LEGAL ISSUES IN CREDIT ADMINISTRATION IN THE ELECTRONIC PLATFORM *

Introduction

Business transactions in today's economy are carried out more efficiently and effectively mainly because world over, focus has shifted from a predominantly cash dependent market to less cumbersome, simpler means of transacting business such as the use of various means and forms presented through electronic platforms otherwise known as electronic commercial transactions. Banks play a critical role to electronic commerce either because they enable payments to be made directly or they simply enable electronic credit which further facilitates commerce. As a result of this growth in electronic commerce, banks are conducting their business with ever growing assistance of telecommunications and telecommunications based tools.

The provision of banking services including credit administration on electronic platforms is what is referred to as electronic banking.[2] This method of providing banking services has revolutionized the banking industry and its market. Banks primarily provide two major services: taking deposits and giving out credits. However, our focus will be to a large extent the provision of credit and its administration on the electronic platform.[3] Indeed, in the words of Wolfgang Wiegand *"e-banking is a part of e-commerce, which is both one of its most significant products of (Information) Technology and one of its moving factors....it is therefore a challenging task for any lawyer to speak or write about e-banking. It is even more fascinating if this is combined with the banker/customer relationship"*. For the reasons that will be discussed in subsequent paragraphs, it may also be dangerous (especially in front of this kind of audience) to discuss the legal aspects of the banker/customer relationship in e-banking.

Credit Administration

Credit and its administration in a limited sense relates to the administration of credit if it has been extended to a customer. There after the bank is concerned is how the loan is administered. Since the customer would have made some undertakings as regards his financial status before the loan is granted.

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[1] Basil Computer on Banking Supervision define electronic banking as embracing payment cards including credit and debit cards, electronic funds transfer, automated teller machines, smart cards, electronic funds transfer, automated teller machines, home banking service through personal computers, telephone facilities and internet facilities.

[2] This paper is restricted to credit and its administration but there is serious doubt as to whether the provision of credit and perfection of its security conducted entirely by electronic means is available. This is because the requirement of money laundering Laws all over the world require certain level of checks commonly defined 'as Know your Customer'. This mandates some interfaces between the Customer and the Bank which makes the provision of virtual credit impracticable.

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The bank in administering the credit will be eager to ensure that all the representations (covenants) are true such that there is no default in the loan. Financial covenants aim to define the parameters within which the borrower may operate its business. This process may or may not be conducted electronically, depending on what is being administered. Strictly this paper would examine the bank's internal administrative polices as circumscribed by the Central Bank of Nigeria, being the supervisory body. There will be a further need to consider whether prudential guidelines had been maintained in administering credit on the bank's books.

Credit administration process involves giving out a loan and supervising the process from its inception until when the loan is paid back. During the life of the loan, the relationship is that of banker/customer. Once there is a default the relationship changes radically giving rise to different legal consequences.[4] This peculiar function of financial institutions can only be conducted by an institution that is licensed to do so.[5] An institution that intends to provide virtual credit will also require a license. At any rate, in Nigeria only banks which are licensed, supervised and with physical presence can offer electronic banking services.[7] It is however important to restate the obvious that extension of credit is not limited to banks in the traditional sense in which it has earlier been described.[8] A credit market in its wider sense denotes a platform in which credit or finance may be raised by a company/individual in the form of debt finance. Debt finance may be raised in a number of different ways,[9] and the type of funding often reflects the nature of the lender. In summary, a borrower may raise debt finance by obtaining a loan from a bank. The life cycle of that loan in terms of its origination, administration and enforcement is what is causally referred to as credit administration.

Retail Banking and Origination

Traditionally, a borrower seeking a loan will approach a bank requesting for a facility. Almost invariably, he would also have an existing relationship with the bank.[10] If the applicant has no account the bank will insist that an account be opened before credit is extended. Once an account is opened and the customer deposits money in that account, the bank becomes a debtor of that sum to the borrower. In other words, upon demand of the same amount, the bank is under an obligation to pay the borrower.

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[4] Where the loan is not paid back, the relationship of Banker-Customer is converted into a Creditor-Debtor and there is a different administration for recovering what will now be classified as a non-performing asset.

[5] See section 8.2 CBN Guidelines on Electronic Banking in Nigeria 2003

[6] Hire Purchase Transactions are regulated by the Hire-Purchase Act Cap H4 Laws of the Federation of Nigeria, 2004

[7] See section 4.2 CBN Guidelines on Electronic Banking in Nigeria 2003

[8] When a firm raises money for working capital or capital expenditure by selling bonds, bills or note to individuals and/or institutional investors, in return for lending the money, the individuals or institution become creditors and receive a promise from the debtor that the principal and interest on the debt will be paid.

[10] The borrower might be a non customer who engages the bank with cash for electronic transfer but it is most unusual for a bank to provide such a service, the risk being a contravention of the relevant money laundering legislation by acting for a stranger.

The deposit establishes a creditor-debtor relationship.[11] The terms upon which the parties relate to each other is embodied in a contract document[12] - the terms of which must necessarily incorporate offer, acceptance, consideration and finally the terms upon which the loan will be repaid. This contractual document signed by both parties will be in the traditional form and not electronic. The basic principle of freedom of contract applies to negotiating these contracts. The only constraints are that the terms should not be (a) illegal; (b) conceptually impossible; (c) contrary to public policy or contrary to any existing regulation. The bank will ordinarily have a policy that guides the criteria upon which it gives credit known as credit policy.

Unavailability of Electronic Credit

Whereas, as stated earlier, customers intending to conduct banking business or seek credit would visit the bank, electronic banking in some respect replaces direct personal contact between the bank and the customer. In reality, in Nigeria and most other jurisdiction, we are yet to transcend to credit administration electronically. In other words, a situation where an applicant who is unknown to the bank simply writes to the bank electronically requesting to be granted a loan and the bank similarly responding in the positive or negative electronically. Not much progress has been made in permitting prospective borrowers to receive credit based on nothing more than an electronic credit application. Worst still is the non-availability of perfection of security interest electronically.

Part of the reason online loan services do not actually complete the loans and disburse the funds is the high risk of fraud in internet commerce generally. Financial services pose additional risk over and above transaction relating to physical assets. A common fraud prevention mechanism is for merchants selling tangible goods to compare the delivery address with the credit card billing address and to decline the transaction if the two are not the same. This opportunity does not present itself with financial services, particularly credit. Beyond this operational difficulty, there are other legal barriers to electronic banking. A customer who seeks a credit facility will almost invariably be requested to offer collateral in the form of either a guarantee or real property.

Pursuant to the relevant statutes, a guarantee must be in writing under the hand of a guarantor. Similarly, any transaction dealing in land must also be in writing. The general understanding is that an electronic form of these documents will not satisfy the statutory requirement.[13]

Electronic Payment System

In essence, what is available in many jurisdictions including Nigeria and referred to as electronic banking is in reality payment systems in the form of debit cards, cash cards, electronic funds transfer, automated teller machines and home banking services through personal computers. Typically, a customer who has an existing relationship with the bank is given or offered additional services such as access (through the website) to their account information and to authorize payments to be made from such accounts.

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[11] This relationship is critical as it defines the legal relationship between the parties and the obligations arising there from.

[12] Document will should address the amount to be borrowed, the cost of borrowing, fees to be paid etc.

[13] It is submitted that sections 84 and 93 of the Evidence Act 2011 dealing with admission of electronic evidence and proof of electronic signature do not necessarily cure the defects.

This paper will inevitably concentrate on payment systems. There are presently no authorities from the Supreme Court to the knowledge of the writer, that help to explain the rights and obligations of parties who choose to use this method of payment. The problem is further compounded by the fact that payment cards are not legal tender.[14] Parties have therefore, had to rely on banking regulations, contract and torts to define and circumscribe obligations arising from this method of payment.[15]

There are two forms of electronic funds transfer prevalent in Nigeria:

1. Plastic cards payments
2. Home banking/Internet banking

It is perhaps necessary to discuss how this works in practice before considering legal issues that are applicable to most types of electronic payments.

1. Payment Cards

Typically, a customer of a bank can use an ATM card to make a balance enquiry, order a cheque book but most importantly, it is used to withdraw cash from an automated teller machine operated by the card issuer bank or any other bank. There will usually be one contractual relationship involved, i.e. the issuer of the card and the supplier of the cash, being one and the same person.[16] The card at this point is almost akin to a cheque which is cashed over the counter. There is however, a significant difference as the card is not a negotiable instrument.[17]

Debit Cards

Debit cards scheme operates in a special contractual relationship that effectively causes goods and services to be paid for by electronic means. The card enables the customer to obtain goods and services from merchants against the bank's undertaking to pay those suppliers by way of a debit to the customer's account and a corresponding credit to the merchant's account. There is a limited sense in which credit is provided. Where the customer presents the card to the merchant[18] he is simply representing that the bank will make payments on its behalf. The debit card transaction is successfully effected only if the customer's account is in funds or there is in place an overdraft. Credit is not extended to the customer or the account holder because his account is debited almost instantaneously and the merchant is credited in accordance with a pre-existing contractual arrangement.

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[14] Coins or banknotes that must be accepted if offered in payment of a debt.

[15] Regrettably, there is a draft bill to facilitate electronic transaction in Nigeria which has been in existence since 2004 but yet to be passed into law.

[16] Where the card can be utilised in other ATMs operated by other banks, such bank will usually by agreement be under a network switch company that will undertake to clear the commercial balances between the card user and such banks obviously extends beyond the bilateral relationship referred to.

[17] A Negotiable Instrument is a document guaranteeing the payment of a specific amount of money, either on demand, or at a set time, with the payer named on the document

[18] Person who sells goods and services otherwise known as a retailer.

The mechanics of how this works is necessary for a better understanding of the contractual and legal obligation that arises from the scheme. The card is inserted into a card reader installed at the merchant/retailer's point of sale terminal and the cashier enters the amount of the transaction. The customer will in turn be required to punch in his Personal Identification Number (PIN). The retailer's terminal will seek authorization from the customer's bank to accept the card. The PIN acts as the customer's mandate to debit his account and credit the retailer's account and the message is accordingly transmitted. When the customer's bank and the retailer's bank have received the respective debit and credit instructions over the network, the customer's and retailer's account will be adjusted accordingly. The merchant/retailer effectively gives credit to the bank since payment is not instantaneous.[19] It is admitted however that it is technically possible for the transmission of a credit message from the retailer's terminal to be instantaneous. This is however unlikely, as the message is often transmitted and stored away for onward transmission in batches made at the close of business. Following from this process, there is some sort of network process such that the merchant gets payments after at least three days.

Credit Cards

The credit card operates in more or less the same way as a debit card. There is however, a fundamental difference.[20] Whereas with a credit card, credit is effectively administered in favour of the card holder, with a debit card no credit is issued to the card holder. Again, it is perhaps necessary to recount the mechanics by which a credit card operates.

A credit card issuing company, such as a bank or credit union, would enter into agreements with merchants for them to accept their credit cards. Merchants often advertise which cards they accept by displaying acceptance marks - generally derived from logos - or may communicate this orally, as in "We accept (brands X, Y, and Z)" or "We don't accept credit cards".

The credit card issuer would issue a credit card to a customer at the time or after an account has been approved by the credit provider, which need not be the same entity as the card issuer. The cardholders can then use it to make purchases at merchants accepting that card. When a purchase is made, the cardholder agrees to pay the card issuer. The cardholder indicates consent to pay by signing a *receipt* with a record of the card details and indicating the amount to be paid or by entering a *PIN*. Electronic verification systems allow merchants to verify in a few seconds that the card is valid and the cardholder has sufficient credit to cover the purchase, allowing the verification to happen at time of purchase. The verification is performed using a credit card payment terminal or point-of-sale (POS) system with a communications link to the merchant's acquiring bank.

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[19] There is a real possibility that before the merchant's account is credited, the customer's bank becomes insolvent

[20] Ref: Lufthansa German Airlines V. William Ballantyne,(2013)1 BFLR, Pg. 178, where a court used interchangeably the terms 'credit card' and 'debit card' as if they were one and the same payment mechanism.

Each month, the cardholder is sent a statement indicating the purchases made with the card, any outstanding fees, and the total amount owed. After receiving the statement, the cardholder may dispute any charges that he or she thinks are incorrect. The cardholder must pay a defined minimum portion of the amount owed by a due date, or may choose to pay a higher amount. The credit issuer charges *interest* on the unpaid balance if the billed amount is not paid in full (typically at a much higher rate than most other forms of debt). In addition, if the cardholder fails to make at least the minimum payment by the due date, the issuer may impose a *late fee* and/or other penalties. To help mitigate this, some financial institutions can arrange for automatic payments to be deducted from the cardholder's bank account, thus avoiding such penalties altogether, as long as the cardholder has sufficient funds.

Home/Internet banking

Internet banking referred casually as home banking is used in a broad sense to cover or extend to all form of self service banking enabling users to perform many functions from outside the bank. Through this means, customers can access their banks internal system and do the following: check their balances; give orders to transfer funds; receive advice; order cheque books. The learned authors of Paget's Law of Banking at page 393 describe three main types of internet payment systems:

1. Use of the internet as an alternative means of communicating payment instructions to the customer's bank;
2. Use of an Internet Payment Operator (IPO) either as the customer's agent to make funds transfer from the customer's normal bank account to payees, or by the IPO assuming the customer's indebtedness to the payee; and
3. Payment through the transfer of electronic money (also known as 'digital cash') over the internet.

Legal Issues

Choice of law/Jurisdiction

In discussing the legal issues, it is necessary to demarcate between a banker-customer relationship and a bank-bank relationship. The focus of this paper will be on the bank-customer relationship. The legal issues that relate to electronic fund transfer are diverse and numerous, depending on the type of transfer that is being considered. Take for example, a scenario where a card issued by a Nigerian bank is used outside the country but fails to activate or validate the transaction. Or a customer sitting in Japan attempts to access his bank account in Nigeria to purchase goods from the United Kingdom.

This failure immediately generates a critical issue of determining the law governing the transaction as well as the question of which country's jurisdiction should decide the dispute. This question will always arise if the parties in the scheme live or operate in different jurisdictions. But the question of where to institute the action could also possibly arise where the stakeholder lives within Nigeria but in different States.

The general principle of course is that the action will be instituted where the defendant resides. Where payment is expected to be effected electronically, it might be difficult to determine where the defendant resides. As stated earlier, there is still no provision for an entirely virtual credit. As a result and almost invariably, the electronic funds transfer is supported by contracts entered into prior to the commencement of electronic transactions. The usual connecting factors, the parties' choice, most significant relationship, provided for in domestic conflict of laws legislations or case laws will identify the applicable law which in turn will govern rights and duties of the parties. Notwithstanding the express provision in a pre-existing contract when common law principles are applied to electronic contracts it proves practically impossible to conceptualize let alone implement. The United Nations Commission on International Trade Law (UNCITRAL) provides a functional mechanism for dealing with such issues. Interestingly, the Bill[21] now pending before the National Assembly draws from that Law and provides as follows in its section 19:

> (4) An electronic communication is deemed to be sent from the sender's place of business and received at the addressee's place of business.
>
> (5) if the sender or the addressee has more than one place of business, the place of business for the purpose of subsection (4) of this section is the one with the closest relationship to the underlying transaction which the electronic communication relates or, if there is no underlying transaction, the person's principal place of business.
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> (6) If the sender or addressee does not have a place of business, the person's place of habitual residence is deemed to be the place of business for the purpose of subsection (4) of this section.

Contractual relationships as a substitute to legal tender

As stated earlier, payment by plastics is not legal tender and the merchant or retailer is under no obligation to accept the card as substitute for money being a legal tender. The retailer accepts this having entered into a pre-existing contractual arrangement. The general features of credit card transactions are eloquently described by Sir Nicolas Browne-Wilkinson in the case of ***Re Charge Card Services Ltd***[22]**:**

[21] A Bill for an Act to facilitate Electronic Transactions in Nigeria and for Related Matters 2009 (Electronic Transaction Bill)

[22] 1989 Ch 497 CA

(a) There is an underlying contractual scheme which predates the individual contracts of sale. Under such scheme, the suppliers have agreed to accept the card in payment of the price of goods purchased: the purchasers are entitled to use the credit card to commit the credit card company to pay the suppliers.

(b) That underlying scheme is established by two separate contracts. The first is made between the credit company and the seller: the seller agrees to accept payment by use of the card from anyone holding the card and the credit company agrees to pay to the supplier the price of goods supplied less a discount. The second contract is between the credit company and the cardholder. The cardholder is provided with a card which enables him to pay the price by its use and in return agrees to pay the credit company the full amount of the price charged by the supplier.

(c) The underlying scheme is designed primarily for use in over-the-counter sales, i.e., sales where the only connection between a particular seller and a particular buyer is one sale.

(d) The actual sale and purchase of the commodity is the subject of a third bilateral contract made between buyer and seller. In the majority of cases, this sale contract will be oral, over-the-counter sale. Tendering and acceptance of the credit card in payment is made on the tacit assumption that the legal consequences will be regulated by the separate underlying contractual obligations between the seller and the credit company and the buyer and the credit company.

(e) Because the transactions intended to be covered by the scheme would primarily be over-the-counter sales, the card does not carry the address of the cardholder and the supplier will have no record of his address. Therefore the seller has no obvious means of tracing the purchaser save through the credit company.

(f) In the circumstances, credit cards have come to be regarded as substitutes for cash: they are frequently referred to as "plastic money."

(g) The credit card scheme provides advantages to both seller and purchaser. The seller is able to attract custom by agreeing to accept credit and payment. The purchaser, by using the card, minimizes the need to carry cash and obtains at least a period of free credit during the period until payment to the card company is due.

The special relationship between a customer and his bank and its legal implication as it relates to electronic payments calls for further elucidation. When a customer's account is in credit, the bank is effectively indebted to the customer creating a creditor-debtor relationship. When the account is in debit, the customer becomes a debtor to the bank and the roles are reversed. The readjustment of accounts pursuant to an electronic debit and credit affects the contractual obligations between the customer and his bank on the one hand and the beneficiary and his bank on the other. The learned authors of Paget's Law of Banking give a graphic explanation as follows:

> *"Strictly speaking, there is no transfer of fund involved in a funds transfer operation as cash (coins and notes) is not transferred from one account to another .... As noted earlier, what happens with a fund transfer is that the debt owed to the originator (customer) by his bank, the originator's bank, is extinguished or reduced pro tanto (or, where his account is overdrawn, his liability to the bank increased) by the amount of the 'transfer' to the beneficiary, whilst the debt owed to the beneficiary by his own bank, the beneficiary's bank, is increased (or, where his account is overdrawn, his liability is reduced) by the same amount."*

The interrelationship between the obligation the bank owes its customer on the one hand and that which is owed by a corresponding bank to the supplier is more than an academic interest. Take for example a credit card holder who uses a credit card to pay for goods and the bank that issues the credit card fails to pay for the goods, can the merchant/retailer bring an action against the purchaser/card holder on the grounds that the goods were released on the condition that the bank will pay for the goods. The corresponding bank having not paid, the obligation of the purchaser to pay for the goods is revived. The complex question being whether there is a right of recourse to the purchaser.

The complexity of determining whether the use of a card discharges the obligation of the originator/purchaser absolutely or upon a condition that the beneficiary ultimately receives credit was considered in *Re Charge Card Services Ltd.*,[23] Sir Nicholas Browne-Wilkinson upheld on appeal Millett's J's first instance decision that payment obligation to the retailer was absolute and not conditionally discharged by the use of the card. His lordship observed that the question could only be answered by looking at the agreement between the parties.

Surprisingly, neither of the parties had stated what would happen in the event that the bank or card issuer is unable to meet its obligation to the retailer. To reach his conclusion, His Lordship then inferred from the conduct of the parties that it was unimaginable that the retailer would have a right of recourse to the purchaser, the bank having assumed the responsibility of settling the cardholder's obligation. His lordship arrived at this conclusion, notwithstanding that there was no separate contract between the retailer and the cardholder to accept payment cards as legal tender in place of cash.

Completion of Payments

With payment by cash, it is easy to determine when payment is complete. With a cheque, the instructions to the bank may be countermand provided the account of the beneficiary has not been credited.

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[23] supra

In other words, payment is completed when the account of the beneficiary is credited. Therefore, determining the time that payment is complete is more than an academic question.[24]

In the case of payment by a debit card, payment is more or less complete when the customer has entered his PIN into the keyboard provided at the retailer's terminal. However, this may not be entirely correct. The fact that the originator cannot countermand his instruction is not the same thing as saying that payment is complete. To say that payment is complete is effectively to assume that the beneficiary discharges the right he will otherwise have to sue the originator for non-payment.

In an electronic transfer, the time at which payment is considered effected may not necessary be the same time the obligation to pay for the goods is discharged. Tendering a card as a substitute for payment by cash following the case of *Re Charge Card Services Ltd* discharges the obligation of the originator absolutely. In other words, the purchaser is no longer obliged to pay for the goods in cash. In effect, the creditor admits to accept a funds transfer into his bank account in fulfillment of an obligation to pay cash. This arrangement is translated into a new set of obligations between the customer and his bank on the one hand and the creditor and his bank on the other. By agreeing to payments by funds transfer, the creditor beneficiary agrees to accept a right of action against his own bank instead of a right of action against the original debtor. This substitution of one debtor for another is equivalent to payment by cash and discharges the monetary obligation between the payer and the payee.

Liability for unauthorized use

A bank can only debit a customer's account and such debit will only be effective and legal where the bank has the mandate to do so. With traditional banking, the customer will seek to issue its mandate by way of a cheque. The cheque mandate is a signature. A forged or unauthorized signature on a cheque does not represent the customer's mandate and the bank is not entitled to debit the customer's account. With electronic payments, the authority to debit an account is usually the punching of the correct PIN. Difficulties may arise where the correct PIN is used by an unauthorized person.[25] The use of an electronic access device merely authenticates the instruction; it does not identify the person who actually gave it.

Where the PIN is used by an unauthorized person, the critical question is whether the bank is under an obligation to debit the account. In the absence of an agreement,[26] since it is the bank that wishes to debit the account, the normal practice must be that the bank must show that it acted in accordance with the customer's mandate. This will be satisfied, if the bank can show that the PIN was used and its use was authorized by the customer.

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[24] When a contract requires that payment be made on a due date, it may be necessary to determine the exact time payment was made to ascertain whether a breach has occurred. Also, ascertaining the time for payment is relevant for determining without question of fraud, whether a payment advice is completed with another bank or remains with the originator's bank such that the instruction is subjected to a freezing order or attachment proceeding. Query situation where information is wrongly entered, causing the credit of an account holder other than the intended recipient.

[25] Almost invariably, there will be a documentary agreement between the bank and the customer that places the burden of unauthorized use on the customer.

In the United Kingdom (UK), the banking ombudsman[27] practice has been to place the burden of proving that the machine was not at fault on the bank and if the bank can prove that there was no technical breakdown, it then shifts the burden to the customer to prove that he definitely did not use the card.

In one of the very few cases that got to the Court of Appeal, **Benjamin Agi v. Access Bank Plc**,[28] the court seems to have placed the burden of unauthorized use of a debit card entirely on the card holder. The court took the following facts into account that the PIN adopted by the card holder was personal to him and that at every material time he was in possession of the card. As a result, the Court drew the following inference at p.g 155

> *"following from these critical pieces of evidence, I am impelled to draw the inference that it was either the Appellant that did the withdrawal or an unknown third party to whom he divulged the PIN. I have the unbridled license of the law to make the inference... I am fortified in the inferences because, without the secret PIN, which is usually personal to the card holder as testified by the Appellant, it is impossible to withdraw money through the ATM debit card."*

It is submitted that there are many other inferences that may have been drawn including the fact that the method by which the PIN was originated might have been compromised, the ATM machine may have been faulty or the card itself may have been cloned. It is for these reasons that in other jurisdictions, by regulation, the bank is required to demonstrate that the system and structure that it had in place could not have been easily compromised. It is only after establishing that fact that the burden shifts to the card holder and at that point the courts may draw a negative inference against the card holder.

In practice, the bank quite often inserts a clause that places a burden and liability for unauthorized use on the customer. A bank may want to allocate to the customer the risk of failing to keep safe his user identification. The scope and breadth of such a clause is often subjected to careful scrutiny under legislative provisions in other jurisdictions. Article 4A of the Uniform Civil Code (UCC) contains provisions regarding the allocation of risk with regard to online authentication in wholesale funds transfer. The risk of an unauthorized use of an online authentication procedure can only be passed to the bank's customer if the online authentication procedure was first shown to be commercially reasonable. In the United Kingdom, the Unfair Contract Terms Act may come to the rescue of the customer.

Unfortunately in Nigeria, a simple question that the court will ask is whether the customer is bound by the terms of the contract regardless of the unequal bargaining power between the parties and the unreasonableness of the exclusion clause. Such a clause notwithstanding, it is submitted that a customer may yet be able to argue that the bank had been negligent in the way that it allowed or facilitated such unauthorized use. It may, for example, be a plausible argument that the bank was negligent in failing to detect an unusual pattern of withdrawals which would have put it on notice as to the unauthorized use of the card.[29]

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[27] It is surprising that there is no ombudsman in Nigeria in relation to banking activities. However, there is a Bill currently pending before the National Assembly called the Nigeria Financial Services Courts and Ombudsman Bill

[28] [2014] 9 NWLR. Pg. 121

[29] See Benjamin Agi v. Access Bank Plc [2014] 9 NWLR Pg. 121

Electronic Miscommunication

In instantaneous and automated communications, it is extremely easy to make mistakes that are clearly unintentional for example, pressing the wrong button on the internet can cause serious loss and have catastrophic legal consequences, and the obvious question that arises is whether the originator can recover such money or benefit paid by mistake. In the absence of regulations dealing with electronic mistakes, the court will have to rely on the principle as it relates to payment by negotiable instruments. After many years of uncertainty, the proposition relating to recovery of money was established by the House of Lords in *Westdeutsche Landesbank Girozentrale v. Islington London Borough Council.*[30] The House of Lords[31] also held:

1. There is no principle of English law that payments made under a settled understanding of the law which is subsequently departed from by judicial decision cannot be recovered in restitution on the ground of mistake of law.

2. It is no defense to a claim in English law for restitution of money paid or property transferred under a mistake of law that the defendant honestly believed, when he learnt of the payment or transfer, that he was entitled to retain the money or property.

3. There is no principle of English law that money paid under a void contract is not recoverable on the ground of mistake of law because the contract was fully performed.

4. Section 32 (1) (c) of the Limitation Act 1980[32] applies in the case of an action for recovery of money paid under a mistake of law.

There is no reason why this principle cannot be applied to electronic miscommunication. There has now been statutory intervention in other jurisdictions in this respect. The originator may recover monies paid by mistake if two conditions are satisfied:

A. Notifying the other party of the error as soon as possible after having learnt of it and;

B. Not having used or received any material benefit from the erroneous input.

Undoubtedly, legislation in Nigeria will introduce a level of clarity that will be beneficial to stakeholders.

There is a further complication where a customer reacts to instructions which turn out to be a scam. In this scenario, the customer either provides information or deliberately triggers an activity based on a fraudulent misrepresentation. A set of facts to which many will be familiar formed the subject of instructions to the firm recently.

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[30] (1996) AC 669, (1996) 2 All ER 961

[31] Kleinwort Benson v. Lincoln City Council (1999) 2 AC 349

[32] This section defers the running of the limitation period for an action for relief from the consequences of a mistake to the date on which the claimant discovered the mistake or could with reasonable diligence have discovered it.

A young lady maintains a current account with A Bank Plc. With a view to enjoying a more convenient, secure and easy-to-use international and local banking transaction as a customer of the bank, she subscribed to some of the bank's electronic products including the Naira Debit Card and Internet Banking. By reason of the aforesaid subscription, she had cause to do occasional online banking transactions.

At about 12:55 am on Saturday May 17, 2014, she received an electronic mail with the subject 'Internet Banking-Site Upgrade'. The mail which she understood was sent by the bank, informed her that the bank had upgraded its system to serve its customers better and required that the customers apply for the upgrade on their accounts with the bank via its website failing which their online account access would be suspended within 24 hours. The young lady immediately responded by logging on to the bank's website using her bank account details as directed in the email.

At about 7:59 am on the same May 17, 2014, she received yet another email informing her about a debit transaction on her account. Her account had been debited in the sum of N1,100,000 and a credit transfer made in favour of one Kpachie Destiny who purportedly maintain an account with First Bank of Nigeria Plc. Upon this shocking discovery, she contacted her relationship officer in the bank and lodged a complaint protesting the unauthorized debit on her account. She subsequently visited the bank on Monday May 19, 2014 to lodge a formal complaint. She was informed that the bank would investigate the circumstances leading to the unauthorized debit on her account including an investigation on the beneficiary of the stated sum who appeared to be a customer of First Bank of Nigeria Plc. The bank never reverted on the outcome of its investigation hence the move by the customer to seek redress by recovering the said sum of N1,100,000.

There are many legal questions including whether the bank is under an obligation to warn a customer not to react to such instruction/enquiry? Is the bank negligent in divulging information that triggered the fraudulent misrepresentation? Is the corresponding banking (First Bank of Nigeria Plc) under an obligation to ensure that the beneficiary is located and subjected to a restitution claim?[33] Again, in the absence of regulation, a customer who has been wrongly debited may have to rely on the complex common law position for any remedy.

Signature and written requirements

The general rule under Nigerian Law is that contracts need not be in writing or signed to be enforceable unless a special rule applies.[34] In relation to credits, there is a specific requirement for written documents and 'signatures' in connection with the collateral required by banks. A guarantee

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[33] Pursuant to the Money Laundering (Prohibition) Act, 2011 every bank is required to know its customer

[34] See the Statute of Frauds, 1677.

must be in writing. Any transfer of land must also be evidenced in writing. Although, the Evidence Act now makes provision for admissibility of electronic evidence, it is submitted that where an act specifies a form in which a document must be represented, that Act must first be complied with before the Evidence Act dealing with admissibility becomes relevant. In other words, compliance with terms of the preceding Act is a precondition to applicability of the Evidence Act.

This point is underscored by the provisions of the Electronic Transactions Bill pending before the National Assembly which states as follows:

"S. 1. The objects of this Act are :
(a) to eliminate the legal barriers to the effective use of electronic communications in transactions;

(a) to promote the harmonization of legal rules on electronic transactions across national boundaries;

(b) to facilitate the appropriate use of electronic transactions;

(c) To promote business and community confidence in electronic transactions... "

In addition attention must be drawn to Section 4 (1) of the aforementioned Bill which states that *"a rule of law that requires information to be in writing or to be given in writing is satisfied by information in electronic form if the information is accessible so as to be usable for subsequent reference"*

The proposed Bill in summary provides that a document shall not be denied legal effect on the grounds that a specific Act requires such a document to be in writing and to have been signed under the hand of the originator. It is important to note that the Bill does not apply to the creation or transfer of interest in real property, negotiable instruments, documents of title, wills and trusts. It is submitted that there is no reason for such restrictive application. This Bill was drafted in 2009 and technology has since advanced to such an extent that secure programs can be introduced to protect all manner of transactions including credit transactions[35].

CONCLUSION
Credit Administration is effectively the life cycle of a lending transaction. It would ordinarily encompass marketing of financial products, analysis

[35] It must be admitted that the actual process of granting loans and executing loan agreements virtually is unlikely to take effect anytime soon.

of credit risk, management and distribution of such risk, by way of securitization and participation transactions. These tasks can be concluded on the electronic platform. However, the actual process of applying for a loan, granting same and executing the loan agreement which is what the consumer is concerned about is yet to be provided on the electronic platform. As a result, the paper turned its focus on electronic banking service as an additional service provided by the bank.

In discussing electronic banking, the objective has been to consider the rights of the customer as against the right of the banks in light of the absence of the Electronic Transaction Act. Since electronic commerce has spread all over the world, many countries are enacting legislation to accommodate the platform for electronic transactions. Still many of the traditional concepts of contract law can be applied without any problem to this form of banking. The object will be at all times to find a balanced distribution of risk, such that risk is not totally transferred to the consumer but also to avoid consumer protection issues that suffocates the whole e-banking process[36]. In the absence of relevant regulation, courts have an even more significant role to play in giving a commercial and purposeful interpretation to these transactions[37]. The current practice in Nigerian jurisprudence where substantive rights are hardly ever determined and many of the superior courts are instead focused on procedural justice, will affect the growth of commerce negatively.

Finally, the Supreme Court of India in **National Textile Workers' Union v PR Ramakrishnan**[38] recognized that, if law fails to respond to the need of changing society, it will either stiffen the growth of society or choke its progress or, if that society is vigorous enough, it will cast aside a law which stands in the way of its growth. Law must therefore, be constantly adapted to the speed of change in society and not lag behind.

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[36] See the case of Re Charge Card Services Ltd supra in the UK where the English Judge used mere contractual principle to analyze electronic payments by credit cards. Compare the fairly recent case of *Okafor v Nweke* (2007) 10 NWLR (Pt. 1043) 521 where the Supreme Court gave an extremely narrow interpretation to the Legal Practitioners' Act in defining what it means for counsel to append his signature to a legal process. This principle was also followed in SLB Consortium v. NNPC (2011) 3-4 MNSC at Pg. 145, Alawiye v. Ogunsanya (2012) 12 S.C.

[37] Principle was also followed in SLB Consortium v. NNPC (2011) 3-4 MNSC at Pg. 145, Alawiye v. Ogunsanya (2012) 12 S.C. AIR SC 1983 at 75