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**THE LEGAL IMPLICATIONS OF
“CASHLESS LAGOS”
ON STAKEHOLDERS**

BY

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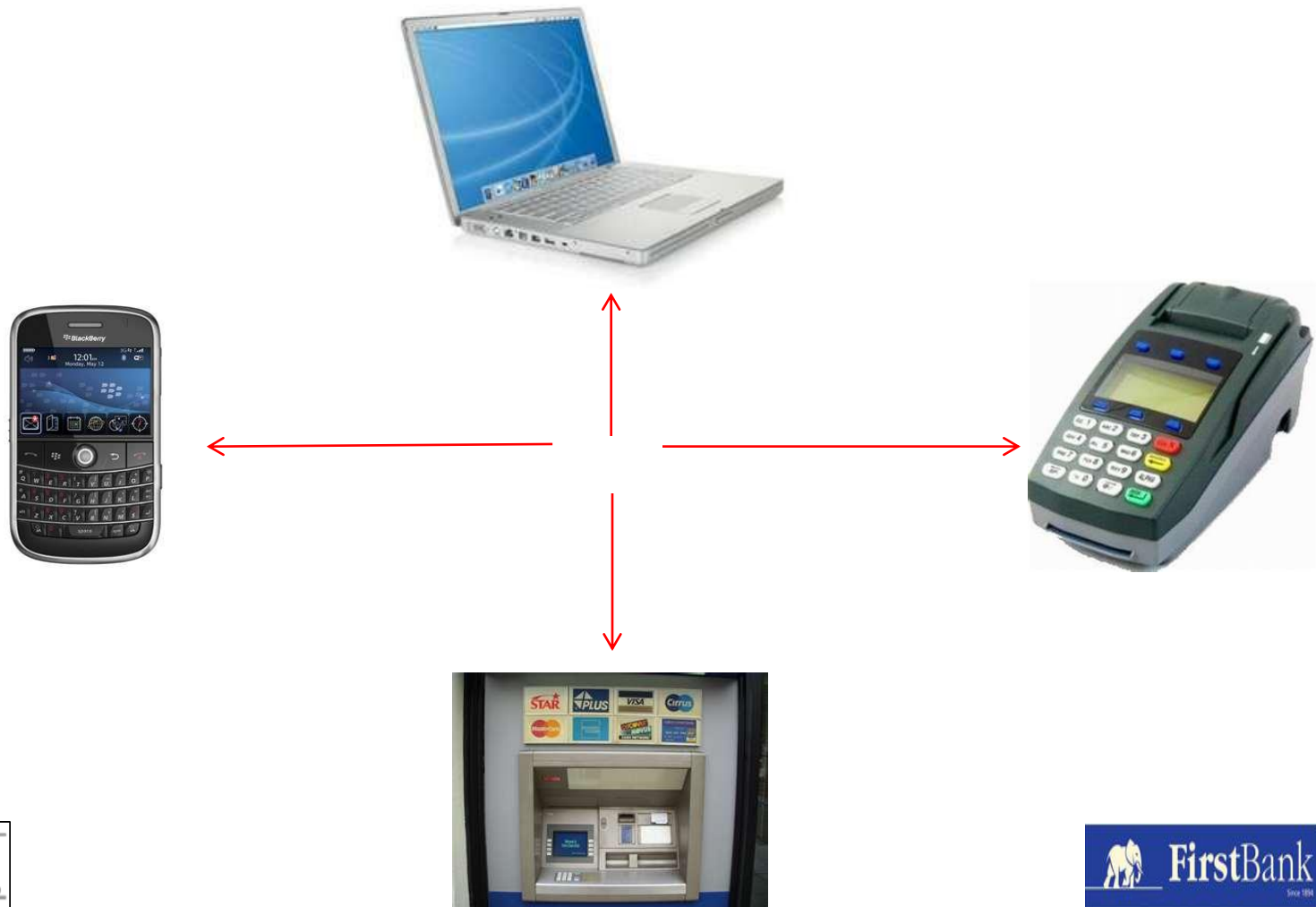
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WHAT IS THE “CASHLESS LAGOS” POLICY?

The “Cashless Lagos” is a policy introduced by the Central Bank of Nigeria aimed at reducing the amount of physical cash (coins and notes) circulating in the economy **and encouraging more electronic – based transactions** (payments for goods, services, transfers, etc.)

FUNDAMENTALS OF “CASHLESS LAGOS”



FEATURES OF THE “CASHLESS LAGOS” POLICY

- A ‘cash handling charge’ on daily cash withdrawals or cash deposits that exceeds N500,000 for Individuals and N3,000,000 for Corporate bodies.
- Cash handling charge:
 - Affects both deposits and withdrawals.
- Processing fee for withdrawals:
 - 3% for Individuals
 - 5% for Corporate Bodies
- Processing fee for lodgments:
 - 2% for Individuals
 - 3% for Corporate Bodies
- Exemptions
 - Ministries, Departments and Agencies of the Federal and State Governments on lodgments for accounts operated by them, for the purpose of revenue collections **ONLY**.



FEATURES OF THE “CASHLESS LAGOS” POLICY CONT'D

- The following aspects of the policy have been applicable from 1st January 2012 in Lagos:
 - Only Cash In Transit (CIT) licensed companies shall be allowed to provide cash pick-up services. Banks will cease cash in transit lodgment services rendered to merchant-customers in Lagos State from 31st December 2011.
 - 3rd party cheques above N500,000 shall not be eligible for encashment over the counter. Value for such cheques shall be received through the clearing house.
- **The limits are cumulative daily limits** and apply to an account so far as it involves cash, **irrespective of the channel** in which cash is withdrawn or deposited (e.g. over the counter withdrawals, ATM, 3rd party cheques cashed over the counter, etc):
 - e.g. if an individual withdraws N450,000 over the counter, and N150,000 from the ATM on the same day, the total amount withdrawn by the customer is N600,000, and the service charge will apply on N100,000 - the amount above the daily free limit.



FEATURES OF THE “CASHLESS LAGOS” POLICY CONT'D

- Charges/fees shall apply for all transactions in Lagos, and on Lagos State based accounts effective from 1st April 2012.
- For accounts outside Lagos, charges/fees shall apply effective from 1st January 2013.
- Transactions initiated out of Lagos State, and affecting a Lagos based account shall not attract charges/fees for now, and shall not be counted as part of the daily cumulative amount on that account since the policy has not been activated outside Lagos. (E.g. A deposit above the limit made from Onitsha into a Lagos State account shall not attract charges/fees).
- Transactions initiated from Lagos State, and affecting an account outside Lagos, shall attract charges/fees (when the specific transaction is above the limit), since the policy has been activated in Lagos. (E.g. A deposit made from Lagos State above the limit, into an account in Abuja, shall result in the initiator paying the relevant charges/fees, while the account into which it is paid outside Lagos shall not be impacted).



AIMS OF THE “CASHLESS LAGOS” POLICY

For Consumers

- Increased convenience
- More service options
- Reduced risk of cash-related crimes
- Reduced cost of banking

For Corporations

- Reduced revenue leakage
- Reduced cash handling costs

For Banks

- Reduced cash management costs
- Faster payment systems

For Government

- Improved tax collections
- Better management of money in circulation
- Reduction in Bribery and Corruption
- Reduction in Money Laundering

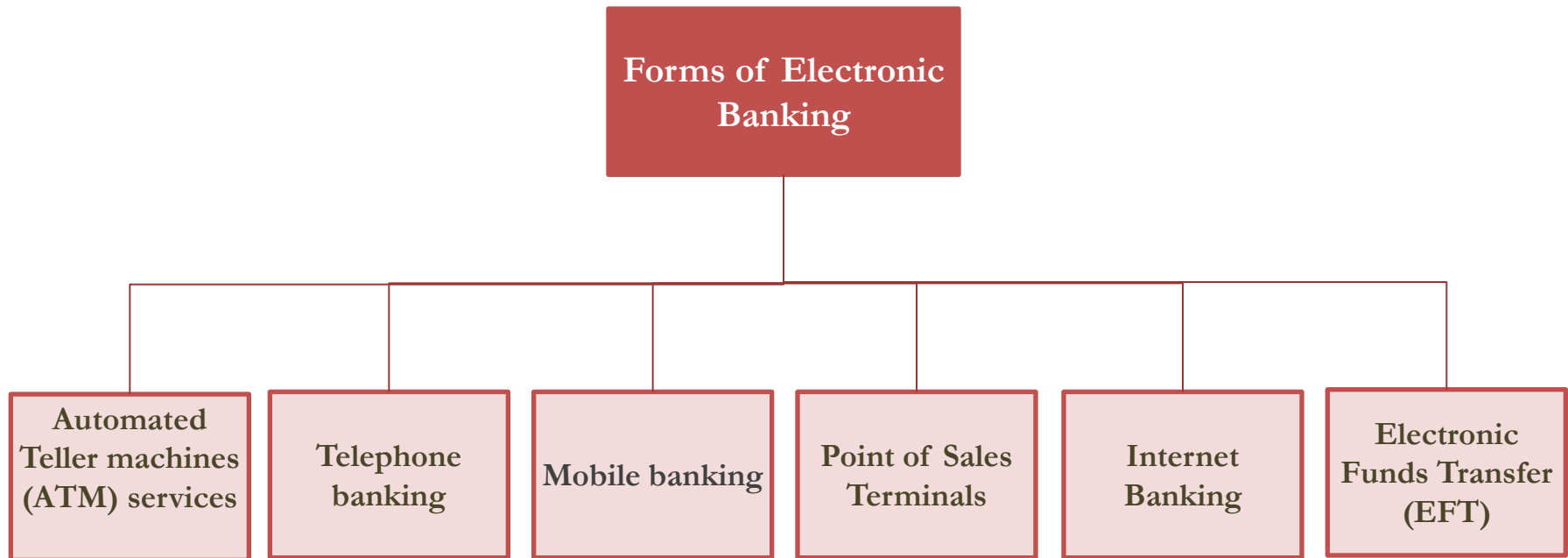


STAKEHOLDERS INVOLVED/AFFECTED BY THE POLICY



ELECTRONIC BANKING LIES AT THE BEDROCK OF THE “CASHLESS LAGOS” POLICY

Electronic banking simply refers to a means of banking whereby banking business is facilitated through the use of information communication technologies and electronic communication devices.



LEGAL IMPLICATIONS OF “CASHLESS LAGOS”/ ELECTRONIC BANKING

- In analyzing the legal implications of electronic banking, it will be expedient to examine the laws that are relevant in that regard.
- Currently, there is no **explicit** law to regulate electronic transactions, electronic banking or e-commerce in Nigeria.
- We thus have to consider the powers of the Central Bank of Nigeria (CBN) under S33(1)(b) of the CBN Act 2007 to issue guidelines to any person and any institution under its supervision as well as the powers of the CBN to make regulations under the Banks and Other Financial Institutions Act.
- With respect to Electronic Banking, the CBN has issued the following relevant Guidelines and Regulatory Framework:
 - Guidelines on Electronic Banking 2003;
 - Guidelines on Transaction Switching Services;
 - Regulatory Framework for Mobile Payment Services in Nigeria; and
 - Guidelines on Point of Sale (POS) Card Acceptance Services.



LEGAL ISSUES

- Electronic Funds Transfer (EFT)
- Legal Liability of Switching Companies
- Mobile Payments
- Status of Electronic Documents and Signatures
- Evidential Value of Electronic Signatures
- The Legal Control of Crimes in Electronic Banking
- Data Confidentiality
- Consumer Protection
- Applicable Laws in the Event of a Dispute
- Legal Status of CBN Guidelines

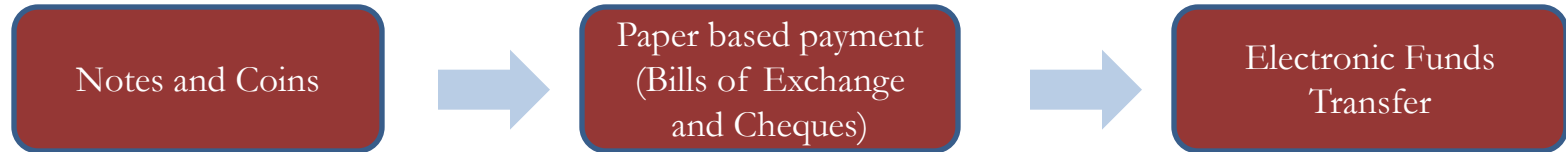


Electronic Funds Transfer



ELECTRONIC FUNDS TRANSFER

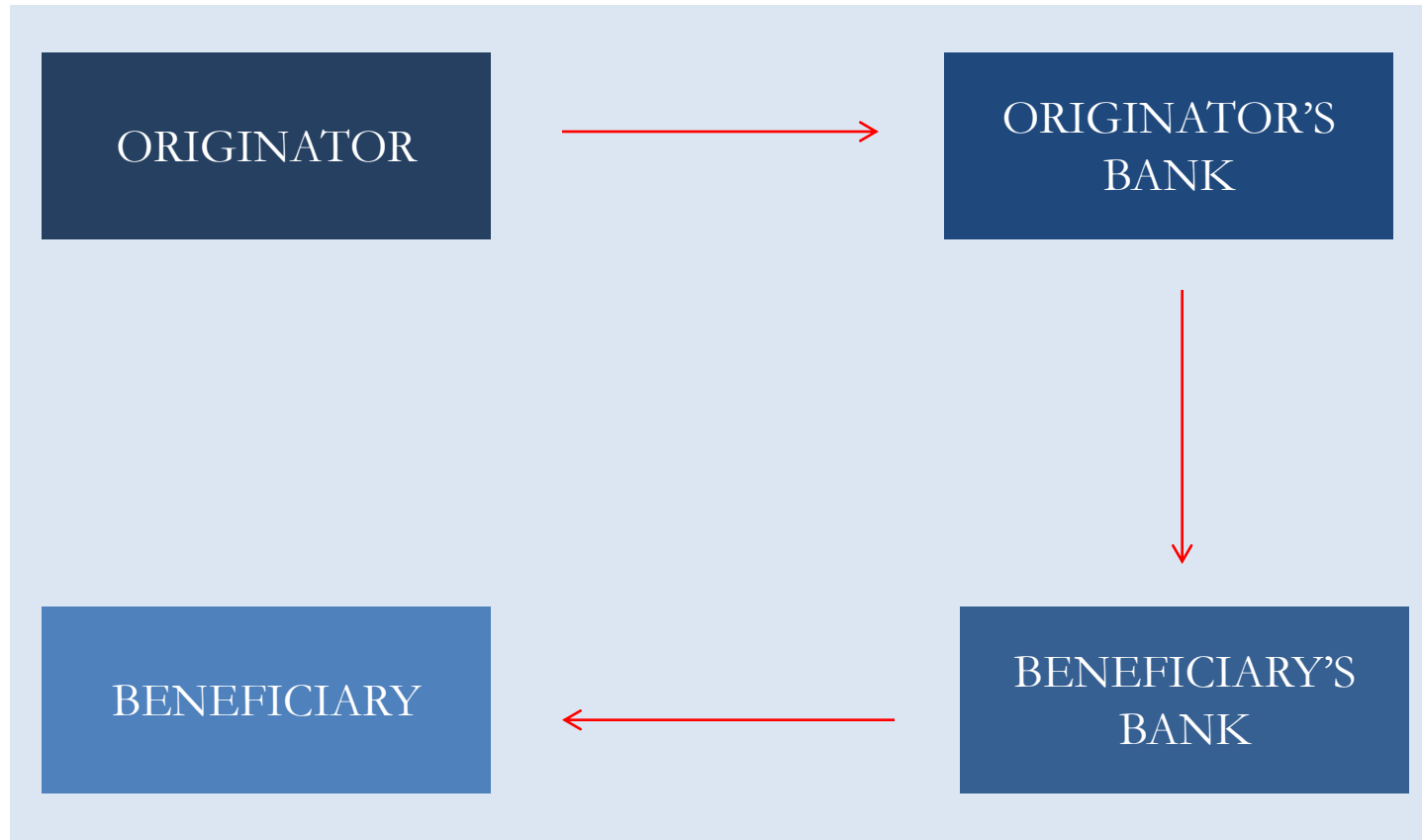
- Payment by Electronic Funds Transfer has been described as the third of the three great ages of payment (*UNCITRAL, Legal Guide on Electronic Funds Transfers, 1987 United Nations, New York*):



- No universally accepted legal definition of EFT.
- The **United States Electronic Funds Transfer Act of 1978** defines EFT as:
“any transfer of funds, other than a transaction originated by check, draft or similar paper instrument which is initiated through an electronic terminal, or computer or magnetic tape so as to order, instruct or authorize a financial institution to debit or credit an account”
- The **United Nations Commission on International Trade Law (UNCITRAL)** defines EFT as:
“a funds transfer in which one or more steps in the process that were previously done by paper – based techniques are now done by electronic techniques”.
- Electronic Funds Transfer can be by ATMs, Electronic Funds Transfer Point of Sale and Internet Banking.



BASIC FLOW OF AN EFT



KEY LEGAL ISSUES WITH EFT

- **Relationship between the Originator and Originator's Bank**

- Where the originator is a customer of the bank instructed to make a transfer, the relationship is that of debtor and creditor (and not agency) and the bank is under a duty to obey its customer's mandate. See **Foley v Hill (1848) 2 HL Cas 28, Sanni Abacha Foundation for Peace and Unity v UBA Plc (2010) 17 NWLR pt. 1221 pg. 192 .**
- Issues arise where the instruction is given through an electronic device that has been by-passed by a third party for e.g. through a computer where a password is used which merely **authenticates** the instruction but does not **identify** the person who gave the instruction.
- **GENERALLY**, as long as all security mechanisms as provided by the bank have been duly followed (albeit by a third party), the bank will be under no liability for processing such instructions **SUBJECT** to the duty of the originator's bank to use reasonable care and skill in carrying out the payment order. This duty arises primarily out of common law.
- Where the originator's bank acts within the terms of its originator's payment instruction, it is irrelevant if the underlying transaction between the originator and the beneficiary is vitiated by beneficiary's fraud or misrepresentation or mistake so long as the originator's bank had no notice.



KEY LEGAL ISSUES WITH EFT CONT'D

- **Relationship between the Originator's Bank and the Beneficiary**
 - The contractual duty of care and skill owed by the originator's bank to the originator does not extend to the beneficiary as there is no contractual link between them.
 - A dissatisfied beneficiary should be able to pursue the originator for a breach of the underlying contract and the originator may then sue his own bank for applicable remedies.
- ❖ **Who bears the liability as between the Originator's bank and Beneficiary's bank for wrongful/erroneous instructions authorised by an Originator and already credited to the Beneficiary ?**



KEY LEGAL ISSUES WITH EFT CONT'D

- **Is a payment by EFT recognized as payment by legal tender under Nigerian Law?**
 - Payment through the use of funds transfer system is **strictly legally speaking** not payment by Legal Tender .
 - Legal Tender are coins and bank notes which meet the requirement for legal tender. See Section 19(1) and (2) CBN Act 2007 which defines notes and coins issued by the CBN as legal tender .
 - Unless a person has expressly or impliedly agreed to accept payment by some other means, a creditor is entitled to demand and is only obliged to accept payment in legal tender. See **Libyan Arab Foreign Bank v. Bankers Trust Co 1989 QB 728.**
 - In Netherlands, the 1992 Dutch Civil Code stipulates that payment by credit transfer is legal tender.
 - However, courts in recognition of commercial realities have been willing to recognize electronic funds transfer as “legal tender” transfers. In **Tenax Steamship Co Ltd v. The Brimnes 1975 QB 929 CA**, the court recognized “payment in cash” to include a bank transfer of immediately available funds.



Liability of Switching Companies



Liability of Switching Companies

- In Nigeria, the CBN Guidelines on Transactions Switching Services sets out the procedure for the operation of switching services.
- The Guideline also provides for the regulation of the relationship between Switching Companies and other parties to the Switching Services including Banks, NIBSS, Merchants and Cardholders.
- Fundamentally, in the absence of specific laws on electronic transactions, recourse will have to be had to the Guideline and the specific contracts entered into between the Switching Companies and the Banks further to Section 1.4.4 of the Guideline.
- These contracts detail the responsibilities of each party, operational rules and procedures and liabilities of parties in the event of loss of funds arising from negligence of any of the Parties.



Mobile Payments



MOBILE PAYMENTS

- The regulatory regime for Mobile Banking popularly called Mobile Money is contained in the “Regulatory Framework for Mobile Payments Services in Nigeria” issued by the CBN.
- The framework sets out the terms upon which Participants in the Mobile Payment System will operate.
- Participants include service providers, infrastructural providers, solution providers, scheme operators and the consumers.
- No specific sanctions are provided in the framework for non- compliance.



Status of Electronic Documents and Signatures



THE LEGAL STATUS OF ELECTRONIC SIGNATURES

Legal Status of Electronic Signatures

- Various laws of some countries (e.g. Australia, Canada, India, England) recognize that where a signature is ordinarily required, this condition is met where the method used to identify the person and to indicate the person's approval of the information communicated was as reliable as was appropriate for the purpose and the person to whom the signature is required gives consent to the requirement being met electronically.
- Electronic signature is defined under S7(2) Electronic Communications Act (UK) as:
“...anything in electronic form that is incorporated into or otherwise logically associated with any electronic communication or electronic data; and purports to be so incorporated or associated for the purpose of being used in establishing the authenticity of the communication or data, the integrity of the communication of data, or both”.

Types of Electronic Signature

- Typing a name into a document
- Clicking the ‘I accept’ icon
- PIN
- Scanned Signature



THE LEGAL STATUS OF ELECTRONIC SIGNATURES

CONT'D

The Nigerian Situation

- Nigeria lacks a specific legal framework to regulate electronic transactions and signatures. Most of the existing Nigerian laws were made prior to the digital revolution and do not give cognizance to the relevant application of ICT in modern day activities.
- In recognition of this fact, Paragraph 3.0(b) of the CBN Guidelines on Electronic Banking stipulates that digital signatures should **not be solely relied** on as evidence in electronic banking transactions given that there is no legislation to regulate electronic banking in Nigeria. However, this raises the practical issue of the nature of evidence to be relied on in such instances.
- For some years now the Nigerian Electronic Transactions Bill has been pending before the National Assembly. The Bill proposes to give electronic documents a functional recognition. Electronic documents and signatures **are indispensable** in electronic banking transactions; consequently, it is imperative that electronic documents and signatures should be legally recognised in Nigeria.
- In the absence of specific laws governing this area, it is expected that in the event of a dispute, reliance will have to be placed on specific contractual provisions of counterparties with whom consumers deal with online for transactions involving local and foreign counterparties.



Evidential Value of Electronic Signatures



EVIDENTIAL VALUE OF ELECTRONIC SIGNATURES

- The lack of clarity about the legal status of electronic signatures has also been problematic in establishing the evidential status of hard copies of electronic documents and transactions.
- Consequently, digital documents and signatures may not be solely reliable as evidence in electronic banking transactions.
- However, Section 84 of the Evidence Act 2011 provides for the admissibility of Statements and Documents produced by Computers.



The Legal Control of Crimes in Electronic Banking



THE LEGAL CONTROL OF CRIMES IN ELECTRONIC BANKING

- In Nigeria most forms of malicious conducts that affect electronic banking such as unauthorised access, unauthorised interception of data, computer hacking, spamming, online identity theft, and ordering goods electronically, using skimmed credit or debit cards **are not explicitly criminalized**.
- S36(12) of the 1999 Constitution provides generally that *a person shall not be convicted of a criminal offence unless that offence is defined and the penalty therefore is prescribed in a written law*.
 - *Nulla poena sine lege* (No penalty without a law).
- However the CBN Guidelines on Electronic Banking 2003 provides that banks will be considered liable for fraud arising from card skimming and counterfeiting except where it is proven that the merchant is negligent and that a cardholder will be generally liable for frauds arising from the misuse of a card's Personal Identification Numbers (PIN).
- S 383 (1) of the Criminal Code provides that – A person who fraudulently takes anything capable of being stolen, or fraudulently converts to his own use or to the use of any other person anything capable of being stolen, is said to steal that thing.
- Although the Nigerian Advance Fee Fraud Offences Act attempts to criminalise various species of fraudulent conducts that may be perpetrated in an electronic environment, the scope of the Act is limited to advance fee fraud offences and is thus insufficient.



THE LEGAL CONTROL OF CRIMES IN ELECTRONIC BANKING CONT'D

United States

- Electronic Funds Transfer Act (EFTA) Title 15: Ss.1693m and 1693n comprehensively provide for the protection of individual consumer rights in electronic funds transfer systems. The Act protects consumers who use electronic funds transfer systems such as ATMs, Point of Sale Terminals (POS), and remote banking programs. It also creates provisions for civil and criminal liabilities as well as the administrative enforcement of the Act.

United Kingdom

- In the UK, a consumer is responsible for all transactions carried out by the use of his/her card where such transaction was initiated with the consumer's authority and for all other (unauthorised/fraudulent) transactions carried out by the use of the card up to a limit of GBP 50
- However, the consumer's liability for fraudulent transactions ceases when the customer informs the bank that the card has been lost or stolen. This is in accordance with the provisions of Ss.84 and 171 of the Consumer Credit Act 1974 and the Regulations made under it relating to credit cards as well as the policy of the Banking Code adopted in September 2000 by the British Bankers Association and the Association of Payment Clearing Services.



THE LEGAL CONTROL OF CRIMES IN ELECTRONIC BANKING CONTD

Nigeria

- Nigerian Computer Security and Critical Infrastructure Protection Bill also known as “Cybercrime Bill” is pending before the National Assembly and needs to be passed urgently.
- Nigerian law enforcement agencies have to be retrained to acquire the requisite human and technical capacities to combat malicious conduct in the electronic banking environment.
- ❖ **Who bears the liability for phishing websites (that replicate a genuine website of a bank) where a customer is lured to enter his/her PIN**



Data Confidentiality/Protection



DATA CONFIDENTIALITY/PROTECTION

- In this information age, it is essential that consumers have confidence in the handling of their personal information particularly with respect to online operations and financial service products as technology makes it much easier to infringe on the rights of individuals especially when it comes to their personal data.
- S 1.5.5 of the CBN Guidelines on Transactions Switching Services provides that Acquirers (Banks) whose transactions are switched shall maintain databases that can handle information relating to cardholders for a period of 10 years.
- In recognition of the risks that can accrue to an individual, privacy laws have been enacted the world over to act as a cushion to define what constitutes legal and illegal activity when it comes to the protection of an individual's data.
- With regard to the Cashless Policy, it is important that data protection laws are put in place to protect consumers especially when making payments for goods and services online or through POS Terminals.



DATA CONFIDENTIALITY/PROTECTION CONT'D

Data Protection Law in the UK

- These are contained in the Data Protection Act (1998) through the Data Protection Principles which are as follows:
 - Personal data is to be obtained and processed fairly and lawfully;
 - Data is to be processed for specified purposes
 - Personal information should be adequately relevant and not excessive in relation to the purpose for which it is processed;
 - Personal Information should be accurate and kept up to date where necessary;
 - Personal Information should not be kept longer than necessary for the purpose for which it is processed;
 - Technical and organizational measures shall be taken to ensure that personal information is secure from damage or destruction; and
 - Personal Information must not be transferred to a country without equivalent level of data protection.



Consumer Protection



CONSUMER PROTECTION

- It is pertinent to note that the legal and regulatory framework for the protection of consumers under the Nigerian Consumer Protection Council Act also applies to banking services such as electronic banking. **See Sections 2 – 6 Nigerian Consumer Protection Council Act.**
- Under the Act, the Consumer Protection Council is mandated, *inter alia*, to provide speedy redress for consumer complaints through alternative dispute resolution mechanisms such as negotiation mediation and conciliation.
- The Council can also compel an organisation or a service provider found liable to provide relief and compensation to consumers who have been injured as a result of the effects of adverse technologies.
- So far, the existence of the Consumer Protection Act has not had any tremendous impact on the protection of consumers who utilise electronic banking platforms.
- The CBN Guidelines on Electronic Banking recognise the rights of consumers under the Nigerian Consumer Protection Council Act, and also enjoins banks to insure themselves against risks of unauthorised transfers from customers' accounts through hacking and denial of services as a result of technological failures.



Applicable Laws in the Event of a Dispute



APPLICABLE LAWS IN THE EVENT OF A DISPUTE

- E-banking transaction can transcend national borders particularly in a situation where a transaction involves money transfers from or to a jurisdiction outside Nigeria.
- The issue of the applicable law becomes important under this situation in the event of a dispute.
- What law will then be applicable? The courts have relied on the following in answering this question:
 - Statutory provisions;
 - Common Law and Equity;
 - Contractual provisions;
 - The law of the jurisdiction closely connected with the contract either in terms of where the contract was made or where it is expected to be executed or where the parties are domiciled; and
 - Conflict of laws.



Legal Status of CBN Guidelines



LEGAL STATUS OF THE CBN GUIDELINES

- As earlier stated, the CBN Guidelines on Electronic Banking and Transaction Switching Services have been pivotal in providing a framework to guide electronic Banking and E – Commerce in Nigeria.
- Are these Guidelines merely “guidelines” or are they binding on Stakeholders?
- S33(1)(b) of the CBN Act empowers the CBN to issue Guidelines to any person and any institution **under its supervision**.
- S 35(b) further provides that a person or institution that fails to comply with any guideline issued under S33 (1)(b) shall be liable on conviction:
 - (a) in the case of an institution, to a fine not exceeding N10,000,000; and
 - (b) in the case of a person, to imprisonment for a term not exceeding three years or to a fine of not less than N50,000 and not exceeding N2,000,000 or to both such imprisonment and fine.
- From the above it is clear that the Guidelines are binding on Banks and other financial institutions and intermediaries and should be complied with to avoid sanctions provided therein.
- However, the Guidelines do not explicitly provide for sanctions.
- Therefore, the pronouncement by the Court of Appeal (albeit obiter) in **H.N.B Ltd v Gifts Unique (Nig.) Ltd** that the guidelines mean no more than guidelines and policies to banks which have no force of law is questionable.



CONCLUSION



CONCLUSION

- The CBN Guidelines have not fully addressed the legal and regulatory challenges of electronic banking in Nigeria.
- Therefore the following Acts need to be passed urgently:
 - **Data Protection Act** to safeguard the information of customers and consumers;
 - **Nigerian Electronic Transactions Act** to regulate electronic transactions and give legal efficacy to electronic contracts and signatures;
 - **Nigerian Computer Security and Critical Infrastructure Protection Act** to specifically criminalise electronic/computer based crimes; and
 - **National Payment Systems Bill** to regulate the payment system and relationship between participants in the system
- Banks in collaboration with the regulator can also sponsor relevant bills at the National Assembly.
- Banks and other electronic financial service providers must also invest in capacity building and robust Information Technology software.



CONCLUSION CONT'D

- The Judiciary will also have to undergo some institutional capacity building in order to properly dispense justice in cases bordering on electronic banking and determine such cases on commercial realism. Consequently any interpretative approach that may stifle the development of electronic banking should be discouraged.
- Consumers need to play their part by being more security conscious when utilising electronic banking services particularly with unintended disclosure of passwords
- The CBN needs to embark on more enlightenment programmes in respect of the “Cashless Lagos” Policy especially considering the high level of illiteracy in Nigeria.
- Improved collaborative efforts amongst the regulators e.g. the CBN and NCC.



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