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Legal Perspectives of Dispense Error in ATM Transactions in the Banking Industry in Nigeria

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Abstract: The banking industry in Nigeria plays a crucial role in the economy of the nation. It constitutes one of the pillars on which the economy of the country is erected. It serves as a catalyst to the economic development of the nation through the provision of financial services. Over the years, banking business has continued to evolve into different dynamics with its concomitant sophistication and technological advancement. The evolution of the internet and advances in telecommunication technology has opened up new distribution channels for financial products and services in the banking industry in Nigeria. These have help to fast-tract the banking processes for efficiency, convenience and accessibility. The introduction of ATM (Automated Teller Machine) and other modern means of payment system in the banking industry in Nigeria is one of the technological innovations. However, it is without its own challenges such as technical and operational issues. These issues no doubt have legal implications which this paper is set out to examine and make appropriate recommendations to ensure sound and stable banking system.

Keywords: ATM, Transaction and Banking.

INTRODUCTION

The Banking Industry in Nigeria plays a crucial role in the economy of the nation. It constitutes one of the pillars on which the economy of the nation is erected.[1] It serves as a catalyst to the economic development of the nation through the provision of financial services to all sectors of the economy. Over the years, the banking industry has continued to evolved into different dynamics with its concomitant sophistication and technological advancement.[2]

The evolution of the internet and advances in telecommunication technology has opened up new channels for financial products and services in the banking industry.[3] The internet for example, has opened up a number of mechanisms for commercial transactions such as e-commerce, e-banking, e-business or e-payment. Electronic banking is one of the mechanisms evolved through internet for carrying out banking transactions. These innovative banking processes have helped to fast-tract banking transactions for efficiency and accessibility. ATM (Automated Teller Machine) is one of the forms of electronic banking introduced in the banking industry in Nigeria.[4] The use of ATM as a form of electronic banking transaction is without its own challenges such as technical and operational issues. One of these issues is Dispense error or otherwise called failed ATM transaction. Dispense error in ATM transaction may be caused by technical or operational issues.

However, there are also legal perspectives of the dispense error such as negligence, exclusion clause, privity of contract, indemnity and time frame for reversal of the failed transaction. This paper will examine these legal issues in respect of dispense error in ATM transaction in the Nigerian banking industry and proffer appropriate recommendations to ensure a sound and stable banking system.

Definition and Nature of Bank

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[1] O. Akanle "Legal Institutional Framework for the Control and prevention of Crime in the Banking Industry" Ajibila, B and Awa U. (eds) Banking and other Financial Malpractices in Nigeria (Malthouse Press, Lagos 1990) 1
[2] U. Udok and M. Jonah, "Curbing ATM Fraud in the Banking Industry in Nigeria: Applicable Legal Framework" (2020) 4 (*Uniuyo Journal of Commercial and Property Law*), 1
[3] U. Udok, "*An Examination of E-Fraud. The Nigerian Banking Industry in Perspective*" (2009)1(1) CJPPL, 49
[4] *Ibid*

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It is difficult to give precise definitions to the term "bank" or "banker". Statutory, judicial and text-book writer's definitions have not been helpful. They defy positive and readily identifiable definitions. For instance, the Stamp Act[5] was the first statute to introduce the term "Banker". Later, the Draft on Bankers Act[6] defined the term "banker" to include "any person or persons or corporation or joint-stock or other companies acting as banker or bankers". This definition extended the definition of banker to include both individuals and companies. There was a modification of this definition in the Bill of Exchange Act[7] which defined a Banker as including "a body of persons whether incorporated or not who carry on the business of Banking" However, this definition is restrictive as it excluded individuals from the definition of the term "banker" and restricted it to only a body of persons. It is contemplated that going by the definitions, it meant anybody of persons carrying on banking business became a banker. There are other statutory definitions of the term "banker"[8] The Banks and other Financial Institutions Act, (BOFIA)[9] is the main legislation regulating banks in Nigeria. Unfortunately, it does not give a specific definition of the term "bank" Rather, it defines "bank" as follows: "bank" means a bank licensed under this Act. However, it defines "banking business" as follows:

> "Banking Business" means the business of receiving deposits in current account, saving deposit account or other similar account, paying or collecting cheques, drawn by or paid in by customers; provision of finance, corporate and investment matters, making or managing investments on behalf of any person whether such businesses are conducted digitally, virtually or electronically only or such other business as the Governor may, by order published in the Gazette, designate as banking business"[10]

The definition of banking business" under the BOFIA[11] is a significant improvement over that of the repealed BOFIA.[12] Under the repealed BOFIA, there was no inclusion of banking business conducted digitally, virtually or electronically. The inclusion of these new banking businesses means that the relationship between a bank and customer also extends to banking business conducted digitally, virtually and electronically, and these extend to cover ATM services provided by the banks to customers. The inclusion of banking business conducted digitally, virtually and electronically is also significant in view of the introduction of E-Naira by the Central Bank of Nigeria (CBN). Therefore, the introduction of E-Naira by CBN is backed up by the law. Nigeria is the first country in Africa to launch its own digital currency. It is an electronic version of the local paper naira currency equal in value and issued by CBN. It is not intended to replace cash but will function as a safe and efficient alternative means of payment[13]

Furthermore, attempts have been made by the judiciary to define the term "bank" or "banker". The court decision which is widely accepted as a precedent in the legal definition of the term bank or banking is the decision in the case of *United Dominion Trust Ltd v Kirkwood*[14] where the defendant's only defence to a claim on certain bills of exchange which he had endorsed was that the Plaintiffs were money lenders and as such they were bankers and accordingly had no need to register. The decision depended therefore, upon whether or not the Plaintiffs were bankers. The court of Appeal by a majority decision laid down the usual characteristics of banking at that time as follows:

- The acceptance of money from and collection of cheques for customers and the placing of them to the customer's credit.
- The honouring of chques or orders drawn on the bank by their customers when presented for payment and
- The keeping of some form of current or saving account in their books in which the credits and debits are entered.

The above decision of the court of Appeal did not represent a precise definition of the term "bank" or "banker".

It merely laid down the characteristic of banking or description of the functions of a bank. However, it is pertinent to state that modern day banking has moved away from the above traditional functions of bank to a more sophisticated form of banking which includes investment, consultancy, and advisory services.[15]

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[5] 1953
[6] 1856
[7] 1992. See also Section 2 of the Bill of Exchange Act Cap B 8 Laws of the Federation 2004
[8] See section 2 of the Coins Ordinance No. 6 of 1928; Section 258 of the Evidence Act Cap E Laws of the Federation 2004; Section 55 of the Central Bank of Nigeria Act, No. 7 of 2007; Section 46 of the Nigerian Deposit Insurance Corporation Act, No. 16 of 2006; Section 23 of the failed Banks (Recovery of Debts) and other Financial Malpractices in Banks Act Cap F2 Laws of the Federation 2004.
[9] 2020
[10] Section 131 of BOFIA 2020
[11] 2020
[12] Cap B4 Laws of the Federation 2004. Repealed by BOFIA 2020. See section 130 of BOFIA 2020
[13] African Business-Nigeria gear up for eNaira https://African.business accessed on 22/10/2021
[14] (1966) 1 QBD 783. Appeal (1966) 2 QBD 431
[15] See section 131 of BOFIA 2020

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In Nigeria, the first case that attempted to clarify the meaning of the term "banker" or "bank" was the case of *Akwule v R*[16] which was a decision by the then Federal Supreme Court based on Banking Act of 1958.[17] The Federal Supreme Court (as it was then called) had to define a bank by jointly reading and interpreting the provisions of section 2 and 3 (1) of the Banking Act, 1958 (now repealed). The Federal Supreme Court relying on section 2 and section 3(1) of the then Banking Act which stated that a "bank can operate in Nigeria only by a company or body corporate" and overturned the judgment of the lower court which equated the Bank Manager, Mr. Akwule with a bank by convicting him as a "banker". Therefore, based on the judgment of the court "banker" refers to a body with a separate legal existence and not to a biological person who can be not more than an employee. This decision was subject to criticisms[18] However, it is well settled that only corporate bodies can answer to the description of "bank" or "banker"[19]

As a corollary, *Late Justice Pat-Acholoru in SBN Ltd v De Lluch* lamented the difficulty in having a precise definition of the term "bank" or "banker". The late Justice of the Supreme Court stated as follows:

> "The term "banking" cannot be easily compartmentalized. In otherwords, the term defies positive and readily identifiable definition. It must be remembered that a recital of usual characteristics is not equivalent to a definition. There are other characteristics which go to make a banker. A banker is easier to recognize than to define".

It follows from the above statement of Late Justice Pat-Acholonu that one cannot readily compartmentalize the terms "bank" "banking or "banker". It defies positive and readily identifiable definition. Attempts have also been made by authors or text-book writers to define the term "bank" or "banker". The Late Dr. Hart defined a banker or bank as follows:[20]

> "…a person or company carrying on the business of receiving moneys and collecting drafts, for customers subject to the obligation of honouring cheques drawn upon them from time to time by the customers to the extent of the amount available on their current account".

The Halsbury's Laws of England defined a banker as:

> "…an individual, partnership or corporation whose sole or predominating business is banking that is the receipt of money on current or deposit account and the payment of cheques drawn by and the collection of cheques paid in by a customer.[21]

The definition of "bank" or banker" by the authors of Paget's Law of Banking is not different from the other two.

It defined "bank" or "banker" as follows:

> "A banker or bank is a corporation or person (or group of persons) who accepts monies on current account, pays cheques drawn upon such accounts on demand and collects cheques for customers".[22]

A common characteristic of the above definitions of "bank" or "banker" is that a person or group of persons can be a bank but this is not possible in Nigeria where only a company duly incorporated in Nigeria and holds a valid license issued under the BOFIA can become a bank.[23] Therefore, any person who carries on banking business in Nigeria without a valid licence under BOFIA commits an offence and is liable on conviction to:

- Imprisonment for a term of not less than 5 years
- A fine of not less than ₦50,000,000
- Two times the cumulative deposit or amount collected; or
- Both imprisonment and fine[24]

[16] (1963) NNLR 105
[17] Repealed by the Banking Act 1969. The Banking Act 1969 was repealed by the BOFIA, Cap B2 LFN 2004 BOFIA 2020 repealed BOFIA Cap B2 LFN 2004
[18] J. Anifalaje, "The legal meaning and Structure of Banks in Nigeria. A Critical Appraisal" *in the Nigerian Journal of Contemporary Law* 2
[19] (2002) 18 NWLR (Pt.905)at paras. B Quoting from Lord Denning Mr. in *Dominion Trust Ltd v Kirkwood* (1966(1 ALL ER 968 at 986.
[20] "The Law of Banking" Vol. 1 1931
[21] Halsbury's Law of England, Vol. 1 P. 31
[22] Paget's Law of Banking
[23] Section 2(i) of BOFIA 2020
[24] *Ibid*. section 2 (2) a, b & c

A comparative analysis of the penalty for carrying on a banking business without licence under the repealed BOFIA and the BOFIA, 2020 is necessary. Under the repealed BOFIA,[25] any person who transacted banking business without a valid licence was guilty of an offence and liable on conviction to imprisonment for a term not exceeding Ten years or a fine of ₦2,500,000 or to both such imprisonment and fine. It is very clear that the new BOFIA has reduced the term of imprisonment to not less than 5 years while increasing the fine to not less than ₦50,000,000. The inclusion of additional penalty of "two times the cumulative deposit or other amount collected" in the new BOFIA is intended to make the penalty for carrying on banking business without licence more severe and to deter potential violators. The penalty under the repealed BOFIA was less stringent and not deterrent.

From the above analysis of the various definitions of bank or banker or banking, it may seem as though the terms are not capable of any precise and readily identifiable definition. Rather, they are recitals of usual characteristics of banking or functions of bank. Neither the term "bank" nor "banking" is given interpretation in the constitution or in the interpretation Act. Perhaps, this may sound academic, but it is suggested that a constitutional Interpretation will laid to rest the controversy as to exact definition of the terms since the constitution is the supreme law of the land.

AUTOMATED TELLER MACHINE

Meaning and Nature of Automated Teller Machine

Automated teller machine (ATM) is an electronic communication device that enables customer of financial institution to perform financial transactions such as cash withdrawals, deposits, funds transfer and account information inquiries at anytime and without the need for direct interaction with the bank staff.[26]

It is a cash dispenser which is designed to enable customers enjoy banking services without coming into contact with cashiers. ATM combines a computer terminal, record keeping system and cash vault into one unit permitting customers to enter into the bank book keeping system with a plastic card containing a personal identification number (PIN). Once access is gained, it offers several retail banking services to customers.

An ATM has also been described as an electronic outlet that allows customers to complete basic transaction without the aid of a branch representative.[27] ATMs are known by a variety of names.[28] Many ATMs have a sign above them indicating the names of the bank or organization that owns the ATM, and possibly including the networks to which it can connect. ATMs that are not operated by a financial institution are known as a white label ATMs.

Introduction of ATM into Banking Industry in Nigeria

In Nigeria, a mechanical cash dispenser, arguable an ATM was introduced in 1986 by the defunct *Societe Generale* Bank. In October, Inters witch ATM system took off.[29] In 1991, First Bank of Nigeria Ltd (then First Bank of Nigeria Plc) introduced its first ATM and it was located at No 35 Marina, Lagos, the headquarters of the bank. It was introduced as part of convenience round the clock.[30] Zenith bank introduced the first ATM Gallery in Nigeria at Plot 276 Ajose Adeogm Street, Victoria Island, Lagos. The Gallery was the first full-fledged bank branch in Nigeria without the human teller in 2007.[31]

It is pertinent to mention that initially ATM in Nigeria was operated as elitist services designed for those desirous of exclusive service. Availability of cards was rare and to obtain the cards, it was a difficult process. Presently, the use of ATM cards has been widely promoted. Banks prefer not to have personal contact with their customers because of the use of ATM cards. In order to compel customers to adopt the use of ATM cards, banks often resort to debiting the account of customers for withdrawing below a certain amount across the counter.[32]

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[25] Cap B4 LFN 2004

[26] *Automated Teller Machine*. En.m.wikidpedia.org. Accessed on 5th May, 2020

[27] Julia Kajan *"Automated Teller Machine*https://www.investopedia.com. Accessed on 14th May, 2020

[28] In USA, it is called Automated Teller Machine (ATM) or sometimes ATM machine. In Canada, it is called Automated Banking Machine (ABM). In British English, it is called Cash Machine and hole in the wall. Others are anytime money, cash time, bank time machine, cash dispenser, cash corner, bank omat etc. Julia Kajan, "Automated Teller Machine https://www.investoppedia.com>Accessed on 14th May, 2020

[29] "An Assessment of the use of Automated Teller Machine (ATM) in the Banking Industry in Nigeria" https://www.projectclue.com/banking-and-finance/project-topics-mat. Accessed on 8th May, 2020

[30] "First ATM Introduced by First Bank" https://www.firstbanknigeria.com Accessed on 8th May, 2020

[31] "Zenith Bank launches First ATM Gallery" https://allafrica.com Accessed on 8th May, 2020.

[32] Wole Olatokun & Louisa Igbinedion "The Adoption of Automatic Teller Machines in Nigeria: An Application of Theory of Diffusing of Innovation" (2009) 6 *Issues in informing science and Information Technology Journal* 274

In Nigeria, the introduction of ATM by banks and its use by bank customers have gained grounds and the rate of such introduction has increased tremendously in recent times.[33] The increase in the deployment of ATM by banks and its use by customers became more noticeable especially, after the consolidation of banks. Overtime, both bank customers and banks have found the use of ATM more convenient and faster in bank transactions. Banks charge customers for using ATM

The Central Bank of Nigeria regulates the fees to be charged by the banks for the use of ATM by customers. Apart from the fees charged by banks for the use of ATM by bank customers, banks also charge fees for processing of the debit cards. The debit cards have expiry dates and is usually re-newed after the expiration of the value date.

According to data from the Nigerian Inter-bank Settlement System (NIBSS), the total number of Automated Teller Machine (ATMs) in Nigeria as at 2018 was 18,321. However, the total number of transactions performed was 650.06 million, the transaction value was ₦4.76 trillion.[34] As at 2017, Nigeria needed an estimated number of 60,000 ATM in order to serve the everyday cash needs of Nigeria while persuading them to keep the bulk of their money in banks. It appears that the number may increase significantly by 2020 in view of the increase in the number of business transactions in the country. However, the deployment of POS (Point of Sale) in several business outlets may have affected the use of ATM by bank customers since POS to some extent performs the same functions of ATM. During the period of lockdown, to check the rising number of Covid 19 cases, many people resorted to the use of POS to carry out their transactions especially the buying and selling of goods and payment of services. Business outlets such as supermarkets and filling stations made brisk business using POS.

Types of ATMs

There are two primary types of ATMs. Basic units only allow customers to withdraw cash and receive updated account balances. The more complex machine accepts deposits, facilitate line-of-credit payments and transfer, and access account information. In respect of the more complex machine, the ATM user must have opened an account with the bank that operates the machine. In otherwords, the ATM user must be an account holder with the bank that operates the machine. [35]

Basic Parts of ATM[36]

- **Card Reader:** It reads the chip on the front of the card as well as the magnetic stripe on the back of the card.
- **Keypad:** This is the part that inputs information including the PIN, the type of transaction and the amount of the transaction
- **Cash Dispenser:** This part dispenses the cash through a slot in the machine and is connected to a safe at the bottom of the machine where cash is normally loaded by the bank.
- **Printer:** This is the part that prints the receipt and usually on the request of the customer. The receipt records the type of transaction, the amount and the account balance.
- **Screen:** The ATM issues prompts that guide the customer through the process of executing the transaction. Information is also transmitted on the screen, such as account information and balance.

Functions of ATM

Below are the function of ATM.

- Customers can access their bank deposits or credit accounts in order to make a variety of financial transactions.
- Cash withdrawals can also be made through the use of ATM.
- Customers can use ATM to check their account balances.
- Using an ATM, customers can effect transfer of funds to and from mobile phones.
- It can also be used to withdraw cash in a foreign country.[37]If the currency being withdrawn from the ATM is different from that in which the bank account is denominated, the money will be converted at the financial institution’s exchange rate.
- Customers can also use ATM for settlement of bills like DSTV subscription and PHCN bill etc.
- ATM can also be used for airtime recharge.
- Payment for goods and services can also be carried out through the use of ATM.

Dispense Error in ATM Transaction

[33] *Ibid*
[34] “ATM Cards used in Nigeria”- hppts://naira-metrics.com2019/2020. Accessed on 8th May, 2020
[35] Julia Kagan (n.30)
[36] *Ibid*
[37] Schlicter Serah “using ATM’s abroad Travel-Travel Tips- NBC News en.m.wikidpedia.org Accessed on 5-5-2020

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A dispense error occurs when an account gets debited but the payment is not registered. Sometimes, even if your transaction has been declined, you could receive a text message from the bank saying the transaction was processed and the money has been deducted from your account.

Causes of Dispense Error

A number of factors are responsible for dispense error in ATM transaction but they can be categorized into operational and technical issues.

Operational Issues

The ATM may not have cash to dispense at that particular point in time that the ATM user is making withdrawal.

Technical Issues

Sometimes, there may be cash in the ATM but it cannot dispense because the cash is mutilated and in the process of withdrawal, the cash is returned because the ATM is jammed. Causes of technical issues include the following:

- **Power Surge:** Power fluctuation or outage may affect the inverter and make it weak and in the process, the transaction cannot be completed.
- **Network Issues:** Sometimes, lack of network or fluctuating (unstable) network from the service providers like MTN, Airtel, Glo etc. may create technical issues thereby making the account debited but the payment is not registered.

Faulty ATM

Some ATMs are obsolete and may develop technical issues in the process of carrying out withdrawal by an ATM user. This may lead to payment not registered even though the account of the ATM user is debited.

Steps to take when a Dispense Error Occurs in ATM Transaction

A customer is expected to take immediate steps to seek remedy for a failed ATM transaction. Therefore, the following steps should be taken immediately when a dispense error in ATM transaction occurs.

- The customer should call the banks care line.[38] Almost all the banks have helpdesk contacts which are adequately displayed at the ATM terminals. In addition, banks also dedicate a telephone line or lines for fault reporting. Therefore, a customer who uses ATM and he or she is debited but the payment is not registered should call the bank's care line and report the failed transaction to the bank.
- The customer should immediately visit the nearest bank branch and submit a written complaint. If the customer is using bank A card, but uses bank B ATM, the customer should visit bank A and lodge a complaint. However, there is nothing wrong with lodging reports at both bank A and bank B just to be sure. It is also advisable for the customer to keep the transaction slip to assist him or her to enter the complaint.[39]

It is important to point out that the CBN in a bid to facilitate dispute resolution in respect of a dispense error had revised the time frames for the resolution of all botched online transfers, POS transfer and ATM withdrawals. Pursuant to this revision, Nigerian banks are required to reverse instantly any failed ATM transaction that occurs when a customer attempts to withdraw from the ATM. However, in the event that the instant reversal fails due to technical challenges, the money must be manually reversed within a 24-hour period.[40] It is believed that all banks will comply with this directive from the CBN failing which the customer may resort to litigation to seek redress.

Ownership of ATM Infrastructures

The CBN Standards and Guidelines on Automated Teller Machine provide for ATM consortia to enter into an agreement with a card scheme or a scheme operator or their designated settlement agent for acceptance and settlement of all the transactions at the ATM.[41] Some people erroneously believe that the ATM infrastructures are owned by the banks. These infrastructures are owned by ATM consortia most of which are companies registered in Nigeria and licensed by the CBN to process ATM payment transactions in Nigeria. There are several payment networks that financial institutions in Nigeria partner with them for payment network processing. These payment networks include Interswitch, Mastercard Nigeria and Visa card Nigeria.[42]

[38] "How to handle a Failed ATM transaction" https://www.moneylife.in> accessed on 14th October, 2021
[39] *Ibid*
[40] Udok &Jonah (n.5) 28
[41] See Guidelines on ATM operation in Nigeria by CBN Par. 2 (a)
[42] Others are American Express and Discover. But they may not provide services in Nigeria

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Interswitch

Interswitch is an African-focused integrated digital payments and commerce company that facilitates the electronic circulation of money as well as the exchange of value between individuals and organizations on a timely and consistent basis. The company uses a switching infrastructure to connect the different banks in Nigeria and provides technology for ATM card. It is a payment processing company based in Lagos.[43]

Mastercard Nigeria

Mastercard is a leader in global payments and a technology company that connects billions of customers, thousands of financial institutions. The company is a payment network processor. It partners with financial institutions that issue mastercard, payment cards processed exclusively on the mastercard network. It is the second largest payment network ranked behind Visa in the global payment industry.[44]

Visa

Visa cards are payment cards that use the Visa network. Financial institutions partner with Visa to use the company's network. Visa cards come with a 16-digit account number, microchip and magnetic stripe. Visa cards include credit card, debit card, prepaid card and gift card.[45] Access bank issues Visa card.

It is important to note that pursuant to the CBN Standards and Guidelines on ATM, all ATM transactions in Nigeria shall be processed by a Nigerian company operating in Nigeria as acquirer-processor and no ATM owner or acquirer shall discriminate against any card issuer or scheme.[46] It is for this reason that an ATM user with an ATM card issued by First Bank Nig. Ltd (Interswitch) can use the card on a Zenith bank ATM (mastercard Nigeria) without any hindrance.

Legal Issues Arising from Dispense Error in ATM Transaction

It was earlier stated in this paper that the deployment of ATM as a means of electronic payment in banking transactions was without its own challenges which said challenges maybe due to technical or operational issues.

As a corollary, there are legal perspectives arising from the issue of dispense error in ATM transactions which are very fundamental and require a critical examination. It is therefore pertinent to carry out a critical examination of these legal issues.

Negligence and/or Breach of Contract

Generally, negligence connotes an omission or failure to do something which a reasonable man under the same circumstances, would do or doing of something, which a reasonable and prudent man would not do.[47] The tort of Negligence is a damage which is not remote and cause by breach of duty of care owed by the Defendant to the Plaintiff.[48]

Negligence is a question of fact, not law, so that each case has to be decided on its peculiar facts. Where there is an allegation of negligence, a Plaintiff must establish that:

- The defendant owed him a duty of care;
- There was a breach of the duty, and
- The breach caused him injury or damage.

Consequently, where a Plaintiff cannot show that the adverse party breached a duty of care, he cannot lay claim in incurring injury in Negligence.[49]

In the case of dispense error in ATM transactions, sometimes a customer may find it difficult to establish a **prima facie** case of fraud against the bank. The customer may therefore, rely on an alleged act of negligence on the part of the bank to institute an action against the bank as a result of the bank's failure to take necessary steps to prevent the dispense error or to carry out a reversal of the failed transaction within the time frame. The customer may sue the bank for negligence or breach of contract and rely on negligence.

[43] "Interswitch" https://www.bloomberg.com>accessed on 24/10/21
[44] Julia Kagan "Mastercard" https://www.investopedia.com> accessed on 24/10/2021
[45] Julia Kagan, "What is Visa" https://www.investopedia.com accessed on 24th October, 2021.
[46] See CBN Standards and Guidelines on ATM Operations in Nigeria. Par. 2 (f)
[47] *Agi v Access Bank Plc, PL* (2014) 9 NWLR (Pt 1411) 121 at 154 Par. B-C. See also *Odinaka v Moghalu* (1992) 4 NWLR (Pt. 233) 1. *Diamond Bank Ltd v PIC Ltd* (2009) 18 NWLR (Pt 1104) 307
[48] See *S. P. D. C. N Ltd v Okeh* (2018) 17 NWLR (Pt. 1649) 420 at P. 435
[49] *Agi v Access Bank PLC* (Supra) *Diamond Bank Ltd v PIC Ltd* (2009) 18 NWLR (Pt 1172) 62, *Abubakar v Joseph* (2008) 13 NWLR (Pt 1104) 307; *FBN PLC v Associated Motors Co. Ltd* (1998) 10 NWLR (Pt 570) 441.

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In *Mr. Moses G. Jwan v Ecobank Nigeria Plc & Anor*,[50] the Appellant who operated an account with the 1st Respondent used his ATM card issued to him by the 1st Respondent in the ATM of the 2nd Respondent to request for money. There was a dispense error and the Appellant's account was debited ₦10,000 as money withdrawn and ₦100 as service charge,. No money was dispensed to him. The Appellant lodged a report with the 1st and 2nd Respondent banks but the report did not yield any positive result. The journal paper from the 1st Respondent showed that the transaction was successful and the appellant was paid the money by the ATM. Not satisfied with the findings of the 1st Respondent, the Appellant brought an action against the Respondents at the High Court of Plateau State for negligence. The trial court dismissed the Appellant's case. Dissatisfied, the Appellant appealed to the Court of Appeal which allowed the appeal

The decision of the court of Appeal in this case, has raised serious apprehension in the banking industry in Nigeria and is capable of throwing the banking industry opened to unnecessary litigations by customers who experience dispense error when using the ATM for withdrawal. This paper will attempt to review some of the legal issues canvassed by the Court of Appeal in arriving at its decision.

First, the Court of Appeal in its judgment stated as follows:

> "The ATM card issued by a bank being akin to a cheque, which must be honoured on request once there is enough funds in the customer's account and failure to do that will mean that the banker is in breach of the duty of care owed to its customer"[51]

With due respect to the Justices of the court of Appeal, an ATM card is not akin to a cheque. A cheque is a negotiable instrument. It is a bill of exchange drawn on a banker payable on demand.[52] It is an unconditional order addressed by one person to another. A cheque has no exemption clauses. On the contrary, an ATM card is not a negotiable instrument. ATM agreement has exemption clauses that limits the bank's liability. There are certain peculiarities involved in ATM payment which are not applicable to a cheque. For instance, as already stated in this paper, systematic failure or network issues may lead to a failed ATM transaction but this is not the case in respect of a cheque. An ATM card is configured electronically whereas, a cheque is not. It means that since an ATM card is electronically configured, it dynamics can be affected by systematic failure.

Therefore, where an ATM is unable to pay the customer due to systematic failure beyond the control of the bank, it is submitted with respect that this should not be regarded as a breach of duty of care by the bank to its customer. An ATM card is an electronic device which is used to withdraw money from the ATM and in the event that there is a network problem outside the control of the bank and the transaction fails, the bank should be free from liability. In the case of a cheque, where the customer makes a demand and there is sufficient funds in the account of the customer, the bank is under an obligation to pay and failure to pay will amount to a breach of contract. In this case, payment is not affected by any technical issue beyond the control of the bank. It is true that a bank owes a customer a duty to exercise reasonable care, diligence and skill in carrying out his instructions but where the bank is unable to discharge this duty as a result of factors outside the control of the bank, the bank should not be held liable in the event that the customer suffers a loss.

Secondly, the Appellant in that case relied on a plea of *res ipsa loquitur* and the court of Appeal upheld the plea and invoked the same against the respondent. On the contrary, the trial court had in its judgment found as a fact that the plea of res *ipsa loquitur* did not apply in this case but the court of Appeal found otherwise. The court of Appeal stated as per the issue of *res ipsa* loquitur as follows:

> …the learned trial Judge, with due respect took a very narrow and wrong path and misapprehended the case put up by the appellant. Clearly, the appellant's case was founded on the tort of negligence against the respondents and he was entitled to plead and rely on *res ipsa loquitur* in the circumstances of this case and I so hold"[53]

This paper is in support of the position taken by the learned trial Judge that the plea of *res ipsa loquitur* was not applicable in the circumstances of this case.[54] For the doctrine of *res ipsa loquitur* to apply in any case, three conditions must be satisfied, *viz*,

- Where the thing that inflicted the damage was under the sole management and control of the defendant or of someone for whom he is responsible or whom he has a right to control.
- The occurrence is such that it would not have happened without negligence.

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[50] (2021) 10 NWLR (Pt. 1785) P. 449
[51] Ibid. P. 485. Par. G -H
[52] See *Trade Bank Plc v Barilux (Nig) Ltd* (2000) B NWLR (Part 685) P. 483, *Union Bank of Nigeria Plc. V Wokubama* (2000) 14 NWLR (Pt. 688) 10
[53] *Jwan v Ecobank (Nig.) Plc* (n.) P.485 Paras B-C
[54] *Ibid*. P. 485 Paras A-B

- There must be no evidence as to why or how the occurrence took place.[55]

In respect of the first condition, was the ATM which the Appellant used his ATM card to withdraw the money under the control and management of the 1st respondent bank which is the Appellant's bank?

According to the facts of the case, the Appellant used his ATM card issued to him by the 1st Respondent (his bank) in the ATM of the 2nd Respondent to request for money. His account was debited and the money not released to him. It is a well-known fact in ATM transaction that issues related to transaction done on other banks' ATM are basically handled by payment networks such as interswitch, mastercard or visa . It is completely outside the control and management of the Appellant bank. The Appellant bank can only handle transaction issues that occur while using the Appellant ATM machine because it will be able to see the transaction customer claims to have carried out from the Appellant branch that the transaction was successful and that cash was actually dispensed to the customer.

Therefore, this paper is of the view that the plea of *res ipsa loquitur* did not apply in this case because the ATM machine that appellant used his ATM card to withdraw was not the Appellant's ATM machine and therefore, it was completely outside the control and management of the appellant's bank (the 1st respondent). Moreso, it is only a payment network that handles transactions done on other banks' ATM machine.

In respect of the second condition, this paper is the view that the 1st Respondent was not negligent. On the third condition, there was evidence to show that the transaction was successful and cash dispensed to the appellant even though he did not receive it but that could have been caused by network issues.

An important aspect of the claim of negligence is the requirement for pleading the particulars of the alleged negligence. Thus in action for negligence, the party suing must give particulars of the alleged negligence and is bound to recover only on the negligence pleaded in those particulars.[56]

Privity of Contract

Another issue that stirs controversy in dispense error in ATM transaction is the issue of privity of contract. This involves the role played by payment networks in the settlement of issues especially where a bank customer uses his ATM card on another bank's ATM.

The doctrine of privity of contract is that connection or relationship which exists between two or more contracting parties. The doctrine is part of Nigerian *corpus Juris* and it postulates that a contract cannot confer or bestow rights or impose obligations arising under it on any person except parties to it. In otherwords, a stranger to a contract cannot gain or bound by it even if made for his benefit.[57]

The issue of privity of contract was aptly raised in the case of *Elder Ekong Akpan Udofia v First Bank of Nig. Ltd*.[58] The learned trial Judge stated as follows:

> "As I pointed out earlier, there is no privity of contract between the plaintiff and inter-switch as the defendant would want me to believe any failure on the part of Defendant either for non-dispensing of cash after account has been debited or failure to promptly reverse the wrongful debited, the Defendant must take responsibility notwithstanding that the failure was caused by its agents, staff or other employee".

The doctrine of privity of contract is inelastic in application. In otherwords, it admits of certain exceptions. An accepted qualification to it resides or is deeply rooted in the realm of agency relationship. Therefore, an agency is an exception to the doctrine of privity of contract.[59]

An agent of a disclosed principal incurs no liability; the law has fixed or assigned liability to such named principal. An ATM card being owned by interswitch and not the bank absolves the bank from liability since the interswitch is a disclosed principal.

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[55] *Abi v CBN* (2013) 3 NWLR (Pt. 1286) P. 34
[56] *Agi v Access Bank Plc (Supra); FBN Plc v Excel Plastic Ind. Ltd* (2003) 13 NWLR (Pt 837) 412; *Diamond Bank Ltd v PIC Ltd* (2009) 18 NWLR (Pt 1172) 67
[57] *Mbata v Amanze* (2018) 15 NWLR (Pt.1643) 570 at 583 Par. A-C: *Rebold Ind. Ltd v Magreeola* (2015) 8 NWLR (Pt1461) 210.
[58] Suit No. HEK/46/2016, delivered on 5th April, 2017
[59] *Mbata v Amanze (Supra) Rebold Ind. Ltd v Magreola (Supra)*

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The issue of privity of contract also came up in the case of *Guarantee Trust Bank v Motunrayo Tolulope Aleogera*.[60] The claimant operated an account in one of the Guarantee Trust Bank branches in Lagos, Nigeria on the basis of which she was issued an ATM card. Whilst in the UK, she used the ATM card in Barclays Bank machine in Broadway Stratford, London to withdraw 800 pounds. The claimant's account was debited but she was not paid. The claimant immediately made a report and she was informed that investigation was ongoing and a refund would be made within 45 days. She instituted an action claiming the sum of ₦15m as damages for breach of contract.

The bank's defence was that the ATM was owned by Master Card International (the payment network) and therefore, the bank was not liable based on the limiting clause as stated in the master card chargeback guide, the master card being the disclosed principal of the ATM card should be sued and held liable. The trial court in its judgment held that the claimant's claim for damage succeeds and awarded the sum of N3m as damages for breach of contract and ₦100,000 as cost of action, the bank was dissatisfied and appealed to the court of Appeal in Lagos.

It is pertinent to state that the court did not consider the argument canvassed by the bank's lawyer to the effect that the ATM was owned by master card international (the Payment Network) and therefore, the bank was not liable. In other words, the bank's lawyer was simply stating that the bank being an Agent to master card international, the disclosed principal, it should not be held liable for the dispense error. Regrettably, this argument was not accepted by the court. This paper is strongly in support of the argument canvased the bank's lawyer in that case especially where there is a limiting clause in the ATM agreement.

Furthermore, as earlier stated, transaction done on other bank's ATM machine are issues handled by the payment network and not the customer's bank. However, where the dispense error occurs on the customer's bank ATM machine, the customer's bank is solely responsible for the reversal of the debited amount. In the case of *Elder Ekong Akpan Udofia v FBN Plc*,[61] some of the dispense errors occurred on FCMB, ECOBANK and Diamond Bank ATM machines. The dispense error that occurred on the defendant's ATM machine was reversed and the plaintiff's account credited. Indeed, the Plaintiff ought to have joined First City Monument Bank, Diamond Bank, Ecobank and inter-switch in that case and failure to join them was fatal to the Plaintiff's case.

Exemption Clause

Another burning issue relating to the issue of dispense error in ATM transaction in Nigeria is that of exemption clause.

Exemption clause is "a clause which may be inserted into a contract which purports to exclude one party from liability for breach of contract, negligence or misrepresentation."[62] It has also been defined as "a term which seeks to exempt or limit one of the parties to a contract from liability wholly or in certain situations which may arise under the contract.[63]

Exemption clause is mostly found in standard form contracts *ie* contracts whose terms are contained in printed forms and are used for all contracts of the same kind. The term used in a particular trade or for the sale of a particular product or service will usually be the same. The customer is then faced with the option of either accepting the contract as it is, or not entering into the contract at all. In such a case, the doctrine of the freedom of contract practically does not exist.[64]

Exemption clauses are of two types: limitation or limiting clause and exclusion clause. Limitation or limiting clause seeks to limit the liability of the party who desires to insert the clause while the exclusion clause seeks to exclude the party who desires to insert into the contract completely from any sort of liability or liabilities.

The bank and customer relationship is contractual in nature.[65] Contracts entered into between banks and customers are one out of many types of standard form contract. The ATM agreement is an example of a standard form contract wherein banks insert limiting or exclusion clause (as the case may be) to either limit or exclude them from

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[60] Cited in Elvis Asia, liability of the Bank for Dispense Error in Nigeria https://www.linkedin.com>acceded on 14th October, 2021
[61] Elder Ekong Akpan (n.58)
[62] Yerokun, *Modern law of contract* (12th edu, Nigerian Revenue Projects Publication, Lagos 2002) 104
[63] Adebayo, *Case Book in law of Contract* (Princton & Associates publishing Co. Ltd, Lagos) 189
[64] G. H. Treitel, *The Law of Contract* (6th edu. Stevens & Sons Ltd London) 167
[65] See *Trade Bank Plc v Barilux* (Nig.) Ltd (2000) 1 NWLR (Pt.685) at 483; *Union Bank of Nig. Plc v Wokubama* (2000) 14 NWLR (Pt 688) 10

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liability. In *Ekong Archibong v FBN*,[66] the court of Appeal sitting in Calabar upheld the Judgment of the High Court of Akwa Ibom State sitting in Uyo which dismissed the claim of the appellant against the respondent. The respondent bank had relied on an exemption clause in the ATM agreement which absolved the respondent bank of liability (This was a case of unauthorized withdrawals from the ATM).

The case of *Guarantee Trust Bank v Motunrayo Tolulope Aleogena*[67] is apt and instructive as it related to the issue of dispense error. Here the court of Appeal considered the extent to which banks can limit their liabilities for dispense error or pass it to third parties. The court of Appeal posited on the issue of exemption clause in dispense error as follows:

> …More importantly the exclusion clause in the contract was not brought to the attention of the customer at the time of issuing the contract. On the construction of exemption clause, an exemption clause cannot avail a party who has been guilty of a fundamental breach of contract. Having breached the fundamental term to honour the customer's mandate, the bank could not seek to rely on the exemption clause. This is consistent with the leaning of the law in Nigeria that a party guilty of a fundamental breach cannot rely on an exemption clause to escape liability.

This paper is therefore of the view that for a bank to rely on exemption clause to escape liability in dispense error, the exemption clause must be brought to the knowledge of the customer at the time of signing the ATM agreement by the customer. Furthermore, the bank should not be found wanting in honouring the customer's request for withdrawal of money from his account where there is sufficient funds in the account. The question is will the bank be held liable where the inability of the bank to honour the request from the customer to withdraw money from his account using the ATM is constrained by factors beyond the control of the bank such as technical issues already discussed in this paper? What happens where the process is managed and controlled by a third party? It is submitted that the court ought to take these factors into consideration in determining whether the bank is liable or not.

Indemnity

As earlier stated in this paper, the CBN Standards and Guidelines in ATM make provision for ATM consortia to enter into an agreement with a card scheme or a scheme operator or their designated settlement agent for acceptance and settlement of all transactions at the ATM. The ATM consortia are payment networks that the banks partner with them for payment network processing. Transactions carried out on other banks' ATM other than the customer's ATM are issues handled by the payment networks and not the customer's bank. Therefore, where a customer uses his or her ATM on other banks' ATM and a dispense error occurs, issues arising therefrom are usually investigated by the payment network involved.

Regrettably, the customer's bank will be made to refund the debited amount, if not reversed. Sometimes, if there is a delay in the reversal of the transaction and the customer institutes an action against his or her bank to claim damages, the court will hold the customer's bank liable to pay damages in addition to the reversal of the debited amount. The other bank(s) where the customer used his or her ATM to withdraw and the payment network processor are usually left off the hook.[68]

In the light of the above, the issue of indemnity becomes pertinent. An indemnity is a contract of undertaking by which the promisor assumes a primary and independent liability for the debt, default or miscarriage of another person.[69] Unlike a contract of Guarantee, which the Guarantor assumes a secondary liability, in a contract of indemnity, the indemnitor assumes a primary liability for the debt, default or miscarriage of another person. A contract of indemnity need not be in writing unlike a Guarantee which must be in writing.[70] But it may be dangerous for a creditor to be content with an oral agreement for an indemnity. An indemnity provides an important additional protection to a creditor that even if the principal debtor's liability may have for some reasons been extinguished, the right to be indemnified for the loss may survive.

There is a separate contract that exist between the creditor and the indemnitor. In other words, a contract of indemnity is a separate agreement between the creditor and the indemnitor.[71] This paper is of the view that in addition to the agreement entered with the payment network processor for acceptance and settlement of all transactions at the ATM,

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[66] Suit No CA/C/73/2013
[67] CA/L/461/2016
[68] See *Elder kong Akpan Udofia v FBN Ltd* (Supra) see also *Mrs. Idongesit Utibe Nwoko v Polaris Bank* HIT/2/2021
[69] David Palfreman, The law of Banking (Plymouth, 1982) 188
[70] Section 4 of the Statute of Fraud and local Statutes that have adopted the substance of that provision which requires certain contracts to be in writing including contract of Guarantee does not mention contract of indemnity.
[71] *Khaled Barakat Chami v UBA PLC* (2003) SC, 257

the banks should sign a contract of indemnity with the payment network processor. The essence of the contract of indemnity is for the payment network processor to indemnify the bank for any loss suffered in the event of a dispense error in the ATM transaction in the event that the customer's bank approaches the court for redress and the court awards damages against the said customer's bank.

In other words, based on the indemnity agreement, the payment network processor undertakes primary responsibility for the damages awarded against the bank by indemnifying the bank against damages awarded by the court in favour of the bank customer. It is therefore, advisable that where a dispense error occurs on another bank's ATM, a customer should take steps to join both the said bank(s) and the payment network processor when approaching the court for redress.[72]

Timeline for Reversal of Failed Transaction

The issue of time frame for reversal of botched online transfers, POS transactions and ATM withdrawal is very worrisome. It has been a source of concern to banks, payment network processors and bank customers. Paragraph 2.5 of the CBN Guidelines on Electronic Banking in Nigeria is focused on dispute resolution. It makes it mandatory for all cardholders' complaints to be treated within a maximum of 72 hours from the date of the receipt of the complaints. Unfortunately, such complaints lodged by customers especially in respect of dispense error in ATM transactions often take longer period of time up to one month or thereabout before the transaction is reversed by the bank. In 2020, the CBN revised the timeframes for the resolution of all botched online transfers, POS transactions and ATM withdrawals. Pursuant to this revision, Nigerian banks are required to reverse instantly, any failed POS or ATM transaction that occurs when a customer attempts to make withdrawals from the ATM or POS as the case may be.[73] However, in the event that the instant reversal fails due to technical issues, the transaction must be manually reversed within a 24-hour period. This revision took effect from 8th June, 2020.[74]

A critical examination of the above revised timeline for all botched online transfer, POS and ATM transactions is apt. Earlier in this paper, it was pointed out that transactions done on other banks' ATM are basically handled by the payment network processors (inter connectivity) such as Interswitch, Mastercard or Visa and not the customer's bank. The reason is that since, the transaction is done on other banks' ATM, it is only the payment network processor that handles the interconnectivity that is able to see full details of the transaction in the journal paper that is generated electronically. The customer's bank cannot see the full details of the transaction, consequently, it is risky for the customer's bank to reverse the botched transaction.

Therefore, what happens is that upon receipt of a complaint from the customer, the customer's bank will write to the payment network processor requesting for an investigation of the failed POS or ATM transaction. The payment network processor will carry out the said investigation and make a report which the said report is sent back to the customer's bank. The customer's bank will get in contact with the customer to furnish him or her of the outcome of the report. If based on the report, there was a dispense error and the transaction was not successful, the transaction will be reversed.

In the light of the above, it is inconceivable how this process can take 72 hours or 24 hours to be concluded and the transaction reversed for the customer to get his or her money refunded. Where the dispense error occurs on the customer's bank ATM, the transaction can be reversed within 24 hours or if difficult, it can be manually reversed, because in that case, the customer's bank is able to see the full details of the transaction on their system.

Regrettably, our courts do not take all these circumstances into consideration when a customer who experiences dispense error in either POS or ATM transaction approaches the court to seek redress. The case of *Mrs. Idongesit Utibe Nwoko v Polaris bank* is very instructive[75] though it was a case of dispense error in POS transaction. The facts of the case is that the Plaintiff used POS to withdraw ₦60,000.00 but the transaction failed. The Bank did not reverse the transaction within 72 hours as required by law (This is according to the Plaintiff's Lawyer). However, the bank finally reversed the transaction after 28 days. The Plaintiff, therefore, approached the court to seek redress. The court in its judgment held that Polaris bank was negligent as to its duty of care, to its customer and awarded the sum of ₦500,000.00 (Five hundred thousand Naira) as damages against the bank. Polaris bank did not appeal against the judgment but agreed to pay the said judgment sum to the Plaintiff.

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[72] See *Guarantee Trust Bank v Motunrayo Tolulope Aleogera* (Supra) and See *Mr. Moses G. Jwan v Ecobank Nig. Plc & Anor. (Supra)*

[73] Emmanuel Benson, "CBN revises timeline for resolution of dispense error, refunds complaints" https://nairamatrics.com accessed on 5th June, 2020.

[74] *Ibid*

[75] Suit No. HIT/2/2021. See also *Elder Ekong Akpan Udofia v FBN Ltd* (Supra)

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Indeed, a land mark judgment but the issue is whether the dispense error occurred on Polaris POS or another bank's POS. if truly, the failed POS transaction occurred on another bank's POS other than Polaris bank POS, then it was proper for the bank to reverse the transaction after 28 days for reasons earlier explained in this paper. Therefore, this paper is of the view that the judgment of Itu High Court awarding ₦500,000.00 as damages against the bank was given in error.

CONCLUSION AND RECOMMENDATIONS

The issue of Dispense error transaction is likely to open the banking industry in Nigeria to a plethora of litigations by bank customers who are victims of dispense error. There is need for the court to exercise restraint in holding the bank liable for Dispense error transaction. The court cannot continue to apply the principles applicable in payment of cheque by a paying bank to that of ATM card in view of the peculiarities of the latter. Furthermore, The court ought to take into consideration the role of the payment networks in processing ATM payment transactions and the fact that exemption clauses are contained in ATM agreement whereas there is none in respect of cheque. In the light of the foregoing, it is pertinent to make the following recommendations.

- When a customer lodges a report of a dispense error in ATM transaction, the bank should take urgent steps to investigate the same and communicate the findings of the investigation to the customer.
- When a dispense error in ATM transaction occurs on the customer's bank ATM, the bank should immediately reverse the transaction since it does not involve a third party's inter connectivity.
- The bank should avoid the use of obsolete ATM and must ensure that their ATMs are always serviceable.
- When a third party is involved, an aggrieved customer should take steps to join the third party in an action to recover his or her money.
- Banks should ensure that the exemption clauses in the ATM agreement are brought to the notice of the customer.
- The issue of indemnity should be taken seriously by the bank especially with the payment network providers.

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