



An Overview of BIMCO Electronic Signature Clause 2021 and the Nigerian Law

BACKGROUND

Owing to the emerging digitalization of the shipping trade especially given the challenges and accompanying innovations arising from Covid-19 lockdown and restrictions, BIMCO has introduced Standard Clause 2021¹ (BIMCO Clause) to facilitate electronic signature of shipping commercial contracts by parties to a contract without the necessity of meeting physically. The contracts envisaged are most likely to be charter-parties and other related shipping documents such as Bills of Lading, Letters of Indemnity and the BIMCO Clause could as well be incorporated in other commercial contracts with such modifications as may be necessary.

¹ Available on [Electronic Signature Clause 2021 \(bimco.org\)](https://www.bimco.org) and accessed on September 15, 2021.

This article seeks to highlight the BIMCO Clause and appraise its provisions with the Nigerian Law (so as to serve) as a guide to ship owners, charterers, ship brokers, P & I Clubs and other business stakeholders that intend to do shipping business and other commercial transactions in Nigeria.

Meaning of Electronic Signature

The term Electronic Signature is not defined by any domestic law in Nigeria but by sub-clause (a) of the BIMCO Clause, the term means:

“data in electronic form which is attached to or logically associated with other data in electronic form and which is used by a signatory to sign and includes, without limitation, typing a name into a contract, inserting a signature (in the form of an image) into a contract or using a web-based electronic signature platform to generate an electronic representation of a handwritten signature or a digital signature using public key encryption technology.”

The above definition is flexible and wide enough to cover any form of electronic signature that may be resorted to by the Parties.

Operative Provisions of the BIMCO Electronic Signature Clause 2021

Sub-clause (b) of the BIMCO Clause provides as follows:

“The Parties agree that this Contract, and any documents to be signed in connection herewith, may be electronically signed and the use by a Party of an Electronic Signature shall, for the purposes of validity, enforceability and admissibility, be conclusive evidence of that Party’s intention to be legally bound as if such signature had been written by hand”

The said Sub-clause, in a nutshell, empowers parties to a shipping Contract to electronically execute such documents and other connected documents with the intention that the parties shall be bound by the Contract as if written by hand and same shall be valid, admissible and enforceable against the parties.

Sub-clause (c) on its part provides that:

“In the event that an Electronic Signature is, for any reason whatsoever, not recognized by any relevant person, entity or authority in any applicable jurisdiction, each Party undertakes, upon request, to promptly provide a handwritten signature on any relevant document.”

Thus, where Electronic Signature is not recognized in any jurisdiction, the parties to a shipping contract shall arrange for a handwritten signature. This entails that both the law governing the Contract and the law of the Jurisdiction of the Parties need to recognize the validity of electronic signature to a Contract for such Contract to be binding and enforceable otherwise parties would resort to a handwritten signature.

On the other hand, sub-clause (d) empowers Parties to a contract to execute same in counterparts and each of the counterparts shall be regarded as an original of the Contract and if any of the Counterparts is executed using electronic signature, it shall satisfy the requirements of the BIMCO Clause.²

² BIMCO Electronic Signature Clause 2021 sub-clause (d) “This Contract may be executed in one or more counterparts, each of which shall be deemed to be an original and all of which together shall constitute one and the same agreement. A counterpart bearing an Electronic Signature shall satisfy the requirements of this Clause.”

The Nigerian Law Position on Electronic Signature

The Nigerian **Evidence Act, 2011**³ (the Evidence Act), the **Cybercrimes (Prohibition, Prevention, etc) Act, 2015**⁴ (the Cybercrimes Act) and the **Companies and Allied Matters Act, 2020**⁵ (CAMA) recognise as valid and binding, the use of electronic signature in commercial contracts and transactions. The Evidence Act provides that:

“where a rule of evidence requires a signature, or provides for certain consequences if a document is not signed, an electronic signature satisfies that rule of law or avoids those consequences.”

In the same vein, the Cybercrimes Act provides that *“electronic signature in respect of purchases of goods, and any other transactions shall be binding.”*

While CAMA on its part provides that *“a document or proceeding requiring authentication by a company may be signed by a director, secretary, or other authorised officer of the company, and need not be signed as a deed unless otherwise so required in this Part and that an **electronic signature** is deemed to satisfy the requirement for signing under this section.”* This provision is further complemented by other Sections of CAMA⁶ to the effect that a document is validly executed by a Company as a deed if it is duly executed by the company and delivered as a deed without affixing a common seal on the document provided the document is executed by a director and the secretary of the company; at least by two directors of the company or a director in the presence of at least one witness who shall attest the signature and any such document executed in this manner shall satisfy the requirement of any law requiring affixing of a common

³ Section 93(2) of Evidence Act, 2011

⁴ Section 17(1a) Cybercrimes Act, 2015

⁵ Section 101 of CAMA, 2020

⁶ Sections 102 & 103 of CAMA, 2020

seal to a document for purposes of authentication.

On proof of Electronic Signature, the Evidence Act⁷ provides that *“an electronic signature may be proved in any manner including by showing that a procedure existed by which it is necessary for a person, in order to proceed further with a transaction, to have executed a symbol or security procedure for the purpose of verifying that an electronic record is that of the person”* while the **Cybercrimes Act**⁸ on its part provides that *“whenever the genuineness or otherwise of such signatures is in question, the burden of proof, that the signature does not belong to the purported originator of such electronic signatures shall be on the contender.”*

Exceptions to the use of Electronic Signature in Nigeria

Under the Cybercrimes Act⁹, electronic signature is excluded from certain contractual transactions and declarations such as creation and execution of wills, codicils and or other testamentary documents; death certificate; birth certificate; matters of family law such as marriage, divorce, adoption and other related issues; issuance of Court Orders, notices, official court documents such as affidavit, pleadings, motions and other related judicial documents and instruments; cancellation or termination of utility services; **any instrument required to accompany any transportation or handling of dangerous materials** either solid or liquid in nature and any document ordering withdrawal of drugs, chemicals and any other material either on the ground that such items are fake, dangerous to the people or the environment or expired by any authority empowered to issue orders for withdrawal of such items.

⁷ Section 93(3) of the Evidence Act, 2011.

⁸ Section 17(1b) of the Cybercrimes Act, 2015.

⁹ Section 17(2) of the Cybercrimes Act, 2015.

In a nutshell, Charter-parties and other carriage documents such as Bills of Lading in relation to and/or involving the carriage of ‘dangerous materials’ are excluded from being executed pursuant to any electronic signatures. It is necessary to note that the term ‘dangerous materials’ is not defined in the Cybercrimes Act thereby making it difficult for Parties to a shipping contract to ascertain the goods that may be affected by the exception. This is further compounded by the fact that what amounts to dangerous goods may vary from one jurisdiction to another. For proper guidance therefore, Parties to a shipping contract may have recourse to International Maritime Dangerous Goods (IMDG) Code which contains list of dangerous goods for guidance as to when electronic signature in Contract for carriage of certain goods is not required where a Nigerian Party is involved.

Effect of Unauthorized use of Electronic Signature

By virtue of the Act¹⁰ it is a criminal offence for any person with the intent to defraud and or misrepresent, forges through electronic devices another person’s signature or company mandate and the person shall be liable on conviction to imprisonment for a term of not more than 7 years or a fine of not more than ₦10,000,000.00 or to both fine and imprisonment.



¹⁰ Section 17 (1c) of the Cybercrimes Act, 2015.

Comment

The BIMCO Clause is a step in the right direction which is aimed at maintaining business exigency in shipping trade in line with the current technological advancement in business facilitation. Nigerian Law on the other hand has not only adequately provided for the use of electronic signature as a valid and binding way of business transaction and document authentication, but has also placed the burden of proof of establishing that an electronic signature is not that of the maker, on the contender.

Nigerian law, in recognition of the cyber security threats and possible compromise of the integrity of electronic documents, has also gone ahead to criminalise illegal and unauthorised interception, forgery and use of someone’s electronic signature with the intent to defraud and misrepresent the person.

It is also expedient for Ship Owners/Carriers and Charterers, as the case may be, to ascertain the nature of the goods for Nigeria destination and confirm whether they fall under the category of dangerous materials prior to affixing their electronic signature in any Charter-parties or other shipping documents such as Bills of Lading. It would also be prudent for the Ship Owner/Carrier to ensure the inclusion of the usual “dangerous goods” clause contained in Bills of Lading.

Whilst contending that the BIMCO Clause is a necessary tool in this global digital economy, there is the need for Parties resorting to electronic means of transaction to have a watertight end-to-end cyber security process to ensure authenticity of documents executed and exchanged through electronic means.



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