

The New Practice (TNP)

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The Payment Service Provider's Liability in Failed Transactions – Possible Suspension of Domestic Airline Operations in Nigeria

Fly-Safe, an airline company, desires seamless online payments for its customers. It engages Swift-Pay, a Payment Service Provider ("PSP"), to make this happen. Swift-Pay integrates into Fly-Safe's online platform; and is now responsible for processing Fly-Safe's transactions with its customers.

O moyeni, based in Lagos, has been looking forward to visiting her family in Abuja for the Christmas holidays. She buys a ticket from Fly-Safe in October, using Swift-Pay's payment gateway. In November, the cost of jet fuel is at an all-time high. Weeks after, things are not looking up; the increasing cost of jet fuel and foreign exchange are plaguing the operations of airline operators. The Airline Operators of Nigeria (AON) makes an announcement – all domestic flight operations will be suspended!

Although *O moyeni* is concerned, she is hopeful that things will get better, and come December, Fly-Safe's services will be up and running. Unfortunately, this is not the case. Fly-Safe's services remained suspended. She decides to request a refund as she did not receive the services paid for. Fly-Safe does not honour her request because of their financial difficulties. She decides to sue Fly-Safe and includes Swift-Pay as a party, after all, it was Swift-Pay who took her money!

Obviously, Swift-Pay believes it has been brought into a matter which it has no business. It thinks – my business is with Fly-Safe, who I'm providing a payment service to. I simply collect, process, and remit, by acting as a gateway between Fly-Safe and *O moyeni*.

What happens to customers who have paid for a service that is not rendered? The answer is obvious, you think – the customer will demand a refund from the Merchant. However, you will find that customers will go beyond that, and may attempt to hold the PSP responsible.

Recently, on 9 May, 2022, the AON announced the imminent suspension of flight operations by domestic airlines due to the high cost of jet fuel. This spiraled concerns from customers like *O moyeni*, who had purchased flight tickets. Like Swift-Pay, PSPs were concerned about the effect the suspension would have on their businesses, especially the expected upsurge in chargeback claims and ticket refund requests from their Merchants' customers, and Court cases that were likely to be filed.

What are the risks PSPs may be exposed to in view of the imminent shut down?

The Contract

A PSP typically has a contract with its Merchants; it is not a party to any contract between the Merchants and their customer(s) and is precluded from any contractual liabilities towards the Merchants' customers. This is because the legal principle of privity of contract

recognizes that the PSP, being a third-party to the contract between the Merchant and its customer, cannot generally acquire any right or liability from a contract which it is not a party to.

Tort to the Rescue?

Whilst customers like *O moyeni* may not succeed in an action for breach of contract against the PSP, it is possible that they may institute an action under the law of tort, for example the tort of "money had and received." This type of action aims to recover monies paid to a third-party, in respect of which no consideration was received. Therefore, as Fly-Safe suspended its flights and failed to fly *O moyeni*, *O moyeni* may decide to sue Swift-Pay for the fare she paid. However, the PSP may be able to advance the defence that the service paid for (carriage by air) ought to have been provided by the Merchant, as its role in the transaction was simply to process the payment (which it did).

It is essential that customers are aware that monies the PSP processes are ultimately received by the Merchant (who is enriched even though the service paid for was not rendered). There are decided cases by Nigerian courts which affirm that the tort of "money had and received" is based on the principle of unjust enrichment, and where there is no enrichment (of the PSP), no question of unjust enrichment arises.¹

It is worthy of note that transactions are authenticated and authorised before they are processed and settled to the Merchant.

Authentication of Transactions

Depending on the payment option available to customers, the process of making electronic payments comprises a series of positive actions by the customer. These actions include the customer providing their debit/credit card details, personal identification number, and codes generated by a token to authenticate the proposed debit. The PSP merely facilitates the transaction between the customer and the Merchant, as authenticated by the customer and authorised by their bank. In other words, before the PSP takes *O moyeni's* money, *O moyeni* gave the authorisation.

Settlement of Transactions

The contracts between PSPs and Merchants are typically clear on the terms for settling funds collected on behalf of Merchants. The PSP is merely a conduit collecting funds from customers, and settling the same to the Merchant's account, less the fees payable to it for the service provided to the Merchant. Accordingly, the Merchant is the ultimate beneficiary of the funds processed by the PSP.

Consumer Protection Liabilities

In the PSP-Merchant-Customer triangle in *O moyeni's* case, there are two distinct services being provided – the payment service, and the carriage by air. The PSP is only bound to provide the payment service to the Merchant, whilst the carriage-by-air service is provided by the Merchant to *O moyeni*.

The Central Bank of Nigeria Consumer Protection Regulation 2019 ("the Regulations") which applies to all institutions licensed by the Central Bank of Nigeria ("the

"CBN"), defines a "consumer" as a person or an entity that uses, has used, or is a potential user of financial products or services of an institution.² The relevant financial product or service is the payment service being provided by the PSP to the Merchant. Consequently, the customer is not the direct user of the financial product.

Likewise, the Federal Competition and Consumer Protection Act 2018 defines a "consumer" as "any person . . . to whom a service is rendered"³. Based on this definition, the customer is a consumer of the service provided by the Merchant whilst the Merchant is the consumer of the service provided by the PSP. Given that the PSP provides no direct service to the customer [*O moyeni*] and is not in default of its obligations to the Merchant, it is unlikely that the PSP will be liable to the customer under the FCCPA and the Regulations.

Protective Measures

The PSP's contract should include provisions that would protect it against liability arising from the services provided (or not provided) by a Merchant to its customers. Some of the non-exhaustive measures include:

- acknowledging that the PSP is not liable for any defects in the services rendered by the Merchants to their customers, through the PSP's payment service;
- excluding the PSP from liability in third-party claims and acknowledging that the PSP would not be a party to any claim between the Merchant and its customers, and in the event that the PSP is made a party to such action, the Merchant will indemnify the PSP;
- implementing rolling reserves, a risk mitigation mechanism aimed at accounting for any losses the PSP may incur from processing transactions on behalf of the Merchants and covering costs that may be associated with chargeback claims.

To ensure Merchants honour their indemnity obligations and pay monies they may owe to a PSP, the PSP may include a security provision in its contracts – which grants the PSP the right to request the provision of security from the Merchants at *any time* for the purpose of securing the PSP's interest in the event it suffers any liability as a result of failed transactions between Merchants and their customers.

The contract can also grant the PSP the right to request that the Merchants provide respective guarantors, undertaking to pay any amounts owed by the Merchants.

The Companies and Allied Matters Act (CAMA) 2020 also provides for a measure where a PSP may apply to the Court for an Administration Order in respect of the Merchant, as a creditor of the Merchant.⁴ The Court will make this order where it is satisfied that the Merchant is or is likely to become unable to pay its debt, or the order is likely to achieve the purpose of administration.

Conclusion

Whilst logic may be on the side of the PSP, who is carrying out a payment service to its Merchants and prohibited by law to hold any of the funds processed; logic may not always win, and PSPs may find that more Merchants' customers will claim refunds from them, for services which ought to have been provided by the Merchant - but were not.

It pays PSPs to take practical steps to understand and reduce their exposure to such risks by including protective terms in their contracts.

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¹ FBN LTD v. AP LTD (1996) 4 NWLR (Pt. 443) page 438
² Section 10 of the Regulations
³ Section 167 of the FCCPA
⁴ Section 450 of the CAMA

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