



LEGAL ASPECTS OF ELECTRONIC BANKING IN NIGERIA: AN OVERVIEW

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INTRODUCTION

Technology, in the 21st century, has become widespread and its effect inevitable. Not spared by the revolution, is the banking industry.

A notable development in the industry is the adoption of information and communication technologies (ICT) in providing banking services and goods.

Examples of ICT-based products include Automated Teller Machines (ATMs) transactions, pay-by-phone systems and personal computer banking, among others, which form the subject of electronic banking, or electronic funds transfers (EFTs).

Electronic funds transfers have been described as the third of the great ages of payment, the first being payment by cash (notes and coins) and the second being paper based payment (for instance, cheques).

It is not only advantageous to financial institutions because it can speed up processing of transactions, reduce costs, and help attract and retain customers, but also to consumers, as they can save time and money and may be more convenient than conventional ways of banking.

Electronic banking started in the 1980s, the revolution took place throughout the 20th century and flourished even more in the 21st century with the advancements in the internet, the trend shifting towards use of internet as a medium, to electronically perform the transactions for both customers and banks. Since then, an impressive number of innovative electronic banking systems have been developed and tested commercially.

WHAT IS ELECTRONIC BANKING?

- ▶ Simply put, electronic banking is the process by which a bank customer initiates banking transactions via electronic device without visiting the brick-and-mortar institution.
- ▶ **According to Report of Technical Committee on E-Banking (CBN, 2003)**, e-banking can be defined as “a means whereby banking business is transacted using automated processes and electronic devices such as personal computers, telephones, facsimiles, Internet, card payments and other electronic channels.”
- ▶ Electronic Banking (Also known as “Electronic Fund Transfer”) is defined by **Section 58 of Cybercrime (Prohibition, Prevention Etc) Act 2015** to mean “ any transfer of funds which is initiated by a person by way of instruction, authorization or order to a bank to debit or credit an account maintained with that bank through electronic means and includes point of sales transfer, automated teller machine transactions, direct deposits or withdrawal of funds, transfer initiated by telephone, internet and card payment.”
- ▶ The most distinguishing feature of e-banking is that it is a kind of banking that involves electronic form of money transmission using an electronic device. Here, banking services are fully automated such that transactions are concluded in a jiffy without visiting the banking hall or having any physical interaction with a bank personnel

TASKS THAT CAN BE PERFORMED THROUGH E-BANKING

- ▶ A bank customer can perform the following non-transactional tasks through e-banking or online banking:
 1. Viewing account balances
 2. Viewing recent transactions
 3. Downloading bank statements, for example in PDF format
 4. Viewing images of paid cheques
 5. Ordering cheque books
 6. Downloading periodic account statements
 7. Downloading applications for M-banking, E-banking etc.
- ▶ Bank customers can transact the following banking tasks through e-banking:
 1. Funds transfers between the customer's linked accounts
 2. Paying third parties, including bill payments and third party fund transfers etc
 3. Investment purchase or sale
 4. Loan applications and transactions, such as repayments of enrollments
 5. Credit card applications
 6. Register utility billers and make bill payments
- ▶ Some financial institutions offer special internet banking services, for example:
- ▶ Personal financial management support, such as importing data into personal accounting software. Some online banking platforms support account aggregation to allow the customers to monitor all of their accounts in one place whether they are with their main bank or with other institutions.

BENEFITS OF ELECTRONIC BANKING

- ▶ There are some advantages on using e-banking both for banks and customers:
- ▶ TO THE CUSTOMER:
 1. Permanent access to the bank
 2. Lower transaction costs / general cost reductions
 3. Access anywhere
 4. Less time consuming
 5. Very safe and secure method
 6. Helps to transfer the money immediately and accurately
- ▶ TO THE BANK:
 1. Banks need not open new branches as customers can have access to their accounts 24hrs a day
 2. The customers do all the work themselves so staff numbers can be reduced
 3. It reduces overhead costs (heating and lightening, insurance, salaries etc)
 4. it makes banks to be more competitive and creative in providing incentives to customers

LEGAL COMPONENTS OF ELECTRONIC BANKING

- ▶ Going by our definition of electronic banking, the following can be identified as the indispensable components of electronic banking:

1. Bank
2. Bank Customer
3. Banking Transaction/Business
4. Electronic Device (Access Device)

Let us take a brief look at these legal components of e-banking

LEGAL COMPONENTS OF E-BANKING (CONTINUE)

WHAT IS A BANK?

It is pivotal to have a proper conceptual understanding of what a bank is because as Pastre and Jeffers put it,

“[t]here seems even to be a confusion about what is a bank, especially with the integration of ICT in the industry.”

There is no single international legal definition on what a bank is, with each country adopting one favorable to its legal system but with a common thread – that is- of conducting banking business.

In general terms however, a bank is understood as an organization, usually a corporation, chartered by a government, which receives demand deposits and time deposits, honors instruments drawn on them, and pays interest on them; discounts notes, makes loans, and invests in securities; collects checks, drafts, and notes; certifies depositor's checks; and issues drafts and cashier's checks.

In Nigeria, there seems to be countless statutory and judicial definitions of what a bank is. However, the common denominator amongst these plethora of definitions is that a bank must be a corporate person duly licensed by the appropriate authority to carry on the business of banking.

- ▶ *Section 59 of the NIGERIA DEPOSIT INSURANCE CORPORATION ACT 2006,*
- ▶ *Section 2 of the CORRUPT PRACTICES AND OTHER RELATED OFFENCES ACT 2000 etc*
- ▶ *A.D.I.I Ltd Vs A.T Ltd (2006) 10 NWLR (PT 989) 635 to 651,*
- ▶ *CBN Vs S.C.S.B.V (No 1) (2015) 11NWLR (PT 1469), 130 at 150*

For a clearer and more in-depth understanding of the statutory and judicial definitions of a bank, we refer you to our book titled: Banker-Customer Relationship: A Practical Legal Guide

LEGAL COMPONENTS OF E-BANKING (CONTINUE)

WHO IS A BANK CUSTOMER?

A bank customer is not defined under statute.

In general terms, however, a customer means a person who buys goods or services from a shop or business.

In banking terms, a customer can be either an incorporated body or a substantive person who:

- ▶ holds an account with a bank; or
- ▶ is in the process of opening an account with a bank; or
- ▶ the person for whom a bank has agreed to enter into a contractual relationship on a banking related transaction.

See I.T.P.P Ltd Vs U.B.N Plc (2006) 12 NWLR (PT 995) 483 at 516

- ▶ **For a clearer and more in-depth understanding of the statutory and judicial definitions of a bank customer, we refer you to our book titled: Banker-Customer Relationship: A Practical Legal Guide**

LEGAL COMPONENTS OF E-BANKING (CONTINUE)

WHAT IS BANKING BUSINESS ?

In Nigeria, banking business, according to **Section 6 of the Banks and other Financial Institutions Act 1991 (as amended in 1997, 1998, 1999, AND 2002)** means:

- ▶ The business of receiving deposits on current account, savings account or other similar account;
- ▶ Paying or collecting cheques, drawn by or paid in by customers;
- ▶ Provision of finance or such other business as the Governor of the Central Bank of Nigeria may, by order published in the Gazette, designate as banking business. **See also the case of Societe Bancaire (Nig) Ltd Vs Margarida Salvado De Lluch (2004) 18 NWLR (PT 905) 341 SC**

This definition places every emphases on money deposits and cheque payments and it does not seem to be in tune with the present reality of ICT in carrying on banking business operations in Nigeria.

There was no attempt to accommodate “Electronic Banking Business”, i.e., banking transactions conducted through electronic means.

Going by the e-banking revolution currently skyjacking banking operations in Nigeria, it has become extremely imperative for the Nigerian Lawmakers to either amend the existing laws or promulgate a new law that will make adequate provision for e-banking business in Nigeria

LEGAL COMPONENTS OF E-BANKING (CONTINUE)

WHAT IS ELECTRONIC DEVICE?

Electronic Devices (also known as Electronic Channels, Electronic Techniques, Access Devices etc) are the bedrock of electronic banking. They are what make the difference between cash/coin banking and cheque/paper banking on one hand and electronic banking on the other hand.

Section 58 of Cybercrime (Prohibition Prevent Etc) Act 2015 describes Electronic Device to mean “a device which accomplishes its purpose electronically and this includes computer systems, telecommunication devices, smart phones, access cards, debit cards, credit cards, loyalty cards etc”

“Access Device” on its own is described by the Act to include:

1. Debit Cards (2) Credit Cards (3) Charge Cards (4) Loyalty Cards (5) Magnetic Stripe Based Cards (6) Smart Chip Based Cards (7) EMV Cards (8) Passwords (9) Personal Identification Numbers (10) Electronic Plate (11) Electronic Serial Number (12) Code Number (13) Mobile Identification Number (14) Any account number or other telecommunications service, equipment, or instrument identifier, or other means of account access including telephones, PDAs etc (15) Automated Teller Machines (17) Point of Sales Terminals, and (18) other vending machines

From the view point of access and media, electronic banking devices can be categorize into:

1. Electronic banking using a telephone connection (phone banking and mobile banking);
2. Electronic banking using a computer connection (home banking, internet banking and mail-banking); and
3. Electronic banking using payment instruments (post-paid cards, pre-paid cards, money on a microchip etc.)

LEGAL NATURE OF BANKER AND CUSTOMER RELATIONSHIP BEFORE THE EMERGENCE OF ELECTRONIC BANKING

Before the emergence of e-banking, what was primarily invoked was what we call cash/coin banking and cheque/paper banking. The cash and paper banking necessitated the use of branch banking since there was no network to interlink customers' accounts and interconnect banking activities. This by implication dictated the nature of the banker-customer relationship as at that time.

A good illustration of this point was demonstrated in the Judgment of Lord Atkin in the celebrated case of **Joachimson .Vs. Swiss Bank (1921) 3 KB 110 at 127.**

In that case, Lord Atkin describes the relationship between the bank and its customers as one and the same contract involving obligations on both sides and includes the following conditions:

1. The bank undertakes to receive money and to collect cheques for its customer's account;
2. The proceeds so received are not to be held in trust for the customer, but the bank borrows the proceeds and undertakes to repay them;
3. The Promise to repay is to repay at the branch of the bank where the account is kept;
4. It includes a promise to repay any part of the amount due against the written order of the customer addressed to the bank at the branch;
5. Such written orders may be outstanding in the ordinary course of business for two or three days;
6. The bank will not cease to do business with the customer except upon reasonable notice;
7. The customer undertakes to exercise reasonable care in executing her written orders so as not to mislead the bank or facilitate forgery;
8. The bank is not liable to pay the customer the full amount until he demands payment from the bank at the branch at which the current account is kept.

LEGAL NATURE OF BANKER AND CUSTOMER RELATIONSHIP IN THE LIGHT OF THE EMERGENCE OF ELECTRONIC BANKING

However, Ninety-Six years after the pronouncement of this Judgment by **Lord Atkins in Joachimson .Vs. Swiss Bank (supra)** , the emergence of electronic banking has revolutionized banking business operations and altered the nature of the banker customer relationship all over the world by providing bank customers with, among others, the following benefits:

1. Twenty-four-hour access to their accounts;
2. Payments need not be made upon written orders;
3. Widespread use of digital signatures;
4. Payments may be made through public access terminals, for instance, Automated Teller Machines, Electronic pay roll systems, Direct transfers, Electronic cheques and so on

It is noteworthy to observe that electronic banking is rigged with complexities and difficulties in view of the fact that the risks of the modern technology are unforeseeable and some are unavoidable. Consequently there is a paradigm shift in the general contractual terms and conditions. The use of ICT in banking business has added more duties like the duty to inform customers about foreseeable system failures, interruptions by scheduled maintenance services and so on

The current practice by nearly all banks operating electronic banking is to transfer the risk to the customer by a combined use of general terms and condition.

GUIDELINES ON ELECTRONIC BANKING IN NIGERIA

The CBN recognizes that electronic banking and payments services are still at the early stages of development in Nigeria. Arising from the three major roles of the CBN in the areas of monetary policy, financial system stability and payments system oversight, the CBN Technical Committee on E-Banking in 2003 produced a report, which anticipates the likely impact of the movement towards electronic banking and payments on the achievement of CBN's core objectives.

Following from the findings and recommendations of the Committee, four categories of guidelines have been developed as follows:

1. Information and Communications Technology (ICT) standards, to address issues relating to technology solutions deployed, and ensure that they meet the needs of consumers, the economy and international best practice in the areas of communication, hardware, software and security.
2. Monetary Policy, to address issues relating to how increased usage of Internet banking and electronic payments delivery channels would affect the achievement of CBN's monetary policy objectives.
3. Legal guidelines to address issues on banking regulations and consumer rights protection.
4. Regulatory and Supervisory, to address issues that, though peculiar to payments system in general, may be amplified by the use of electronic media

For the purpose of this presentation, we shall constrain ourselves to the identified legal issues and guidelines.

LEGAL ISSUES ON ELECTRONIC BANKING AS IDENTIFIED BY THE CBN

GUIDELINE ON ELECTRONIC BANKING, 2003

1. Banks are obliged not only to establish the identity of their Customers (KYC principle) but also enquire about their integrity and reputation. To this end, accounts should be opened only after proper introduction and physical verification of the identity of the customer. (Please note that BVN was introduced in keeping with this guideline. For a detailed information on BVN, See our book: Banker-Customer Relationship: A Practical Legal Guide)
2. Digital signature should not be relied on solely as evidence in e-banking transactions, as there is presently no legislation on electronic banking in Nigeria. (Please note that this position is no longer correct in line with section 17 (1) of Cybercrime (Prevention, Prohibition Etc) Act 2015 and Section 93 of the Evidence Act 2011)
3. There is an obligation on banks to maintain secrecy and confidentiality of customer's accounts. In e-banking scenario, there is the risk of banks not meeting the above obligation. Banks may be exposed to enhanced risk of liability to customers on account of breach of secrecy, denial of service etc because of hacking /other technological failures. Banks should, therefore, institute adequate risk control measures to manage such risks.
4. Banks should protect the privacy of the customer's data by ensuring: (i) that customer's personal data are used for the purpose for which they are compiled. (ii) consent of the customer must be sought before the Data is used (iii) data user may request, free of cost for blocking or rectification of inaccurate data or enforce remedy against breach of confidentiality (iv) processing of children's data must have the consent of the parents and there must be verification via regular mail (v) strict criminal and pecuniary sanctions are imposed in the event of default.
5. In e-banking, there is very little scope for the banks to act on stop payment instructions from the customers. Hence, banks should clearly notify the customers the time frame and the circumstances in which any stop-payment instructions could be accepted.
6. While recognizing the rights of consumers under the Nigerian Consumer Protection Council Act, which also apply to consumers in banking services generally, banks engaged in e-banking should endeavor to insure themselves against risks of unauthorized transfers from customers account's, through hacking, denial of services on account of technological failure etc, to adequately insulate themselves from liability to the customers.
7. Agreements reached between providers and users of e-banking products and services should clearly state the responsibilities and liabilities of all parties involved in the transactions.

LEGAL ISSUES ON ELECTRONIC BANKING TRANSACTION IN NIGERIA AS ARE COMMONLY ENCOUNTERED IN PRACTICE

We shall discuss some of the commonly encountered legal questions in electronic banking transactions in Nigeria. They are:

1. What is electronic signature?
2. What constitutes electronic signature?
3. Is electronic signature valid and legally admissible in Nigeria ?
4. who is responsible for (mis)documentation of electronic funds?
5. who bears liability for unauthorized transactions?

Let us have a look at this identified legal issues

WHAT IS ELECTRONIC SIGNATURE?

Traditionally, a signature is a distinctive product or characteristic by which someone or something can be identified. **Black's Law Dictionary, (9th Ed, 2009), West Publishing Co, at pg 1536** simplifies the meaning further by defining it as "[a]ny name, mark, or writing used with the intention of authenticating a document (Note that emphasis is on "with the intention of authenticating a document")

However, with the introduction of electronic banking, personal relationship has been replaced with man-to-machine interaction. This advancement has, in some instances, hindered the use of traditional signatures. As such, a necessity arises for the creation of unique signatures for conducting electronic transactions, that is, the electronic signatures.

WHAT IS ELECTRONIC SIGNATURE? Unfortunately, there is no statutory definition of electronic signature in Nigeria as at the time of this presentation. However, **Lorna Brazell, in his book, Electronic Signatures and Identities Law and Regulation, (2nd Ed 2008), Sweet and Maxwell Publishers, at pg 52** defines electronic signature as an electronic symbol, sound, or process that is either attached to or logically associated with a document (such as a contract or other record) and executed or adopted by a person with the intent to sign the document.

Essentially, there are four reasons why an electronic signature may be appropriate for use in connection with an electronic transaction:

1. Expression of intent to authenticate the document. The nature of the signer's intent will vary with the transaction, and in most cases can be determined only by looking at the context in which the signature was made.
2. Legal requirement as dictated by law or regulation for a document to be considered legally effective. (Documents can only admitted against the party that made it or signs it 83(4) Evidence Act 2011
3. Identity. This is more so in electronic transactions where the parties are remote and often not otherwise known to each other, thus a signature serves the purpose of identifying the signer.
4. Integrity. A signature serves this very purpose in cases where one needs assurance that a document has not been altered.

WHAT CONSTITUTES ELECTRONIC SIGNATURE IN NIGERIA?

There is no law yet in Nigeria that describes what constitutes electronic signature. The two most significant laws that regulate electronic transactions and the admissibility of electronic documents in Nigeria, i.e., **Cybercrime (Prohibition, Prevention Etc) Act 2015** and **Evidence Act 2011** did not outline what constitutes electronic signature. Rather, the two enactments made provisions on the prove of electronic signature.

Section 93 (3) of the Evidence Act 2011 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.”

Section 17(2) of the Cybercrime (Prohibition, Prevention Etc) Act 2015 provides that “whenever the genuineness or otherwise of electronic signature is in question, the burden of proof, that the signature does not belong to the purported originator of electronic signature shall be on the contender.”

Furthermore, **Section 17(4) Cybercrime (Prohibition, Prevention Etc) Act 2015** provides that the following transactions or documents cannot be validated by electronic signature (that is, the documents must be hand-signed): (1) wills and other testamentary documents (2) death certificates (3) birth certificates (4) documents relating to family law issues like marriage, divorce, adoption etc (5) documents relating to court process like court orders, affidavits, pleadings, motions, judgments etc (6) termination or cancellation of utility services (7) documents required to accompany any transportation or handling of dangerous materials either solid or liquid in nature (8) documents ordering the withdrawal of fake, dangerous or expired drugs and chemicals.

Notwithstanding the situation in Nigeria, the following have been identified and statutorily recognized as constituting electronic signature in most American and European States:

1. a typed name at the end of an email message by the sender;
2. a unique biometrics based identifier, such as fingerprints, voice print, or retina scan;
3. a digital image of a handwritten signature; and
4. the click of an "I accept" button on an e-commerce site
5. Passwords.
6. Personal Identification Number (PIN)
7. Mobile Identification Number etc

IS ELECTRONIC SIGNATURE VALID AND LEGALLY ADMISSIBLE IN NIGERIA ?

Prior to the enactment of the Evidence Act 2011, there was confusion as to the validity and admissibility of electronic signature in Nigeria because Nigerian Courts were not in agreement as to the legal validity and admissibility status of electronically signed documents.

However, the situation was laid to rest by the provision of **Section 93 (2) of the Evidence Act 2011** which 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 avoid those consequences.”

In like manner, **Section 17(1) of the Cybercrime (Prohibition, Prevention Etc) Act 2015** solidified the legal validity and acceptability of electronic signature in Nigeria by providing that “electronic signature in respect of purchases of goods and any other transactions shall be binding.”

Furthermore, **Section 84 Evidence Act 2011** makes a general provision that rendered electronically generated (signed) documents legally admissible in evidence in Nigeria.

WHO IS RESPONSIBLE FOR (MIS) DOCUMENTATION OF ELECTRONIC FUNDS?

Electronic banking involves man to machine interaction. As a result, documentation of electronic funds transfers is very important. The bank customer is entitled to receive at the end of the transaction confirmation of a valid transaction duly authorized by him. This is done by way of a terminal receipt which clearly certifies:

1. the amount of the transfer;
2. the calendar date;
3. the consumer who initiated the transfer;
4. the time; and
5. the balance in the consumer's account.

Documentation of electronic funds transfer largely remains statutorily unregulated in Nigeria. The Bank's obligation to provide a terminal receipt (advice slip) is an implied term of the contract between the cardholder and them. As a matter of practice, the recurrence of a bank statement is a matter for agreement between the parties in Nigeria.

This then raises the legal question, where there is (mis) documentation of such electronic funds transfer, who is responsible? Is it the bank? Is it the customer?

This legal puzzle has been resolved in favour of the bank customer. The courts have categorically held in a plethora of cases that the bank owes its customer a legal duty to exercise reasonable care and skill in carrying out its customers instructions. It was held further that the duty of care a banker owes to its customer extends over the whole range of banking business within the bank's contracts with its customer. See the following cases **First Bank of Nigeria Ltd Vs African Petroleum Ltd (1996) 4NWLR (PT443) 438, UBA Vs Folarin (2003) 7 NWLR (PT 818) 18** etc

WHO BEARS LIABILITY FOR UNAUTHORIZED TRANSACTIONS?

Electronic fund transfer made with the access device of the customer to whom it was issued or by another person acting under the customer's authority, is authorized transfer.

An unauthorized electronic funds transfer is one initiated by a person, other than the customer, without actual authority to initiate the transfer and from which the customer receives no benefit.

In dealing with liability from electronic funds transfer, a distinction is drawn between authorized and unauthorized transfers. In Nigeria, the customer's liability for unauthorized transfers is subject to debate, depending on whether it was caused by negligent or by fraud.

An unauthorized electronic funds transfer may be prompted by a customer's negligence, as where the customer writes his Personal Identification Number on the card or on a piece of paper kept with the card and the person stealing the card with the PIN obtains full control of the access device. In that instance, the bank shall not be liable for any loss arising therefrom.

Unauthorized transfer by fraud may arise where, for example, an ATM cardholder is forced by thieves to withdraw funds from his accounts through a public access terminal. Here, the bank's liability will be depended on whether the bank has exercised reasonable care in providing security and putting other necessary facilities in place as may be required by law (See paragraph 1.4.2 of CBN Guidelines On Electronic Banking In Nigeria, 2003)

Section 33 of Cybercrime (Prohibition, Prevention Etc) Act 2015 provides severe criminal sanctions against anybody who steals, counterfeits, fraudulently obtained or uses without authorization any access device belonging to another person. The punishment ranges between 3years to 7years imprisonment and/or payment of fine ranging between N1, 000, 000 to N7, 000, 000 as well as the compulsory refund of the money obtained from the fraud to the owner

CONCLUSION

We would like to conclude this discussion with the old adage that says thus:

“if you are in the business of selling water in the desert and water suddenly started flooding constantly into that desert, you do not require a philosopher to tell you that it is time for you to change your business”

The water of electronic banking has already flooded the modern banking and commercial world and it is aggressively pushing cash banking and paper banking into the pothole of history.

As a matter of fact, it is projected that more than 80% of the all banking transactions will be electronically conducted in the next 50 years. This brings the concept of cashless economy into reality.

Even as at today, it will not be out of the ordinary to assert that electronic devices are gradually becoming indispensable part of our everyday existence and survival will be based solely on how ready and willing a particular country, group or individual is to adopt to the e-movement reality.

RECOMMENDATIONS



We recommend the following:

1. Consumer Education
2. Dispute Resolution Mechanism
3. Incorporation of International law and best practice in the banking sector
4. Specific Legislation on electronic banking
5. Introduction of electronic banking as a separate course in schools (particularly in banking and finance departments)