

# Banker-Customer Relationship under Electronic Banking: Liability and Remedies for Data Breach in Nigeria

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## **Abstract**

This paper is set to examine the nature of banker-customer relationship under electronic banking so as to discover who becomes liable in any occasion of data breach. In order to address this research problem as well as achieve its purpose or objective, doctrinal research method is employed. The discovered that the traditional banker-customer relationship has not been affected by electronic banking; the only effect of electronic banking on this relationship is on the nature and form of contract created under it. It is also observed that banks operating in Nigeria have the attitude of shifting liability to their customers using electronic banking agreements. Based on this observation, it is recommended that there is a need for courts to uphold the traditional banker-customer relationship between banks and customers. It is also recommended that exclusion or exemption clauses cannot avail banks owing to the fact that failure to protect their customers' vital information is a breach of a fundamental condition of the contract existing between them.

## **1. Introduction**

The use of electronic means in service delivery in Nigerian banks has enjoyed a wide acceptance among bankers and customers. One of the reasons necessitating the shift towards electronic banking in Nigeria is as a result of the emergence of the global economy which requires accessibility of funds from other parts of the world. Use of electronic facilities in banking operations and service delivery enable banks operating in Nigeria the opportunity of transferring, receiving and trading in different foreign currencies without having to physically carry the cash or coin.<sup>1</sup> In order to flow with global developments and improve

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<sup>1</sup> IC Onodugo 'Overview of Electronic Banking in Nigeria' (2015) 2(7) *International Journal of Multidisciplinary Research and Development* 334-342.

on service quality, banks operating in Nigeria have keyed into electronic banking operations, using technological infrastructures and communication networks to achieve a more efficient electronic service delivery, customer satisfaction and profit maximization.<sup>2</sup> Traditionally, the relationship between banker and customer is predicated on contract similar to that of a creditor and a debtor in that when a bank customer pays in money into his account, he occupies the position of a creditor while the bank occupies the position of a debtor and vice-versa. This contractual relationship between bankers and customers has been magnified under electronic banking to include other forms of contractual relationships different from pure debtor/creditor relationship. The banker customer relationship also creates some rights and liabilities, the violation of which puts the guilty party in a disadvantaged state of liability towards the other party.

## **2. Origin and Adoption of Electronic Banking in Nigeria**

Electronic Banking has been 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.'<sup>3</sup> It has also been defined 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.<sup>4</sup>

The advent of electronic banking in Nigeria can be traced to the 1986 Structural Adjustment Programme (SAP), which introduced reform in the country's foreign exchange system, trade policies and business generally, emphasising a need for reliance on market forces and private sector in dealing with the fundamental problems of the country's dwindling economy.<sup>5</sup>

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<sup>2</sup> E Ezeoha 'Regulating Internet Banking in Nigeria: Problems and Challenges - Part 1' <<http://www.arraydev.com/commerce/jibc/>> accessed 13 July 2021.

<sup>3</sup> CBN Technical Committee Report on E-Banking, 2003.

<sup>4</sup> Section 58, Cybercrime (Prohibition, Prevention, Etc) Act 2015.

<sup>5</sup> FO Olubisi, 'History and Evolution of Banking in Nigeria' <[www.researchgate.net](http://www.researchgate.net)> accessed on 12 July 2021.

As a result of this reform, many commercial banks were licensed bringing the number of banks from 40 in 1945 to 125 in 1991.<sup>6</sup> This rise in the number of banks led to a fierce competition among banks on ways and means of maintaining good customer base and of profit maximization by delivering better quality services to customers.<sup>7</sup> One of the means adopted towards better and efficient service delivery is the introduction of the Automated Teller Machine (ATM), a form of electronic banking by the then Societe Generale Bank in 1990 and First Bank in 1991.<sup>8</sup> Other forms of delivering quality and convenient banking services in Nigeria such as Electronic Fund Transfer, Point of Sale, Short Message Service alerts, among others, were subsequently introduced into the banking sector to pave way for easy service access and delivery in banks.

From its inception to the time in perspective, use of electronic system of banking has proved beneficial in Nigeria. The identified benefits of electronic banking which makes for its wide acceptance includes improved service delivery, minimized running cost, ease of accessing international and global financial services which makes for wide financial inclusion. Electronic banking also helps in development of new service delivery packages and products, ease of information dissemination to customers, job creation among Nigerian citizens as well as contributing towards national economic planning.

### **3. The Concept of Bank and Bank Customer**

According to the Bill of Exchange Act, a bank includes 'a body of persons whether incorporated or not who carry on the business of banking'.<sup>9</sup> This definition which includes non-incorporated bodies has been faulted in Nigeria by the Bank and Other Financial Institutions Act (BOFIA). The BOFIA provides that 'no person shall carry on any banking business in Nigeria except it is a body duly incorporated and hold a valid banking license issued under this Act'.<sup>10</sup> Going by this provision, no corporation can carry on banking business in Nigeria unless it is registered under the BOFIA. Thus, banks registered and recognized under other laws such as

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<sup>6</sup> KI Igweike, *Law of Banking and Negotiable Instruments* (Rev edn, Africana First Publishers Limited 2008) 7.

<sup>7</sup> V, Monica 'History of E-Banking in Nigeria' <<https://www.infoguidenigeria.com>> accessed 13 July, 2021.

<sup>8</sup> 1D Adewuyi 'Electronic Banking in Nigeria: Challenges of the Regulatory Authorities and the Way Forward' [2011] 2(1) *International Journal of Economic Development, Research and Investment*; 150-156.

<sup>9</sup> BEA, s 2 CAP 35 LFN 1990.

<sup>10</sup> BOFIA 2020 s2(1)

the Central Bank of Nigeria (CBN) established under the CBN Act, Federal Mortgage Bank and Savings banks would be deemed not banks under the BOFIA.<sup>11</sup> It has however been stated in the case of *Woods v. Martins Bank Limited*<sup>12</sup> that banks can only be defined based on the circumstances of every case, considering the nature of the business in issue.

Looking at the above definitions, it is clear that the key phrase in all the above definitions of bank/banker appears to be 'banking business'; that is for an entity to qualify for a bank, it must be in the operation of carrying on banking business.<sup>13</sup> The concept of 'bank customer' or when and how a person who transacts with a bank qualifies for a customer of the bank is that which has also been subjected to different definitions or descriptions.<sup>14</sup> In Nigeria, there is no specific statutory provision as to who a bank customer is. The Money Laundering (Prohibition) Act<sup>15</sup> which provides that banks and other financial institutions should always verify the identity and address of a customer before entering into any business with the customer did not define or describe who a customer is.<sup>16</sup> Owing to this lacuna, the question of who a bank customer is has always been approached through judicial interpretations.<sup>17</sup>

Under electronic banking system, the concept of 'bank'/'banker' has taken a new form different from the usual brick wall as it used to be; a person or entity can transact with and become a bank customer without visiting the bank or having any physical transaction towards account opening. These days, application for account opening can be done online in the comfort of the applicant's home with the aid of electronic infrastructures and network connectivity.<sup>18</sup> The concept of bank customers has equally changed with the wake of electronic banking especially in the present era characterized with ATM machines and debit cards that can be used on other banks different from the issuing bank.<sup>19</sup>

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<sup>11</sup> See the case of *Woods v. Martins Bank Limited* (1959) 1Q.B, 55.

<sup>12</sup> (1959) 1Q.B, 55.

<sup>13</sup> See Lord Diplock's dictum in the case of *United Dominion Trust Limited v. Kirkwood* [1966] 2QBD, 431

<sup>14</sup> (n7) 69.

<sup>15</sup> MLA CAP, M, LFN, 2004.

<sup>16</sup> Igweike, (n15)70.

<sup>17</sup> *Ibid.* See the case of *Great Western Railway Company v. London and County Banking Company* [1901] A.C, 414 at 416. See also the case of *New Nigerian Bank v Odiase* [1993] 8NWLR (Pt. 8) 235 at 243-244.

<sup>18</sup> Electronic Banking with Zenith Bank Plc. <[www.zenithbank.co](http://www.zenithbank.co)> accessed 23 June, 2021.

<sup>19</sup> See the case of *Kume Bridget Ashiemar v. Guaranteed Trust Bank & United Bank of Africa*. Unreported Suit No: MHC/198/2014.

#### 4. Banker-Customer Relationship under Electronic Banking System

The advent of electronic banking opens up enormous opportunities for banks and customers in terms of new services. Some scholars have argued that electronic system of banking has affected or altered the traditional relationship between bankers and customers.<sup>20</sup> On the contrary, it has been argued that what is affected by electronic banking is just the extent of transactions and services delivered by the bank to her customers and not the nature of the relationship between bankers and their customers.<sup>21</sup> That is to say, electronic banking only affected the mode of arriving at the contract but not the contract or the contractual relationship itself. Generally, the legal relationship existing between banks and her customers is contractual based on Creditor/Debtor relationship.<sup>22</sup> However, with the advancement of banking relations and types of services, there has been a shift from this contractual relations purely based on creditor-debtor relationship. Over the years, it has been observed that bankers obligation to their customers is elastic and does not cover only receipt of money and repaying same when demanded for.<sup>23</sup> Thus, where a bank undertakes to pay a third party on the order and instruction of a customer, the relationship of a principal and agent is created.<sup>24</sup>

Electronic banking has opened opportunities to numerous services that can be delivered by banks.<sup>25</sup> These new form of services is believed to have created other forms of relationships different from the traditional debtor-creditor relationship between banks and bank customers. Among these new form of contact created in electronic banking era is that of principal and agent.<sup>26</sup> In modern banking transaction, a customer may authorize his banker to pay certain amount of money to a third party as bills for goods purchased by the customer as well as to receive money in some circumstances on behalf of the customer who stand in the position

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<sup>20</sup> T.T, Kuvya and S, Aayushi 'Banker-Customer Relationship in the Era of Internet Banking' <[www.peacclaims.com](http://www.peacclaims.com)>accessed 14 March, 2021.

<sup>21</sup> E,Ighoroje and O, Oshiobuogie 'An Evaluation of Banker Customer Relationship in Nigeria Money Deposit Banks' [2015] 4(5) *Global Journal of Interdisciplinary Social Science*; 1-8.

<sup>22</sup> See the case of *Joachinson v Swiss Bank Corporation* [1921] 3 KB, 110 at 127. See also the case of *Yusuf v Corporative Bank Ltd* [1982] 1 ALL ER, 266.

<sup>23</sup> See the case of *Official Receiver and Liquidator v Moore* [1959] LLR, 46.

<sup>24</sup> See the case of *Joachinson v Swiss Bank Corporation*

<sup>25</sup> Ighoroje (n22).

<sup>26</sup> S, Ross 'The Economic Theory of Agency; Principal's Problems' [1982] *American Economic Review*; 134-136.

of a principal and the banker, agent.<sup>27</sup> Also when banks take up the role of stock brokers, executors or administrators of an estate as well as receiving dividends for customers, they discharge the function of agents for their principal or customers.<sup>28</sup>

Another form of relationship that arises between bankers and customers through electronic banking is that of trustee/beneficiary. This kind of relationship is created when some money, goods or property is kept in the custody of a bank for the benefit of a beneficiary. For instance, First Bank Plc. offers a fixed deposit savings package to parents for their kids' and wards' future education.<sup>29</sup> Banker-customer relationship under electronic banking can take the form of mortgagee/mortgagor where a customer pledges some valuable property to obtain loan from the bank; Bailee/Bailor, where a bank accepts a valuable from her customer for safe keeping pending when the customer needs it; guarantor/guarantee when a bank guarantees a trusted and credit worthy customer before a third party usually to obtain favour from that third party.<sup>30</sup> In spite of these superadded relationships, it is pertinent to note that the original relationship between a bank and her customer—contract is not altered. What is affected is the form, procedure or resultant effect of this contact. Before a bank enters into principal/agent, bailor/bailee, guarantor/guarantee, or trustee/beneficiary relationship, there must be a contract existing or envisaged.<sup>31</sup> The only difference is that this contract is no longer hinged solely on creditor- debtor relationship.

From the nature and extent of services and transactions delivered by banks especially in electronic banking system, a new form of relationship, fiduciary relationship can also be inferred.<sup>32</sup> This is a form of relationship where the party in a better position is expected to act in good faith towards the party in a weaker position and the party in a weaker position can bring an action based on fiduciary to challenge the act of the stronger party when they fail to act in good faith as required.<sup>33</sup>

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<sup>27</sup> S, Balaji. 'Banker and Customer Relationship' <[www.relationship/banker\\_customer.>](http://www.relationship/banker_customer.>) accessed 2 March, 2021.

<sup>28</sup> *Ibid.*

<sup>29</sup> 'Children Education Trust –FBN Quest Trustees' <<https://fbnquest.com>> accessed 12 July 2021.

<sup>30</sup> *Ibid.*

<sup>31</sup> Ighoroje, (n 26)

<sup>32</sup> P, Isabel 'The Evolution of Banking: A Flexible Fiduciary Duties Approach Will Help Better Protect Mobile Banking Consumers' [2015] 1(1) *Journal of Law, Technology and Policy*; 211-245.

<sup>33</sup> See the case of *U.B.N Plc. Chinaemeze* [2014] 9 NWLR (Pt. 1411) 166.

## 5. Rights and Duties of Bankers and Bank Customers in Electronic Banking System in Nigeria

Arising from the relationship between bankers and bank customers are certain rights, duties and obligations to customers by bankers and customers to their bankers. The existence of customers' rights place bankers not only under obligations not to infringe on the rights, but also duties to keep and protect the rights.<sup>34</sup> Bank customers' rights place the following duties on bankers. The following are some of the banks' duties to customers:

**5.1 Duty to Honour Cheques Drawn on the Banker:** A cheque can be defined as an unconditional order in writing drawn by one person upon another who must be a banker, signed by the drawer, requiring the banker to pay on demand or at sight or presentation, a sum of money to or on order of a specific person.<sup>35</sup> Fundamental to the traditional banker-customer relationship of debtor-creditor is the duty on the bank to honour cheques issued by customers provided there is sufficient fund in the account on which the cheque is drawn.<sup>36</sup> With the advent of electronic banking, cheque is no longer restricted to paper documents. The meaning of cheques has been magnified to include payment request through recognized electronic means and outlets such as ATM channels, POS and other electronic payment channels.<sup>37</sup> In the case of *Moses Jwan v. Ecobank Plc & Anor*,<sup>38</sup> the Court of Appeal held that 'the ATM card issued by a bank is akin to a cheque; must be honoured on request once there is enough fund in the customer's account and failure to do that means that the bank is in breach of duty to honour cheques owed to the customer.'

Interpreting a cheque to include ATM cards and failure to pay or dispense cash based on request using ATM card however, may impose some hardship to bank customers in pursuit of claims of this nature. For example, where an ATM card issued by one bank is used on the ATM machine owned by another bank, a question that may agitate one's curiosity is which of the banks should be held liable in the event of failure

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<sup>34</sup> *Ibid.*

<sup>35</sup> L. Chorley and J.M Holden Law of Banking (1974 6<sup>th</sup> edn) 44

<sup>36</sup> See the case of *NDIC v Okem Enterprises Ltd* [2009] 10 NWLR, (pt. 880) 107.

<sup>37</sup> O.Olukole *Nigerian Electronic Banking Law* (Nonesuchhouse: Ibadan, 2009) p.50.

<sup>38</sup> [2021] 10 NWLR (Pt. 1785)449 at 485 (CA).See also the case of *Agbanelo v. U.B.N Ltd* [2000] 7 NWLR (Pt. 666) 534 and *Diamond Bank Plc. v. Partnership Investment Company Ltd* [2009] 18 NWLR (Pt. 1172) 67.

to dispense cash, the ATM card issuing bank or the ATM machine owned bank?<sup>39</sup>

**5.2 Duty to Receive Customer's Money and Deposits:** the right of a bank customer to have his money received and collected by his banker places on the banker, an obligation not to reject any money, deposits or other banking instruments legally delivered to it by the customer or a third party for the benefit of the customer.<sup>40</sup> In electronic banking system, a simple SMS to customers' phone numbers or email addresses by the bank suffices to notify the customer of this.

**5.3 Duty on the Banker to Act in Due Care and Diligence in Handling Customer's Affairs:** Based on the contractual relationship between banks and customer, bankers especially in electronic banking system undertake several duties in service delivery to her customers.<sup>41</sup> It behooves on the bank to act diligently in discharging these duties to avoid liability.

*D. Duty of Secrecy in Affairs Concerning Customers' Accounts:* the right of a bank customer to secrecy on affairs concerning his account which correlates a duty on the bank not to disclose customers' affair is a long recognized right and imposes on the bankers the duty not to bring transactions and other particulars of their relationship with customers to the public;<sup>42</sup> such as disclosing vital and important information concerning customers account to third parties.<sup>43</sup>

However, there are instances where a banker will be at liberty to disclose customer's confidential information and in such circumstances a banker will not be held liable for such disclosure. These are instances such as:

- i. Where the duty to disclose is imposed by law<sup>44</sup>
- ii. Where duty to disclose is for the protection of public interest.<sup>45</sup>
- iii. Where disclosure is in the interest of the bank.

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<sup>39</sup> See the case of *Kume Bridget Ashiemar v. Gtb & UBA* (Unreported) Suit No. MHC/198/2014, p. 9 delivered on 24<sup>th</sup> May, 2018 where the claimant was faced with the task of that an ATM card issued to her by the first defendant which she used on second defendant's ATM machine failed to dispense cash on the several occasions she used the card on the second defendant's machine. The case was however decided on the claimant's failure to discharge the required burden of proof.

<sup>40</sup>Igweike, (n17)

<sup>41</sup>See the case of *Diamond Bank Plc. v. Partnership Investment Company Ltd* [2009] 18 NWLR (Pt. 1172) 67.

<sup>42</sup> W. A Adebayo and Filani A.O 'Unauthorised Withdrawal of Money from Customers Account in Nigeria: The Legal Implication for the Banker /Customer Relationship' [2021] 9(1) *Global Journal of Politics and Law Research*; 1-20.

<sup>43</sup>See the case of *Walsh v National Irish Bank Limited Walsh v National Irish Bank Limited*.

<sup>44</sup>See section 2(1), (2 and )(3) of the Money Lundering Act.

<sup>45</sup>*Bankers Trust Co. v Shapira* [1980] 1WRN, 1274

- iv. Where the bank has the customer's interest, express or implied to so disclose.

**5.4 Duty to Act in Good Faith:** this duty flows from the fiduciary relationship usually created by banker-customer relationship in electronic banking transactions. In a fiduciary relationship, a party that is in breach of a fundamental term cannot be heard to plead reliance on an exemption or limitation clause.<sup>46</sup>

## **6. Data Insecurity and Right of Customers to Data Protection in Nigerian Banking Sector**

Technology, no doubt, has improved the nature and types of banking services and transactions in Nigeria.<sup>47</sup> Technological advancement has, however, been negatively impacted by data insecurity and attacks on banking facilities as well as customers' data. Data insecurity could be defined as any form of insecurity or risk affecting the use of electronic data and transmission, technological tools and the internet.<sup>48</sup> The wake of cyber attacks which affects the Information Technology Systems and infrastructure used in the banking sector has become a major source of worry to banks operating in Nigeria.<sup>49</sup> Data insecurity in the banking sector takes the form of permanent loss of data, and malicious attacks such as hacking into personal or company accounts among others. In recent times, there are news of different incidence of cyber attacks on Nigerian banks. Some among these is the attack on Unity Bank Plc. and Access Bank Plc. in August and September, 2020 respectively.<sup>50</sup> In 2019, the Central Bank of Nigeria reported that 6.5 Trillion Naira worth of bank transactions was stolen by hackers who hacked into the official websites of various banks in Nigeria.<sup>51</sup>

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<sup>46</sup> See the case of *Guarantee Trust Bank v. Monturayo Motolupe Aleogena* (2019) LCN/12777 (CA).

<sup>47</sup>O, Chukwuemeka 'Cyber Insecurity in Nigerian Banking System and the Need for Urgent Action' <[www.7to5posts.com](http://www.7to5posts.com)> accessed 1 August, 2021.

<sup>48</sup>V.C, Ugwuja, P.A, Ekunwe, and A, Henri-Ukoha, 'Cyber Risks in Electronic Banking: Exposures and Cybersecurity Preparedness of Women Agro-Entrepreneurs in South South Region of Nigeria' [2019] *Paper* Presented at the 6<sup>th</sup> African Conference of Agricultural Economists, Abuja, Nigeria, 23-26, 2019; p. 4.

<sup>49</sup>'Rising Cyber Fraud in Nigeria and Banks' Losses' <[www.businessday.ng](http://www.businessday.ng)> accessed 2 August, 2021.

<sup>50</sup>O, Victoria Critical Data Security Issues in the Nigerian Banking Sector' [2020] *African Academic Network on Internet Policy*; <[www.aanoip.org](http://www.aanoip.org)> accessed on 22<sup>nd</sup> January, 2021.

<sup>51</sup>H, Ogunwale 'The Impact of Cybercrime on Nigeria's Commercial Banking System' <[www.researchgate.net](http://www.researchgate.net)> accessed 14 June, 2020.

The banking sector in Nigeria handles large volume of personal and financial data of bank customers during financial transactions making disclosure of certain information about customers inevitable.<sup>52</sup> Perpetrators of data theft and breach utilize different forms and sophisticated weapons and means in launching attacks on banks and banking facilities, making it possible to easily break in and penetrate secured banking systems.<sup>53</sup> They succeed in perpetrating several attacks unnoticed due to the anonymous nature of the internet where any person can access the internet from any part of the world unnoticed. Owing to the nature of the cyberspace, attacks can be originated from any computer in the world and passed through other computers in the same geographical location or across multiple national and international boundaries. For instance, in the case of *Abolade Bode v. First Bank of Nigeria Plc. & Mastercard West Africa Limited*,<sup>54</sup> it was discovered that the unauthorized withdrawal from the claimant/customer's First Bank account in Nigeria was made in London by one Mr. Manuel Caser of No. 22 Greengate Street London while the last two withdrawals was for purchase of Wizz Air Tickets in Budapest showing the passengers' names as Gamote Lordam and Alina Claudia Duma, respectively.

It has been reported that it takes banks an average of 197 days to become aware of data breaches and invasion; and an average of 69 days to contain it.<sup>55</sup> Owing to the rising risk associated with data theft and breaches in the banking sector, it has become imperative for banks to focus and invest on data security especially looking at the importance of data to bankers in the modern electronic banking system and the high attacks on data by cyber attackers who utilize the loophole of absence of stronger data security measures in Nigerian banks.<sup>56</sup>

## **7. Liability for Data Insecurity in Electronic Banking System in Nigeria**

Generally, liability arises where a party's action or inaction leads to damages suffered by another. In the banking industry, the relationship existing between bankers and customers is contractual, requiring each party to discharge its contractual duty to the other. The adoption of electronic banking system in Nigeria places a duty on bankers especially

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<sup>52</sup>(n50)

<sup>53</sup>(n49).

<sup>54</sup> (Unreported) Suit No: FHC/L/CS/405/13, delivered on 10<sup>th</sup> April, 2019, p.22.

<sup>55</sup> Victoria (n51).

<sup>56</sup>Cybercrime and the Banking Sector: Top Threats and Secure Banking of the Future' <<http://www.information-age.com/cyber-crime-banking-sector-123464602>> accessed 12 June, 2021.

in the area of protection of vital information and data usually supplied by bankers at the point of account opening for electronic banking services and subscription. It has been opined that greater duty is imposed on the bank, the custodian of the data and the gateman of the treasury.<sup>57</sup> It has also been held that a new innovation by bank to make for easy access and operation requires a specialized service and duty by the banks, and failure to provide the means of accessing this specialized service or negligence towards its provision and protection will amount to violation of customers' rights which in turn makes the bank liable.<sup>58</sup>

The applicable laws to cases of data protection and customers' inherent rights in Nigerian banking sector today are a handful of legislations on general banking, cybercrime prevention and data protection. The problem associated with applying these laws stems from the fact that the laws on general banking are not intended to be applied towards data protection as they predate the era of electronic banking and use of personal data in the banking sector. Others made for cybercrime control and data protection did not capture banking operations copiously. This has posed problems to law enforcement agents who usually are faced with the task of shuttling from one law to another in order to sway the court towards doing justice when a breach of customers' data occur.

A relevant law in Nigeria which has some provisions on personal data protection is the Cybercrime (Protection, Prohibition, Etc) Act, 2015. Under the Cybercrime Act, the duty of putting all counter-fraud measures in place by banks and financial institutions so as to safeguard their customers' sensitive information; is reposed on banks.<sup>59</sup> The Act nevertheless has been criticized for failing to give a working definition of the meaning, extent and standard of 'counter fraud measures.' Another area where the Act has been criticized is on the area of its placing the burden of proof on the affected customer where failure or negligence to put counter fraud measures in place is alleged.<sup>60</sup>

Looking at this and other shortcomings in the Act and lack of other legislative framework in this regard, some writers have opined that it will serve a better purpose falling back to the traditional fiduciary relationship between bankers and customers in matters of data protection in electronic banking system. It has equally argued that it would make

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<sup>57</sup>Adebayo (n43)

<sup>58</sup> *Agbanelo v. UBN* [2000] 7 NWLR (Pt. 666) 534.

<sup>59</sup> Section 19(3), Cybercrime Act, 2015.

<sup>60</sup>U.J. Orji. 'Protecting Consumers from Cybercrime in the Banking and Financial Sector: An Analysis of the Legal Response in Nigeria' <[www.tilburylawreview.com](http://www.tilburylawreview.com)> accessed 12 November, 2020. See also section 19(3) Cybercrime (Prevention, Prohibition, Etc) Act, 2015.

for a better protection of bank customers data if reliance is placed on the general legal provisions governing data protection in Nigeria such as the provisions of the National Information Technology Development Agency Act (NITDA) among others.<sup>61</sup> However, it is pertinent to point out at this juncture that despite the protection seemingly provided for in these laws towards data protection by data controllers including banks, bank customers find it difficult to enforce their rights owing to the fact that they are usually gagged into tight corners by bankers in Nigeria using different forms of exclusion, exemption and limitation conditions and terms to limit, exclude and or exempt themselves and their employees from liability.

### **8. Legal Effect of Exclusion Clauses on Banker / Customer Relationship in Nigeria**

Exclusion clauses are clauses or conditions in a contract that has the capacity of totally limiting, excluding or partly transferring certain liabilities in whole or in part from one party in most cases, the seller to another party usually the weaker party, the buyer or the acquirer.<sup>62</sup> Under the electronic system of banking, banks usually introduce certain limitation clauses to reduce the extent or nature of liabilities it suffers from customers. In Nigeria banking sector, a typical form of limitation clauses is stipulated in Electronic Banking Agreements/Documents. Electronic Banking Agreements are agreements between banks and customers or consumers of electronic banking services evidencing the right and liabilities of both parties. In a standard contract relationships such as the banker-customer relationship, there is always a contract agreement specifying the terms and conditions of operation of the contract.<sup>63</sup> In Nigeria, the banks that offer electronic banking services usually capture these terms and conditions in the 'Electronic Banking Agreements' kept by the banks, purported to have been mutually reached between the bank and their customers. For the purpose of this research, the 'Zenith Bank Electronic Banking Agreement'<sup>64</sup> will serve as a working tool. For instance, paragraph 7 of the Zenith Bank Electronic Banking Agreement provides as follows:

Under no circumstances will the bank be liable for any damages, including without limitation direct or indirect, special, incidental

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<sup>61</sup> *Ibid.*

<sup>62</sup> K, Marharaj. 'Limits on the Operation of Exclusion Clauses' (2012) 49(3) Alberta Law Review, 635-654.

<sup>63</sup> Orji (n 60).

<sup>64</sup> <<http://www.zenithbank.com>> accessed on 20 May, 2021.

or consequential damages, losses or expenses arising in connection with this service or use thereof or inability to use by any party, or in connection with any failure of performance, error, omission, interruption, defect, delay in operation, transmission, computer virus or line or system failure, even if the bank or its representatives thereof are advised of the possibility of such damages, losses or hyperlink to other internet resources are at the customers risk thereof are advised of the possibility of such damages, losses or hyperlink to other internet resources are at the customers risk.<sup>65</sup>

Also in paragraph 14, the agreement provides that:

Customer agree that the bank will not be liable for any liability, whether direct, indirect, incidental, special, consequential or exemplary damages, including but not limited to damages for loss of profits, goodwill, use or other intangible losses, even if we have been advised of the possibility of such damages, resulting from (i) The use or the inability to use the service, (ii) The cost of getting substitute goods and service resulting from any products, data, information or services purchased or obtained or messages received or transactions entered into through or from the service; (iii) Unauthorised access to or alteration of transmission of data; (iv) Statements or conduct of anyone on the service; or (v) Any other matter relating to the service.

It is trite and in tandem with the law of contract that parties to a contract are at liberty to include soothing conditions and terms to their contract and once such terms and conditions are stated and agreed upon, courts are duty bound to give effect to it and to reflect the intention of the contracting parties provided that there are no vitiating circumstances. Usually, exclusion or limitation clauses are used in standard form contracts. A standard form contract is a contract between two parties where the terms and conditions of the contract are set by one of the parties and the other party has little or no ability to negotiate a more favourable terms and conditions.<sup>66</sup> Standard form contracts are often used by establishments such as airlines, transport companies, hotels and banks.<sup>67</sup> Apart from limiting or almost eradicating or exonerating

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<sup>65</sup>Paragraph 7, Zenith Bank Electronic Banking Agreement, <<https://www.znithbank.com>> accessed on 20 May, 2021.

<sup>66</sup>G. Gluck 'Standard Form Contracts: The Contract Theory Reconsidered' [1979] 28(1) *The International and Comparative Law Quarterly*, 72-90.

<sup>67</sup>F. Okeke, 'Exclusion Clauses: When He Who Pays the Piper Does Not Dictate the Tune' <[www.mondac.com](http://www.mondac.com)> accessed on 25 December, 2022. See the case of *Anyah v. Imo Concorde Hotels* [1992]4NWLR (Pt.234) 210.

themselves and their employees of every liability arising from data insecurity in electronic banking, Nigerian banks hardly avail customers of this electronic banking agreement documents so as to enable them have a full grip of what they are in for and make an informed choice as to whether or not to go on with the electronic banking contract.<sup>68</sup>

Be that as it may, it is a general principle of equity that an exemption clause cannot avail a party who is guilty of a fundamental breach.<sup>69</sup> To this end, a customer who suffers data breach or data insecurity in any form as a result of failure of her bank to install requisite security towards protection of data and deposits may not be denied the needed respite as a result of exclusion clause in the electronic banking agreement. In other words, should a Zenith bank customer suffer breach arising from failure of the bank to provide the needed security measures to their facility, the bank may likely not escape liability on the strength of the exclusion clauses in the electronic banking agreement owing to the fact that data protection and provision of counter fraud measures may be construed as a fundamental term in a banker-customer relationship in an electronic banking transaction.<sup>70</sup> To this end, a banker may not be heard relying on exemption, exclusion or limitation clause in matters bordering on customer's personal data protection despite there being no clear legislation in this regard in Nigeria today.

### **9. Remedies for Data Insecurity Arising From Electronic Banking Operations in Nigeria**

From the foregoing, it can be deduced that there are rights and duties of banks and bank customers in banking activities, transactions and service delivery. One peculiar nature of right is that it can be enforced by the party possessing the right against the party on whom the duty not to violate the right is reposed. Generally, a banker's liability under electronic banking can arise under contract based on the traditional banker-customer relationship; tort of negligence arising from breach of the duty of care based on the fiduciary relationship between bankers and customers; as well as action for enforcement of fundamental rights for violation of right to privacy arising from breach of duty to protect personal data which can be pursued under the fundamental right to privacy provided for under section 37 of the 1999 Constitution. Thus, an aggrieved customer can maintain action for breach of fiduciary duty of care,

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<sup>68</sup> *Ibid.*

<sup>69</sup> Maharaj (n 63).

<sup>70</sup> Cybercrime (Prevention, Prohibition, Etc) Act, 2015, s 19 (3); *Guarantee Trust Bank v Monturayo Motolupe Aleogena* [2019] LCN/12777(CA).

negligence in tort, general damages for breach of contract as well as an enforcement of right to privacy. However, Nigerian courts are not yet settled on the nature of data protection right, whether or not it is a fundamental right to be enforced under Fundamental Right Enforcement Rules.<sup>71</sup>

## 10. Conclusion

Rights of bank customers attract correlative duties on their bankers not only to safeguard these rights but also to ensure that they are not violated by third parties. One of the rights of bank customers is the right to secrecy concerning bank customers' accounts and affairs relating to their bank transactions. In the wake of electronic banking system, bank customers' data are collected, stored and controlled electronically using electronic infrastructures and internet network for ease and efficiency of banking transactions.

The global nature of the internet enables easy access to different information including bank customers' information stored in bankers' database from any part of the globe. In some instances, this information is accessed by third parties for criminal purposes. The usual question is how can these customers' information in the banks database be secured from third parties interference and whose duty is it to secure this important data? The answer to this poser is obviously the banks that are in control of their database where this information is stored. However, the present day realities in Nigerian electronic banking system has shown that banks usually keep and maintain electronic banking agreements in which they shield themselves of all liabilities arising from third party intrusion and violation of bank customer's rights including right to secrecy of affairs on their account.

## 11. Recommendations

The relationship between bankers and bank customers in electronic banking being that of contract, it is recommended that any liability arising from this contract shall be treated accordingly. To this end, any violation of a fundamental term in the contract such as violation of the customers' right to secrecy and confidentiality shall be interpreted to make the bank liable irrespective of any exclusion or exemption clause provided that the aggrieved customer did not connive or condone the

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<sup>71</sup> *Incorporated Trustees of Digital Right Lawyers Initiative & Ors. v. National Identity Management Commission* [2021] LPELR 55623(CA) and *Emerging Markets Telecommunication Service Limited v Eneye* [Unreported] Suit No. FHC/ABJ/CS/717/2013.

violation. This essay suggests that in order to properly secure bank customers' rights in Nigerian electronic banking system, there is a need for a concrete and comprehensive legislative framework where rights and liabilities of electronic banking customers as well as penalties for non-performance of which will be clearly spelt out.