sup> “Document” includes books, maps, plans, drawings, photographs and also includes any matter expressed or described upon any substance by means of letters, figures or marks or by more than one of these means, intended to be used or which may be used for the purpose of recording that matter and under Section 100 if a document is alleged to be signed or to have been written wholly or in part by any person, the signature

or the handwriting or so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting.

An analyst<sup>21</sup> has stated that the fact that so many records and much information is maintained only in electronic form has strained legal doctrines that were developed to accommodate the written word.

## **ELECTRONIC CONTRACTS**

### **Present position**

Without going into a treatise on the law of contract, two competing definitions define a contract as a promise or set of promises which the law will enforce or an agreement giving rise to obligations which are enforced or recognized by law.<sup>22</sup> Jurisprudential arguments rage on both sides of the divide in favor of or against both definitions. Whilst it is said that it is probably impossible to give an absolute and universally accepted definition of a contract, the expression contract may be used to describe any or all of the following; a) a series of promises or acts themselves constituting the contract, b) the document(s) constituting or evidencing that series of promises or acts or their performance and c) the legal relations resulting from that series<sup>23</sup>.

The essential components of a valid contract are two or more separate and distinct contracting parties, an offer, acceptance, consideration and intention to create legal relations.

Whilst contracts can be oral, written or made by way of a deed, certain enactments enjoin certain cadres of contracts to be in writing. As a general rule, the Statute of Frauds of 1677 applicable in certain parts of Nigeria renders certain categories of contracts unenforceable unless there is a written note or memorandum of the agreement.<sup>24</sup> Other contracts required to be in writing include hire-purchase agreements, agreements between master and seamen, marine insurance policies, Bills of Sale, Bills of Exchange, moneylender's contracts, legal practitioner's agreement with his client for remuneration, pawnbroker's agreement for a pledge, arbitration agreements, declarations of trust respecting land and dispositions of interests in land.<sup>25</sup>

It is contended that there are four main reasons for making formal requirements as to contracts: first, to serve as clear evidence of a transaction and its terms; secondly, to have a cautionary effect thereby deterring premature and hasty contracts; thirdly, as a channeling function and lastly as a device to protect the weaker parties to contracts.<sup>26</sup>

### **Formation of electronic contracts**

The operative words being in the main "writing" and "signature" for certain cadres of contracts, how then can electronic contracts be validly executed between parties? This notion is not as abstract as it appears as a substantial number of the readers of this paper may have entered into on-line electronic contracts albeit unknowingly. The "click-wrap" agreements, the validity of which has been judicially recognized,<sup>27</sup> effectively executed by the reader scrolling down through the contents containing the operative terms and conditions and thereafter a click of the mouse button on an "I agree" icon or dialog box or

words of similar intent, are the most common examples of electronic contracts. These are the modes utilized by Yahoo, Hotmail, Justice-mail etc when new e-mail accounts are being opened by subscribers. Before the new account is opened, the site is configured such that subscribers will be automatically taken to a page displaying the terms and conditions for opening and operating such sites. The said account will not be opened until the prospective subscriber has electronically indicated his acceptance of the said terms and conditions. As it is possible to circumvent the Home page by use of bookmarks or typing the html address directly, terms and conditions should be clearly stated on each relevant page rather than the Home page of the Web site.

The virtual contract has been described a document of paradoxical nature without tangible form or nature but existing and considered real.<sup>28</sup> Although the general contract principles of offer and acceptance apply in the main, under general contract law normally an advertisement is considered as an invitation to treat rather than an offer, with the customer making the offer. Thus, there should be a distinction between the website itself possibly where the goods and services are being advertised and the page containing the contract. How practical or theoretical this distinction is, is entirely another matter in the given example where the customer clicks on a button to signify acceptance. A possible theory is that the customer taking the hyper-text link to the page where the contract is contained is by that act making an offer on the terms contained in the agreement.

## Security

With the security breaches in 2000 at sites such as Yahoo, CNN.com, Amazon etc and recent website defacements of Australian governmental sites in the United Kingdom, Australia and the United States of America (reported in page 19 of **Thisday**, Vol. 6 No. 2104 of Thursday January 25 2001) and the increase in hacking activity, fears have been expressed about the integrity and security of electronic contracts. What is to prevent the content of the contract from being tampered with? How do you know that the document actually emanates from where it purports to originate? Can the sender deny sending or executing the electronic contract? What happens when the document is sent but never arrives? Is the postal rule applied, which is said to become more relevant as technology develops?<sup>29</sup>

The technology that makes business easier and more convenient performs the same service for the fraudster but the systems to protect the integrity of these creative technological advancements lag far behind.<sup>30</sup> In a study undertaken by McConnell International, a Washington based consulting company, 33 (including Nigeria) out of 52 countries had not updated their criminal codes to deal with any offense tied to the use of computers.<sup>31</sup> Bruce McConnell, the company's president said that "in cyberspace, archaic laws often make crime and punishment distant relatives" adding that in a networked world, no country is an island thus all nations must be prepared to contribute to these efforts i.e. defining cyber-crimes in a similar manner across jurisdictions.<sup>32</sup> According to Simon Chalton<sup>33</sup> now, digitization creates opportunities for the content of messages and databases to be extracted, changed and recreated in ways that make the resulting new material unrecognizable as a derivative of the old form from which it was taken. These are serious issues for which answers may not necessarily be found in regulation. Trusted bodies acting, as Certification Authorities now exist to authenticate digital documents. Advances in technology and encryption are readily posited as remedies to potential security breaches.

The use of encryption technology to create "digital signatures" makes it possible to verify that persons exchanging documents electronically are who they say they are, that the messages exchanged between them have not been altered, that the parties cannot deny having sent them, and that no one else can read them.<sup>34</sup> Jose Carlos Erdozain<sup>35</sup> speaks about overcoming the face-to-face interface necessary in real time business through a telematic method of identification, which has the same effect as if parties were gathered together, and negotiating *inter praesentes*. Encryption, and in particular, "public key" encryption, therefore, provides electronic communication with authentication, integrity, non-repudiation, and confidentiality with certification of public keys by a third party providing an additional level of reliability.<sup>36</sup> It is stated that these techniques are based on algorithms and keys or codes and are usually ciphers, words or even a combination of both.<sup>37</sup>

J. Keith Harmon on digital signatures states that under the Public Key Infrastructure ("PKI"), you generate a private key and a public key as two parts of a key pair. The holder of the private key uses his key to encrypt a message (sign it) and sends it to the other person who uses his public key to decrypt the message but cannot use it to encrypt the message. Thus the owner of the private key need not worry about sharing his key with someone else; he need only publish his key while keeping his private key secure and unpublished.

Whilst most analysts hail the introduction of digitalization as a way of reducing costs in the form of a paperless office, others have advised caution stating that just as the Internet is constantly evolving and unpredictable, so is the legislation.<sup>38</sup>

### Internet Contracts

Broadly, the same principles on electronic contracts apply here with the added complications of conflicts of law and jurisdiction, local consumer protection legislation vis-à-vis disclaimers and warnings published on the website particularly where the parties are located in different countries. Another question to be considered is the time and place of the formation of the electronic contract. As to place of formation, in some instances they are specifically provided for by the express terms of the agreement. Some contracts provide that whilst expressly agreeing to be bound by the terms of the page, the viewer by merely opening same expressly warrants certain facts pertaining to age, nationality, country of residence etc without necessarily making the so-called warranted facts true. On the issue of the time when the contract is deemed to have been formed, there appears to be no specific legislation or judicial guidance on this<sup>39</sup>.

### International perspectives

The United States of America recently enacted the Electronic Signatures in Global and National Commerce Act ("the US Act") Public Law N. 106-229 giving recognition and effect to electronic contracts, signatures and records. The Act was signed in June 2000 to take effect from October 1, 2000. The US Act according to an analyst<sup>40</sup> was based on a United Nation's model bill, (the writer believes the UN Commission on International Trade (UNCITRAL) Bill completed in 1996 and formulated to provide national legislators with a set of basic rules that would remove a number of impediments to the encouragement and growth of electronic commerce and validating transactions entered into by means of new

information technologies to promote and encourage implementation of new information technologies<sup>41</sup>) which has been used by other countries to create legislation on digital signatures and document authentication. The purpose of the US Act was to:<sup>42</sup>

- Eliminate legal barriers to using electronic technology to form and sign contracts, collect and store documents, and send and receive notices and disclosures;
- Require that consumers affirmatively consent to doing business on-line and benefit on-line from consumer protections equivalent to those in the paper world; and
- Ensure that government agencies have authority to enforce the laws, protect the public interest, and carry out their missions in the electronic world.

The US Act retains existing consumer protections as it regards form and not contents, which are specifically protected under existing legislation. Consumers have a choice as they are not compelled to accept to use digital signatures and no particular technology is favored.

Another issue addressed by the US Act is the voluminous record keeping by governmental agencies. The Act now allows electronic record retention and filing and as a practical example, electronic filing of tax returns is now permitted under the penalty of perjury for misstatements therein.

The US Act defines an electronic signature as an electronic sound, symbol or process attached to or logically associated with a contract or other record and executed by a person with the intent to sign the record. The electronic signature or an electronic record must be in a form capable of retention and capable of being accurately reproduced for later reference. It further provides that no declaration of intent or other similar statement between the originator and the addressee of an electronic record shall be denied legal effect, validity or enforceability solely on the ground that it is in the form of an electronic record.

Possibly on the grounds of public policy, certain transactions are excluded from the ambit of the US Act. It does not apply to contracts or records relating to: (i) wills, codicils or testamentary trusts, (ii) adoption, divorce or other family law matters, (iii) the Uniform Commercial Code other than Article 1-107 (waiver or renunciation of claim or right after breach), Article 1-206 (statute of frauds for kinds of personal property not otherwise covered), Article 2 (sales) and Article 2A (leases), (iv) court orders, notices and other official court documents, (v) notices of cancellation of utility services, (vi) notices of default, acceleration, repossession, foreclosure or eviction regarding a primary residence, (vii) notice of cancellation of health insurance or life insurance benefits other than annuities, (ix) recall notices for products endangering health or safety, and (x) documents relating to the transportation or handling of toxic substances.<sup>43</sup>

It is believed that the exclusions are for consumer protection<sup>44</sup> and as people become more comfortable with the technology and electronic contracts become more commonplace, the exclusions will be phased out.

Since the U.S. Act was passed, the first paperless, fully electronic mortgage loan and home purchase in the U.S. was completed entirely online and the multi-step mortgage process was transacted in three hours.<sup>45</sup> It required the help of electronic transaction firm, eOriginal, and consisted of eight participants, including the buyer and seller, legal and government representatives.<sup>46</sup>

Legal riddles on when acceptance is deemed to have been received by the offeror when transmission is by computer communication have been answered by Section 13 of the US Act which makes provisions on acknowledgement of receipt and where none in particular is specified, acknowledgement of receipt could be by communication (electronic or otherwise), conduct and where the originator has stated that an electronic record is conditional on receipt of the acknowledgment, the electronic record shall be treated as though it had never been sent, until the acknowledgment is received. Even where there is an acknowledgement of receipt the US Act makes no presumptions that what was sent actually corresponds to what was received. Subsection 7 provides however that except in so far as it relates to the sending or receipt of the electronic record, this Part is not intended to deal with the legal consequences that may flow either from that electronic record or from the acknowledgment of its receipt.

As to the controversy on the time the communication was deemed to have been made, Section 14 provides that unless otherwise agreed between the originator and the addressee, an electronic record is sent when it enters an information processing system outside the control of the originator or the person who sent the electronic record on behalf of the originator. However, it is postulated, as a possible solution to this issue that parties can by themselves stipulate what acts will constitute acceptance.<sup>47</sup>

Furthermore, the US Act also provides for electronic notarization of documents by the electronic signature of a person authorized to perform such acts if the electronic signature is accompanied by all other information required by the applicable law and is attached to or otherwise logically associated with the signature or record being notarized, acknowledged, verified or the subject of an oath. The US Act additionally, eliminates any requirement that a stamp, seal or similar physical embossing device be used to authenticate any such signature or document.

The US Act validates contracts and records created through electronic agents where the actions of the electronic agents are legally attributable to the person to be bound. Electronic agents are computer programs and other automated processes for initiating or responding to electronic records, which do not require human intervention at the time of such action.<sup>48</sup>

Australia's Senate has given the nod to Electronic contracts with the promulgation of the **Electronic Transactions Bill**, removing a number of existing legal impediments to the use of electronic communications in establishing legally binding agreements. It establishes that existing requirements under Commonwealth law requiring tangible documentation, writing and signing to create a binding agreement with certain and known terms can be satisfied by the use of electronic communication containing the required information and elements which constitute an agreement.<sup>49</sup> Additionally, business and the community are enabled to choose electronic communications in dealings with government and the Bill is media and technology neutral (i.e. paper and electronic transactions are not advantaged vice-versa).

The Australian Bill will be implemented in 2 stages; prior to July 1 2001 it will apply to Commonwealth laws specified by regulation and after that date, it will apply to all Commonwealth laws except specifically excluded.

Similarly, the new European Framework on E-Commerce<sup>50</sup> adopted by the European Parliament and the Council of the European Union on May 4, 2000 gives directives on certain legal aspects of information services. Member countries are expected to incorporate its provisions into their national law by 17<sup>th</sup> January 2002 and it states that for a legally binding contract to be concluded on the Internet, offer, acceptance and acknowledgement of acceptance are required and the contract is deemed to be formed when the acknowledgement of acceptance is received regardless of whether or not it is read by the recipient.<sup>51</sup> Mr. De Foestraets states that member states are obliged to remove all obstacles to the use of electronic contracts and in particular requirements as to form. Similarly, as with the US Act, there are restrictions as to its applicability in certain types of contracts such as transfers of rights in real estate, contracts by law requiring the involvement of courts, public authorities or professions exercising public authority, contracts of suretyship granted and on collateral securities furnished by persons acting for purposes outside their trade, business or profession and contracts governed by family law or by the law of succession.<sup>52</sup> This undoubtedly makes sense, as the capacity for mischief and irreparable damage is greater in contracts of this nature. Critics of these regulatory initiatives however state that the criticisms do not go far enough as there are still fears about the capacity of fraudsters to beat all existing online verification technology.<sup>53</sup>

Ireland has promulgated the Electronic Commerce Act No. 27 of 2000, being one of the first European Union member states to enact specific e-commerce legislation implementing key provisions of the EU directive and most significantly, the Act was signed into law by the President of Ireland using an electronic signature.<sup>54</sup>

Additionally, Singapore passed the Electronic Transactions Act which took effect on 10<sup>th</sup> July 1998 creating a legal framework to address inter alia the legal recognition of electronic signatures, authentication, retention of records by electronic means, formation and validity of electronic contracts, legislative framework for certification authorities, digital signatures and the acceptance of electronic filing by government departments.<sup>55</sup> The Act gives the same weight to electronic transactions and documents as their paper counterparts and clarifies how to determine the date, time and place when an electronic document or piece of information is sent or received.<sup>56</sup>

The Hong Kong Government on 5<sup>th</sup> February 1999 issued an international open tender for the design, development and implementation of a public key infrastructure for use by the Hong Kong Post in its role as Hong Kong's Public Certification Authority.<sup>57</sup>

Law 527 of 1999 constituting the legal basis for the development of e-commerce in Colombia had some of its provisions (under challenge) upheld on June 8, 2000 by the Constitutional Court as constitutional with the court confirming the evidentiary value of digital signatures as well as the importance of certification authorities.<sup>58</sup>

The International Telecommunications Union has suggested the adoption of PKI solutions by developing countries to enable the development of e-business based on the non-personal nature of e-business, which require that communications between two parties be protected

and 22 countries including Nigeria will benefit from the framework of the electronic commerce for developing countries (EC-DC) initiative where the ITU is working with leading industry partners in the deployment of latest technologies in more than 90 countries.<sup>59</sup>

To further enhance the efficacy of the new regulations, there has to be trust in the system. With courts all over barraged with adjudicating on paper-based disputes, non-business consumers may not be very quick to embrace these new technologies.

*The issues of jurisdiction, conflict of laws, disclaimers, limitation of liability, consumer protection and privacy although no doubt important are far beyond the scope of this paper and were consequently not considered.*

## **TECHNOLOGICAL DEVELOPMENTS IN CORPORATE GOVERNANCE**

For Corporations, automation of business processes had largely led to increased efficiency and positive contributions to the bottom line. Although companies were computerizing different aspects of their activities to re-engineer their internal work processes, one area that has been largely ignored is the area of corporate governance. Corporate governance is essentially concerned with the rules governing the structure of the corporation and the exercise of power and control of the business of a corporation<sup>60</sup>.

Regulations in respect of corporate governance on Nigerian companies largely derive from the Articles of Association of the said companies and the provisions of the Companies and Allied Matters Act ("CAMA")<sup>61</sup>. This paper will largely concentrate on the CAMA provisions.

### **Company registers**

Every company is required by law to keep certain registers, namely, Register of members,<sup>62</sup> in the case of a public company, a Register of interests in shares,<sup>63</sup> Register of transfers<sup>64</sup>, Register of Charges<sup>65</sup>, Register of Debenture holders<sup>66</sup>, Register of Directors Shareholding<sup>67</sup>, Register of directors and secretary<sup>68</sup>. Section 633 describes the forms of registers, records, indexes and minute books or books of account required to be kept under CAMA and specifically includes any information storage device, which is capable of reproducing the required information in intelligible written form within a reasonable time although in practice the registers are kept in book form. It therefore follows that the required records can be kept in electronic form.<sup>69</sup> CAMA makes provisions for inspection and making of copies of the registers in certain circumstances and it is submitted that these obligations can just be easily satisfied if the registers are kept in electronic form. This submission does not derogate from the obligations of the companies to render the required statutory returns for filing which is presently done in paper form.

### **Meetings**

CAMA provisions require the company to hold an annual general meeting<sup>70</sup>, for public companies a statutory meeting<sup>71</sup> and the Board of Directors may convene an Extra-ordinary General Meeting whenever they deem fit. Section 216(1) provides that all statutory and general meetings shall be held in Nigeria.

Ancillary to meetings is the requirement of notice. Sections 217-220 on notices in respect of members meetings relate to the length, content, persons entitled and service. There appears to be no provision as to form but Section 220 on service of notice presupposes that notices are tangible i.e. may be given personally or sent by post. In contrast to Article 111 of Table A of the English Companies Act, which states that notice given to or by any person pursuant to the articles shall be in writing, our Table A (Parts I-IV) requirements relate more to the mode of service and are silent as to form. *Q-Can a company send out its notices by electronic mail?*

Sections 227-8 relate to attendance at general meetings giving every member a right to attend the said meetings in accordance with Section 81 of the Act (permitting the articles to impose restrictions on voting in respect of any shares in respect of which calls or any other sums remain unpaid). It has been submitted that a meeting can be held without requiring the necessity of everyone physically present in the same room or space.<sup>72</sup> *Browne-Wilkinson V.C in Byng V London Life Assurance Limited*<sup>73</sup> stated that “the rationale behind the requirement for meetings in the Companies Act 1985 is that the members shall be able to attend in person so as to debate and vote on matters affecting the company. Until recently, this could only be achieved by everyone being physically present in the same room face to face. **Given modern technological advances, the same results can now be achieved without all the members coming face to face**” (Emphasis mine).

With regard to Section 263 (1) which merely provides that directors may meet together for the dispatch of business etc, without specific reference to a geographical location for the said meetings, it is submitted that meetings can take place by way of video-conferencing and other communication modes which do not require the assembling together of the said directors in a physical geographical location.

### Written resolutions

Section 234 permits a written resolution in the case of a private company, signed by all members entitled to attend and vote at general meetings to be valid and effective as if passed in a general meeting. There is a similar provision for directors entitled for the time being to receive notice of the meeting of directors contained in Section 263 (8). It is stated that this section is designed to facilitate the business of a company in a situation where time is of the essence of the matter and where it is difficult or impracticable to call an extra-ordinary meeting within Section 215 of the decree (now Act).<sup>74</sup> Whilst CAMA is silent, the English Companies Act does not require that all members signatures approving a written resolution be on a single document provided each is on a document accurately stating the terms of the resolution and it will take effect on the date on which the resolution is signed by or on behalf of the last member to sign. It has thus been stated that a fax sent to all the relevant members is sufficient.<sup>75</sup>

### Accounting records

As seen from the above, the provisions of Section 633 enable accounting records required to be kept by virtue of the provisions of Section 331 to be in computerized form. However the balance sheet is required to be signed by 2 directors on behalf of the board. Section 344 provides for persons entitled to be sent the balance sheet as of right. One then posits the practicality of emailing the said balance sheet since this can still come within the contemplation of “sending”.

*With incessant episodes of dumping of mail, would email notices as a practical step redress this issue? The Nigerian Communications Commission Exploratory Study on Internet Service in Nigeria<sup>76</sup> found that 32% of the respondents of its core study findings were paying exorbitant courier service charges for manual information transactions with 51% doing it on a daily basis.*

*Would website hostings be required to comply with the several disclosure requirements in CAMA pertaining to, RC No, . directors etc? Is a website a place in which its business is carried on for the purpose of Section 631 (1)(a) or an official publication under Section 631 (1) (c) requiring name and RC No?? The writer is not convinced that it comes within the ambit of Section 278 (1) relating to particulars of directors in trade catalogues etc where there is a requirement of issuance or sending to **any person in Nigeria**.*

### **International perspectives**

Internet use in other jurisdictions is greatly harnessed in the field of corporate governance as more corporations take advantage of its attendant cost-savings and security vis-à-vis paper documentation. From 312 companies offered Internet voting of proxies by ADP-ICS in 1998, the number dramatically increased to 14,000 in 1999.<sup>77</sup> In these instances, the law is attempting to adapt to the economic realities and keep pace with technology.

As a practical matter, electronic proxies can save companies big money by eliminating postage costs and reducing printing costs and two primary methods are used.<sup>78</sup>

While an increasing number of companies allow stockholders to view annual meetings via the Internet, the Delaware General Corporations Law (DGCL) does not contemplate a shareholder meeting held strictly over the Internet nor does it envision a stockholder "attending" a meeting over the Internet.<sup>79</sup> Furthermore, in spite of the considerable savings of time and money as advantages of Internet enabled shareholders meetings, the prevailing opinion under German law is that it is not yet possible.<sup>80</sup> Whilst the technological advancements are in the most welcome, some caution should be exercised to ensure that it does not defeat its intended purpose. Some analysts argue that in the future, cyberspace may be a geographical location acceptable to corporation regulatory laws regarding place of meetings but the writer wonders how will that be reconciled with issues of quorum etc which are largely consumer protection policies put in place to guard against mischief, oppression and tyranny. *According to Prof. Lawrence Lessig of the Harvard Law School in his opus- "Governance", cyberspace is that space constituted by code- software and hardware that together makes up the architecture that cyberspace is and the architectures are determining what's possible there, defining the values that will be embedded therein and regulability of behavior there.*

### **A final word**

Craig B. Smith, the chair of the Delaware Corporation Law Council in 1999, observed that new technology and the needs of business may require re-examination of long-standing principles of corporate law. As he explained, "We must decide whether those principles have

continued vitality. If so, are they sufficiently important to the integrity of our corporation law that we will resist the pressure for change?"<sup>81</sup>

For example, Smith referred to statutes requiring that directors attend board meetings either in person or by means of communication permitting all members to hear each other. He then asked: "Are we ready now to substitute an online chat room format for board meetings? If not, why not? Is our resistance well-founded or based on outmoded traditions and values of marginal importance?"

At the Consultative Committee Meeting of the Company Law Review Secretariat, held on 10<sup>th</sup> February 2000, doubts were cast on the utility of the current United Kingdom company law requirements on providing financial statements to shareholders finding them to be of little value and opting for some form of abridged statements but requiring companies to publish the full financial statements on their websites and providing the full statements to any shareholder who requested for same. Rosalind McCarthy-Ward told the Committee that the Government would be publishing shortly for consultation a draft order, to be made under powers in the Electronic Communications Bill, amending the Companies Act 1985 to provide for electronic communication. This would include the possibility of publishing reports and accounts on web sites rather than sending individual copies, where members agreed. It would also cover electronic incorporation and appointment of proxies.

An interesting development is the use of the Internet in company meetings in a more interactive form where shareholders can participate in the form of submission of written questions (submitted prior to the actual holding of the meeting) which are answered by directors at the said meeting. Partly in a bid to showcase itself as a leading high-tech company, Bell & Howell, a Delaware Corporation wanting to get its message out to stockholders around the world allowed stockholders to view its first meeting online in May 1996. While only 40 stockholders physically attended the meeting, more than 950 watched online; Investors could hear what was going on through the Web site audio function and could simultaneously view the charts and graphs presented on PowerPoint slides; additionally, the online viewers were permitted to e-mail questions to directors as early as two days before the meeting and while the meeting was in progress, all of which were read and answered during the meeting.<sup>82</sup>

### **THE INVESTMENTS AND SECURITIES ACT NO. 45 OF 1999 ("ISA")**

The Odife Panel in 1996 set up to review the Nigerian Capital Market had as part of its terms of reference, the task of identifying and itemising all laws and regulations affecting the conduct of capital market activities and **to assess their continued relevance** (emphasis mine). The ISA was promulgated in a more contemporary climate taking due cognizance of advances in technology and their impact of the Nigerian capital market. Under the provisions of the ISA, an invitation to the public is made if the offer is inter alia published, advertised or disseminated by newspaper broadcasting, cinematograph or any other means whatsoever.<sup>83</sup> Similar methods of communication apply to the prohibition of certain notices<sup>84</sup>

Without going into an overview of the provisions of the ISA, and from the perspective of this paper, ISA innovations include recognition of electronic trading of securities<sup>85</sup> and establishment of commodities, options and futures exchanges which by their very nature from a large part of the 24 hour international trading exchanges from New York through London to Tokyo.<sup>86</sup>

Where CAMA restrictively defines "Book and paper" and "book or paper" to include accounts, deeds, writings and documents and "Document" to include summons, notice, order and other legal process, and registers, the ISA defines book as including any register, document or other record of information and any account or accounting record howsoever compiled or stored whether in written or printed form or in microfilm or electronic process or otherwise.<sup>87</sup> Additionally, where CAMA enjoins a share certificate to be under the company's seal, specifying the shares to which they relate and the amount paid up on them<sup>88</sup> under the ISA, a share certificate is an instrument of a body corporate certifying that the person therein named is entitled to a certain number of the shares and is prima facie evidence of his ownership whether electronically expressed or otherwise as may be approved by the Commission and kept, lodged or stored with a licensed depository or custodian company in accordance with the provisions of the decree.<sup>89</sup> The Securities and Exchange Commission of the United States of America expressed its support for the expansion of communications by electronic means, noting that the use of electronic media (itself described as broadly including audiotapes, videotapes, facsimiles, CD-ROM, e-mail, bulletin boards, Internet websites declaring them to be at least an equal alternative to paper based media) enhances the efficiency of the securities market by allowing for the rapid dissemination of information to investors and financial markets in a more cost-efficient, wide-spread and equitable manner than traditional paper based methods.<sup>90</sup> In 1997 the United States SEC issued a report on The Impact of Recent Technological Advances on the Securities Market (Technology Report) where it reiterated that it views its actions as facilitating the use of technological advances concluding that investors benefit from the ability to obtain information electronically.<sup>91</sup>

By virtue of the provisions of Section 261, CAMA, the Central Bank of Nigeria Decree,<sup>92</sup> Banks and Other Financial Institutions Decree,<sup>93</sup> Nigerian Investment Promotion Decree<sup>94</sup> and the Foreign Exchange (Monitoring and Miscellaneous Provisions) Decree<sup>95</sup> *inter alia* are to be read with such modifications as to bring them in conformity with the provisions of the ISA and other provisions therein are void to the extent of their inconsistency with the ISA.

## **MATTERS ARISING**

There are a few matters arising from the increasing move towards digitalization of business, which are cursorily noted hereunder.

### **Stamp duty**

*How do you pay Stamp duty on an electronic contract?*

Section 3 of the Stamp Duties Act<sup>96</sup> imposes duties to be charged on the several instruments specified in the schedule. Instrument is defined in Section 2 as every written document whilst "write" "written" and "writing" are defined as including every mode in which words

or figures can be expressed upon material. Intriguingly, "material" is defined as including every sort of *material* upon which words or figures can be expressed.

It has however been stated that if Nigeria is serious about developing on the basis of market led economic policies, transaction costs and taxes which are so numerous must be minimized consequently a call was made for the repeal of the Stamp Duties Act which has been attributed to inflicting unnecessary burdens in its observance, which is more in the breach.<sup>97</sup>

### Rules of Evidence

Rules of evidence require massive amendments to admit the realities of e-business. For instance what would constitute an original and counterparts? What would be the effect of section 100 on proof of signature and handwriting? What would be the effect on the rules relating to primary and secondary evidence etc?

### Registration requirements

Until Government record keeping goes online, how would compliance with the various registration requirements regarding certain categories of contracts and documents be accomplished?

### THE NEXT STEP

The prognosis seems good following the bold initiatives in the ISA. The Anti-Corruption Act<sup>98</sup> enacted thereafter further recognizes the impact of e-business in the Nigerian society. Therein, Bankers books include all other books and documents or electronic devices used in the ordinary course of business of a bank<sup>99</sup>.

The writer would advocate the blanket adoption of US type laws to avoid piecemeal legislative amendments and provide a holistic solution. Other developing countries such as India are in the process of enacting cyber laws. The Indian Parliament is currently considering the Information Technology Bill, which attempts to recognize electronic business in the form of electronic commerce, e-trading, e-banking etc and amending various pieces of (their similarly) archaic legislation.<sup>100</sup>

Without advocating a slavish, blind adoption of American type legislation, consider once again the views of the White House on this issue:

- *Our Nation has benefited dramatically from the onset of the digital age.*
- *The Commerce Department reports that information technology industries (IT) have contributed 30 percent of U.S. economic growth since 1995.*
- *Economists have consistently found that IT accounts for half or more of the recent acceleration in U.S. productivity growth: from 1.4 percent per year from 1973 through 1995 to 2.8 percent per year since 1995.*
- *IT accounts for two thirds of the growth in overall business investment in recent years.*
- *The potential benefits of the IT revolution reach beyond the IT industry itself to improve the productivity of all segments of our economy.*

*But still there are barriers - especially legal uncertainty - to the use of technology for business-to-business and business-to-consumer commerce. This legislation will help us to achieve the full benefits of electronic commerce.*

- *Companies will be able to contract online to buy and sell products worth millions of dollars.*
- *Businesses will be able to collect and store transaction records that once filled up vast warehouses on servers the size of a laptop.*
- *Consumers will have the option of buying insurance, getting a mortgage, or opening a brokerage account on-line, without waiting days for the paperwork to be mailed back and forth.*

This process is not so much as Americanisation but learning from the wealth of experience of the pioneers of the Internet, the largest users thereof and largest spenders thereon. We could take it a step further and anticipate technological advances as per J. Keith Harmon in, "A Brief Look at the Legal Framework for Smartcards" where he says that Congress took no chances with technology when it enacted the Copyright Act of 1976 well before the computer age of the 80s stating that copyright protection subsists... in original works of authorship fixed in any tangible medium of expression now known or later developed (emphasis his).

## **CONCLUSION**

Inasmuch as there are serious infrastructural barriers to the growth and development of e-business in Nigeria, it has become imperative that regulatory and infrastructural reforms be put in place to properly launch Nigeria into the international setting. With internationalization of business and borderless markets, there is a myriad of opportunities in this regard. More than the rhetoric of attracting foreign business and investors, practical steps are required for this purpose as multi-nationals and their advisers including foreign legal practitioners take advantage of the digitalization of business to offer seamless service to the Nigerian market. In this regard, Nigerian Legal Practitioners would have to rise and embrace this new technology which more than anything eradicates national barriers to enable them remain relevant and on the cutting edge.

Whither the fate of the paper-less office in the Nigerian business setting. Will we see a decline of paper-based transactions in the near future? Perhaps and then again, perhaps not. The providers of electronic payments systems have taken the initiative in sensitizing the populace about electronic alternatives to cash. Additionally, those in the information technology business are turning from their traditional hardware business to provisions of business software solutions and electronic commerce platforms, which they have apparently identified as the new areas of growth.

Rather than waiting for government to set the pace in this regard, the private sector including the providers of information services have to be in the vanguard. In a democratized setting, lawyers can realize added value as being catalysts for legislative reform and policy as the lawyers in Washington USA have realized with their huge portfolio of governmental regulatory services known in another parlance as "lobbying".

Whilst the Framework document<sup>101</sup> noted that technology will always be ahead of the law and the law will always make a futile attempt to catch up. (*i.e. trying to regulate a moving*

*target*) Governments have begun to regulate the Internet (in some instances through technology) which had been argued was a distinct place that needed laws and legal institutions of its own<sup>102</sup>. *Catherine Crier states that it's a fascinating field and a time to be very careful because the knee-jerk reaction( in America) is to create more laws with the possible danger of over-regulation.* It is also noted that over-regulation will inhibit the advancement and further development of technology and thus technology should largely be allowed to regulate itself. What is however clear is that what was science fiction of yesterday is the reality of today and the relic of tomorrow.

This paper does not purport to provide all the answers to the issues associated with e business from the commercial law perspective but to give food for thought for the developmental process and possibly, the acquisition of specialist skills in this regard.

### References

1. Melissa De Zwart, Electronic Commerce: Promises, Potential and Potential and Proposals quoting the US Department of Commerce
2. A Framework for Global Electronic Commerce released on July 1 1997 by the Clinton Administration. It suggests that case-by-case monitoring of Electronic payments systems is preferable and that a domestic and global uniform commercial framework of electronic payments be developed that recognizes, facilitates and enforces electronic transactions world-wide. Fully informed buyers and sellers could voluntarily agree to form a contract subject to this universal legal framework, just as bodies currently choose the body of law that will be used to interpret their contract. To enable private entities to perform this task and fulfill their roles adequately, governments should encourage the development of simple and predictable domestic and international rules and norms that will serve as the legal foundation for commercial activities in cyber -space.  
Similarly, the Group of 10, Electronic Money, Consumer Protection, Law Enforcement, Supervisory and Cross-Border Issues, Report of the Working Party on Electronic Money, April 1997 saw virtue in adopting a flexible response to electronic money issues recognising that innovation and competition in the payment system can provide important efficiency, consumer benefits, facilitate cross-border retail payments. It further stated that given the wide range of national policy approaches on this issue, national policy should be designed and developed to minimise any impediments to the cross border use of or competition in the provision of electronic money.
3. Alec Pienaar, Ethical Behaviour for Corporate Counsel in the Face of Changing Commercial Realities International Business Lawyer, June 1998, Volume 26 No. 6 at page 259. The author was of the opinion that the most significant "changing commercial reality" was the information technology revolution, with all the changes it entailed both for the nature of work and the nature of organizations. He further posited that there is a current debate about the extent to which the provision of legal services is likely to turn into the provision of a type of information service.
4. Introduced in the 60s as a standard to transmit information such as orders, invoices, shipping instructions and bills between computers thereby creating a paper-free system of inter-business communication, linking companies such as manufacturers, suppliers and transport providers but its use was limited by costs and compatibility problems. See Melissa De Zwart, Electronic Commerce: Promises, Potential and Potential and Proposals supra
5. Report of the Electronic Commerce Expert Group to the Attorney-General of Australia, Electronic Commerce: Building the Legal Framework, March 1998
6. D.J. Freeman, Legal Issues Concerning e-contracts, 02/00
7. Mrs. Adebisi Lamikanra, Partner Business Consulting and E-Business at Arthur Andersen, Nigeria. See generally THISDAY, Vol.6 No. 2097 at page 19
8. Mrs. Lamikanra defined same as recurring power outage, low systems availability, low NITEL band-width, low base of PC penetration and usage amongst others. Further challenges to developing countries according to Mr. Alexander Ntoko, Project Manager, Electronic Commerce of the ITU include low income, lack of awareness on ebusiness issues, inadequate legal and regulatory framework, absence of trust, network payments and secure transaction services, See Financial Standard, January 22, 2001 at page 38. Additionally, Dr. J.P Merino Chief Executive Officer of Smartcard Nigeria PLC, includes the challenge of "lack of skills" where we do not have references of (The writer believes comparisons to) what other people do and therefore inertia tends to always have the upper hand. He added that lack of skills means that even when the tools are available, people do not dare use them, afraid of what

may happen simply reflecting the generally low level of technical culture in the country. See further Financial Standard, January 22, 2001 at page 39

9. Samuel Famakinwa, THISDAY, Vol. 6 No. 2097 at page 17. He states further that President Obasanjo at a seminar held on 16th November 2000 on Information technology for effective governance organized by the Federal Ministry of Science and Technology and Compaq stated that his desire and that of the nation is to bridge the digital divide.
10. Cap. 15 Laws of the Federation of Nigeria 1990. See Sections 173 (2) and (3) on evidence in proceedings generally
11. Cap. 19 Laws of the Federation of Nigeria 1990. Specifically, Section 1(1) enjoins every arbitration agreement to be in writing and be contained:
  - in a document signed by the parties
  - in an exchange of letters, telex, telegrams or other means of communication which provide a record of the arbitration agreement
  - in an exchange of points of claim and of defence in which the existence of an arbitration agreement is alleged by one party and not denied by the other

In subsection 2 any reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if such contract is in writing and the reference is such as to make that clause part of the contract.

It thus appears that although Section 1(1) (b) refers to other means of communication possibly implying electronic transmissions by e-mail etc, there has to be some sort of retrieval system that will reduce such communication into a tangible form.

12. Cap. 59, Laws of the Federation of Nigeria, 1990.
13. Used here as a noun and verb.
14. Heather Rowe, Electronic Commerce and Consumers, International Business Lawyer, Volume 26 No. 4 at page 172.
15. Rolf Auf der Maur, Internet Enabled Distribution Models, International Business Lawyer, Volume 27 No. 6. He however believes that both purposes can be served by public key electronic signatures.
16. Black's Law Dictionary, 5th Edition, West at page 1239.
17. Michael Erdle, Online Contracts: Electronic Creation of Effective Contracts, Deeth Williams Wall 1997
18. Michael Erdle, supra
19. Cap. 192, Laws of the Federation of Nigeria 1990 at Section 18(1). See further the definition of "to sign" that is in relation to a person who is unable to write his name, means to make his mark.
20. Section 2 (1) Cap 112 LFN (originally 27 of 1943)
21. Michael J. Lockerby, Non-Contractual Legal Problems International Business Lawyer, June 1999 at page 245
22. Chitty on Contracts, Volume 1 General Principles, 28th Edition, Sweet & Maxwell 1999 at page 1
23. Halsbury's Laws of England, Volume 9, 4th Edition, Butterworths 1974
24. Section 4 provides that "No action shall be brought to charge any executor or administrator upon any special promise to answer damages out of his own estate; or whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person; or to charge any person upon any agreement made upon consideration of marriage; or any interest in or concerning them; or upon any agreement that is not performed within the space of one year from the making thereof; unless the agreement upon which such action shall be, or some memorandum or note thereof shall be in writing and signed by the person to be charged therewith or some other person thereto by him lawfully authorized".
25. J. Olakunle Orojo, Nigerian Commercial Law and Practice, Volume 1, Sweet and Maxwell, 1983.
26. Chitty on Contracts, Volume 1 supra at page 261.
27. By the United States of America in CompuServe V Patterson 89 F.3d 1257, See further Internet Enabled Distribution Models by Rolf Auf der Maur, supra at page 266 (footnote 10)
28. Jose Carlos Erdozain, Encryption Technologies and Digital Signatures, International Business Lawyer, Volume 27 No. 4 June 1999
29. Lord Wilberforce in Brinkibon Limited, referred to in Heather Rowe's article supra. Lord Wilberforce said further that no universal rule can cover all such cases; they must be resolved by reference to the intentions of the parties, by sound business practices and in some cases, by judgment where the risks should lie. Additionally, the consensus amongst the academics seems to be that the postal rule although an exception to the general rule is generally more applicable to modern forms of communication.
30. Joseph J. Norton, Banks: Fraud and Crime, Lloyds of London Press, 1994 at page 15
31. Financial Standard, January 22, 2001 at page 38
32. Financial Standard, January 22, 2001 at page 38
33. Internet and Electronic Trading, International Business Lawyer, Volume 26 No. 4 April 1988. He adds that technological methods of "fingerprinting" or "water-marking" material so that it can be traced to its source are being developed but nevertheless, digital

manipulation makes the hiding, corruption and re-expression of material easier to achieve, so reducing the reliability and integrity of electronic communications.

34. Michael Erdle, *supra*
35. In Encryption Technologies and Digital Signatures, *International Business Law*, Volume 27 No. 4 June 1999
36. Michael Erdle, *supra*
37. Jose Carlos Erdozian, *Encryption Technologies and Digital Signatures*, *supra*
38. Ted Biderman, *Electronic Contracts: What's New?* The author further states that the creation and use of digital signatures, however, can be complicated and expensive. A different view is however expressed by Alston & Bird LLP who believe that billions of dollars of business-to-business and business-to-consumer transactions will be facilitated as written signatures and paper notices will no longer be required. See generally the Alston & Bird article "How the New E-Sign Act will affect E-Commerce"
39. Heather Rowe at page 171
40. Andy Walker of the Journal Cyberwalker Media Syndicate in his article "The digital signature: Electronic Contracts, authentication coming of age thanks to new rules". He states that the United Kingdom and Ireland passed similar digital signatures legislation last summer
41. Melissa de Zwart *Electronic Commerce: Promises, Potential and Potential and Proposals* *supra*
42. Press Release from the White House, Office of the Press Secretary, *Eliminating Barriers to Electronic Commerce While Protecting Consumers: The Electronic Signatures In Global and National Commerce Act*, June 30, 2000  
But the new law will overcome these barriers by:  
Preempting Paper Requirements: The Act provides that no contract, signature, or record shall be denied legal effect solely because it is in electronic form.  
Establishing Technology Neutrality: The Act precludes, in most cases, requirements that one type of technology be used instead of another.  
Ensuring Accuracy of Electronic Records: The Act provides that most electronic contracts and records are only legally enforceable if they are in a form that is capable of being retained and accurately reproduced for later reference by relevant parties.
43. Coudert Brothers, *Electronic Signatures in Global and National Commerce*, *Information Memorandum*, June 30, 2000
44. Neil Iscoe of eCertain, a trust technology service company
45. Andy Walker, *supra*
46. Andy Walker, *supra*
47. Heather Rowe *supra* quoting *Holiwell Securities Limited V Hughes* 1974 1 WLR 155.
48. Coudert Brothers *supra*
49. *Current Accounts*, Deacon Graham and Jones, March 1999 Perth as reprinted by *International Business Lawyer*, Vol. 27 No. 4 June 1999 at page 279.
50. Geoffroy de Foestraets, *E-Commerce-a New European Framework*, *International Business Lawyer*, Volume 28 No. 9, October 2000 at page 389
51. See further, *Jurisdiction and the Internet: the EC Perspective*, Tim Brown and Alex Hamer, *International Business Lawyer* Vol. 28 No. 10 November 2000 page 439 at p 442.
52. Geoffroy de Foestraets at page 391 *supra*. He states further that the directive states that prior to an order being placed by the recipient of a service, the provider must give him a set of minimal information: different technical steps to follow to conclude the contract, conditions and accessibility of filing, technical means for identifying and correcting errors and languages offered for the conclusion of the contract but this requirement does not apply to contracts concluded exclusively by exchange of electronic mail or by equivalent individual communications. He also adds that national laws are not harmonized regarding the moment at which a contract is concluded. He concludes his assessment of the directive stating that it is not a document meant to regulate electronic commerce in a final and definitive way being only a first step in the unified approach to electronic commerce at the Community level. See generally pages 392 and 396.
53. Why I disavow all electronic contracts. The author states that the critics consider some kinds of electronic contracts to be too easily forged and their fear is that the act will encourage and facilitate various kinds of online fraud.
54. John Gaffney and Vincent Nolan, *Electronic Commerce Act: Ireland leads the Way*, *International Business Lawyer*, Vol. 28 No. 11 December 2000 at page 495. The writers aver that the promulgation of this Act was a key element of the Irish Government's policy of establishing Ireland as a key international center for e-commerce business.
55. See further Baker & Mackenzie, *Asia Pacific Legal Developments Bulletin*, December 1998, Singapore reprinted by *International Business Lawyer* Vol. 27 No. 4 June 1999 at page 282.

56. Baker & Mackenzie, Asia Pacific Legal Developments Bulletin, *supra*
57. See Bird & Bird, Information Technology, March 1999, Hong Kong as reprinted by International Business Lawyer, Vol. 27 No. 4, June 1999
58. Gomez Pinzon Linares Samper Suarez Villamil & Asociados, Legal Bulletin, July-August 2000, Santa Fe de Bogota, as reprinted by International Business Lawyer, Vol. 28. No. 11, December 2000.
59. See generally Financial Standard, January 22, 2001 at page 38.
60. Benjamin T. Lo, Improving Corporate Governance-Lessons from the European Community
61. Cap. 59, Laws of the Federation of Nigeria 1990.
62. Section 83 of CAMA, see also Section 85 on necessity of an Index of members where members are more than 50
63. Section 97 of CAMA
64. Section 152 of CAMA
65. Section 191 of CAMA
66. Section 193(1) of CAMA
67. Section 275 of CAMA
68. Section 292 of CAMA
69. See also Palmers Company Law, Volume 1, 25th Edition, Sweet & Maxwell, 1992 at paragraph 7.101
70. Section S213(1) of CAMA
71. Section 211(1) of CAMA
72. Palmer's para. 7.604
73. [1990] 1 Ch. 170 (C.A) at page 183
74. Per Tobi JCA in Attorney-General of Enugu State V AVOP PLC 1995 6 NWLR part 399 page 90 at page 117
75. Palmer's para. 7.716
76. May 1996
77. Michael D. Goldman, Mark A. Morton, Eileen M. Filliben and Brian C. Ralston, Corporate Law's Challenge to Keep Pace with Technology, 1999
78. Michael. D. Goldman etc. The authors state that under the "electronic distribution" method, companies notify stockholders, who have previously consented to such notification, by e-mail that complete proxy sets - the annual report, proxy statement, proxy card or voting instruction forms, and any other instructional material is available at a designated URL address. The stockholders use their personal identification numbers to vote and to review materials. No paper flows between the company and the stockholders, and no postage is required. The company is forced, however, to maintain a database with e-mail addresses and to have a back-up plan in the event that the e-mail addresses fail. Under the second, "electronic availability" method, the stockholder receives a hard copy of the proxy card and a letter giving the URL address where the annual report and proxy statement can be found. While postage is still required for the proxy card and letter, overall postage is significantly lower for stockholders who elect not to receive hard copies of the annual report and proxy statement, opting instead to read them on-line. More savings are achieved by the elimination of the expense of collecting and maintaining a database. In 1999, 101 companies had their annual reports and proxy statements available for either of the above methods, electronic distribution or electronic availability. ADP-ICS reported that those companies saved \$2.8 million in postage in 1999, and it has been estimated that they have the potential of saving nearly \$11 million in printing costs in the future.<sup>39</sup> Even if not taking full advantage of electronic distribution or electronic availability, other companies are providing electronic posting for the convenience of their stockholders.
79. Michael D. Goldman etc
80. Gerhard Wegen and Dr. Stefan Mutter, Use of the Internet at Shareholders' Meetings of German Stock Corporations, International Business Lawyer, Volume 28 No. 9 October 2000 at page 401. The authors state that although Corporations have started making available the Chairman's report (in respect of what we term Annual or Extra-ordinary General Meetings) on the company's website, there is a draft ministerial bill (NaStraG however not expected before 2001 or 2002) which aims to open stock corporation law to the use of modern technology.
81. LAWRENCE A. HAMERMESH Beyond the millennium, II It's been 100 years since Delaware took the forefront in corporate law: What's next? ABA Section of Business Law, Business Law Today, November/December 1999. In 1999 a distinguished group of business executives, institutional investors, academics, lawyers and judges assembled in Wilmington to commemorate that auspicious legal development i.e. the DGCL by examining broad trends in Delaware corporate law and practice and how those trends might affect the evolution of Delaware corporate law in its next century.

There was wide agreement that technological advances will increasingly break down global barriers to communication and trade, and business law must develop and adapt to meet these changes. It is only a matter of time before capital flows and corporate governance are initiated, effected and monitored by electronic means, through offerings of securities on the Internet and real-time virtual meetings of stockholders. As Agnich pointed out, the technology is near at hand that would permit direct corporate democracy, in which stockholders make business decisions directly rather than through representative directors. But he also warned against this trend: "Without the capability of a board of directors to govern the corporation and allow management to pursue long-term strategies, you would not see anything but focus on the next quarter's results."

82. Goldman, Morton, Filliben, Ralston, Corporate Law's Challenge To Keep Pace with Technology, *supra*. Significantly, those monitoring via the Internet were not considered present for quorum or voting purposes.
83. Section 46 (1) (a)
84. Section 52(3)
85. See Section 264 on definition of depositary or custodian company whereby securities are treated as fungible and may be transferred, loaned or pledged by book-keeping entry without physical delivery of certificates.
86. As such the market never closes because of the different time zones of the financial nerve centers.
87. Section 264 of the ISA
88. Section 146(3) CAMA
89. Section 264 of the ISA
90. Use of Electronic Media for Delivery Purposes, Securities Act Release No. 7233, 6th October 1995 (October 1995 Release).
91. See generally pages 189 and 190 of Marketing Mutual Funds on the Internet by Jane A. Kantor and Beth-ann Roth, *International Business Lawyer* Vol. 26 No. 4 page 184.
92. No. 24 of 1991.
93. No. 25 of 1991
94. No. 16 of 1995
95. No. 17 of 1995
96. Cap. 411, Laws of the Federation of Nigeria 1990
97. K. Ajayi and K. Adeoba, Stamp Duties Assessment and Payment in Nigeria, *Modus International Law and Business Quarterly*, Volume 5 No. 1 at page 124. The writers add that payment of stamp duties add to bureaucracy thus impeding entrepreneurial progress
98. The Corrupt Practices and Other Related Offences Act No. 5 of 2000
99. Section 2 of Act No. 5 of 2000. Contrast with the restrictive definition contained in Section 2(1) of the Evidence Act.
100. Orjit Das, Cyber laws in India, *International Business Lawyer*, Volume 28 No. 7, July/August 2000. The Bill will enable the courts to recognize digital signatures and electronic records and they may now be admitted as evidence. The Bill will also regulate cyber-crimes and cyber disputes.
101. See note 1 *supra*
102. David Post and David Johnson, See generally *The Internet and the Law: Stop Signs on the Web*, *The Economist*, 13th-19th January 2001 at page 19. At page 23, it is stated that the struggle between freedom and state control will continue to rage on the Internet.

The information contained in this publication is only intended as a general review of the subject concerned and should not be treated as a substitute for specific advice concerning specific situations. If you need further information about any issue discussed above, please contact Bayo Adaralegbe at [agadaralegbe@babalakinandco.com](mailto:agadaralegbe@babalakinandco.com)

**BABALAKIN & CO.**  
 8<sup>th</sup>-10<sup>th</sup> Floors, 24A Campbell Street, Lagos  
 Phone: +234-1-2632185  
 Fax: - +234-1-26237136  
[http: www.babalakinandco.com](http://www.babalakinandco.com)  
 E-mail: [mails@babalakinandco.com](mailto:mails@babalakinandco.com)