

**BASIC LEGAL CONTRACTUAL GUIDE FOR
PLAYERS IN THE FINTECH INDUSTRY**

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With the increase in active players within the FinTech industry, it has become necessary to shed light in the simplest and clearest terms on how best the relationship established under such arrangements can be regulated. The introduction of technology to the financial service space is unique and accompanied by positives; however, this should not amount to a neglect of important establishing agreements to prevent exploitation in any form. So many attempted partnerships, though unofficially on record, especially by start-ups and individual experts of various specialties have failed as a result of absence of clear terms governing their relationship. Particularly, some of the established companies have acquired start-ups without according them the economic value they deserve. This paper attempts to touch on some of the important contracts to be executed in such relationships and some clauses that are considered of great importance to protect parties to such an arrangement.

1.0. INTRODUCTION

With the impact of technology, certain systems have changed in form. These unending innovations hit the financial institution and the nomenclature 'FinTech' emerged, coined from Financial Technology. The FinTech companies emerged to change the age-long means of dealing with regulated financial services/transactions. New methods and means have been introduced because of the emergence of FinTech companies. In the same light, new legal complications have. It is therefore important that FinTech companies go in line with these new legal trends to avoid being caught in the web of legal battles.

Some persons have described dealing in the FinTech industry as complicated and complex; however, this may not be totally correct. FinTech companies offer different services, therefore no strict rule applies to all FinTech companies. There are certain points of convergence unique to the FinTech industry, but no two FinTech companies possess the same legal requirement in most cases. This is further buttressed with the understanding that some of these

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companies are well established while some are simply start-ups; the services to be provided in each case are also not always the same.

Regardless of all that has been stated above, law plays an undisputable role in the establishment, growth, success, and continuous existence of any FinTech company. Largely, most jurisdictions do not possess full-fledged regulatory books for operation, therefore, a lot is left for the parties to agree on. Even where full regulations are in existence, the law always allows for parties' right to agree on specific terms. This introduces the importance of contractual agreements reduced into writing.

Flowing from the above, this paper highlights certain types of agreements which are regularly required in the FinTech industry and close attention must be accorded to them. The paper goes further to identify some important clauses that must be adequately considered when drafting or reviewing any contract of such nature.

2.0. THE FINTECH NETWORK

This cutting-edge entrant is attracting attention in the business sphere. The players of the sector include the established companies, financial institutions, and technology companies, as well as start-ups, affecting the society in all spheres using technology to impact the economy. The business models are either Business-to-Customers (B2C) or Business-to-Business (B2B).

FinTech can be broken down to payments, investment, lending, analytics, blockchain, banking infrastructure, etc. All of these can further be divided into smaller units; it tells how wide-ranging the term FinTech is. Some of these activities are fully regulated while others are either partially regulated or not regulated at all.

This paper is focused on the foundational relationship within this complex structure, as most of the contracts of concern within this paper are used to establish primary relationships between the parties. These contracts will become appreciated when the relationship gets to an enhanced stage, as this will provide a clear direction to all parties on the direction to go and therefore will prevent friction.

3.0. COMMON FINTECH CONTRACTS

The following contracts are most likely to be considered by a FinTech company or start-up. It is important to state that the best stage to execute contractual agreements is before the commencement of the act and not upon completion. As a result of the uniqueness of the industry and the requirements, which include funds to expertise, collaboration, approvals, information gathering, and risk, etc., the importance of these contracts cannot be over-emphasized. This paper is by no means ruling out the existence of other essential contracts, as the type of contract to be drafted is largely based on the need and legal purpose the agreement is to achieve. In addition, some of the agreements mentioned below may be best put as a clause in another full-fledged agreement. Furthermore, the agreements listed below may apply in the same level of importance to other industries, nevertheless, the FinTech industry is the focus of this paper.

The agreements stated herein, in no particular order of importance, are in some cases to be executed by business partners; in some cases, between the company and professionals or other third parties engaged to perform specific roles; or between the company and its clients; in other cases between the company and financiers/investors.

3.1. Privacy Policies and Terms of Use Agreements

Technology is data driven. This understanding must resonate in the mind of players of the industry and therefore propel necessary actions along this line. The use, collection, gathering and application of data in tech products makes it extremely important to enter into agreements to set out in clear terms whose responsibility it is for the handling of such data at each point and who bears responsibility for the occurrence of a breach of data.

The collection of individual and collective data over the years has risen exponentially, thereby requiring more caution when dealing with the same. The European Union's General Data Protection Regulation (GDPR); the Canadian Personal Information Protection and Electronic Documents Act (PIPEDA); the California Consumer Privacy Act (CCPA); Japan's Act on Protection of Personal Information (APPI); Brazil's General Data Protection Law ("Lei Geral de Proteção de

Dados” or “LGPD”); Thailand’s Personal Data Protection Act (PDPA); India’s Personal Data Protection Bill (PDPB); and China’s Data Security Administrative Measures (the “Measures”) and Cybersecurity Law of China, are all examples of international legislations/regulations¹ requiring compliance for the protection of personal information/data of individuals. In Nigeria, the Nigeria Data Protection Regulation (NDPR) 2019 in its Part III provides for a list of rights data subjects are entitled to. This is in addition to the rights provided for under the 1999 Constitution of the Federal Republic of Nigeria (as amended), the Freedom of Information Act 2011, and the Cybercrime (Prohibition, Prevention, Etc) Act 2015, amongst others.

Privacy policy is more concerned with informing clients and those who engage with the product of the collection and use of the information that may be requested. A review of most of the regulations stated above will prove that the inclusion of a Privacy Policy will serve as a compliance with the regulations. A Terms of Use also referred to as Terms of Conditions or Terms of Service is more of a protection for the Company, it is one of the contracts referred to as a consumer contract. A trained mind would be helpful in ensuring enforceable agreements in this regard are incorporated into your legal arrangement when contracting. Spotify’s terms of use² is an example of a detailed Terms and Condition. However, it is important that such agreements are tailored to a company’s specific needs.

3.2. Service Level Agreements (SLAs)

The nature of the FinTech industry makes the use of milestones to be of immense value since a product may take months to be fully delivered. The time spent at every stage of the production of the product is of high value and should be compensated for. It is by virtue of such agreements that parties are clear on the input made and the value delivered even before the actual value can be enjoyed from the final product.

¹ B Berecki, “10 Data Protection Regulations You Need to Know About”, available at <https://www.endpointprotector.com/blog/10-data-protection-regulations-you-need-to-know-about/> (accessed 22 September 2021).

² Spotify, “Spotify Terms of Use”, available at <https://www.spotify.com/us/legal/end-user-agreement/> (accessed 30 September 2021).

The necessity of putting metrics and measurement units in place to determine and appraise the performance level of service providers by consumers must be acknowledged. The importance of being able to gauge FinTech service delivery factually rather than instinctively is very important in preventing disputes and keeping business relationships alive. The ability to analyse and evaluate the rate and level of service delivered based on determinable terms is an important tool for both sides to the primary contract, and any third-party who may be engaged.

SLAs usually serve as the legal architectural framework for the technical engagement between parties. It is important that SLAs are drafted in a way that business expectations are met and not in the strict means of simply ensuring that service providers meet set expectations with little or no room for creativity or enhanced delivery. It is in the drafting of this agreement that modern trends must be taken into consideration for the efficient delivery of service and accomplishment for both the customer and service provider.

3.3. Confidentiality Agreement (also known as Non-Disclosure Agreements)

The exact nature of FinTech companies requires a high level of confidentiality. The information to be covered by a Confidentiality Agreement ranges according to what is defined in the agreement. It is therefore advised that information to be included as confidential should be made wide and encompassing to capture all that is required to protect the interest of the parties to the agreement. Certain information is considered essential by participants in the creation of a product, and it is appropriate to ensure that such information is covered by the definition of 'confidential' in the agreement. This writer will be quick to state that there are, however, general exceptions to when the Confidentiality Agreements would not be allowed to be relied on.

Confidential agreements are also like, and are sometimes referred to as, Non-disclosure Agreements (NDAs). In some instances, confidential agreements may simply be required to be included as a clause in another agreement. This agreement is mostly required to be

signed by a Service provider to a FinTech contract, employees, contractors, and other third parties.

3.4. Joint Venture Agreements (JVA)

It has become popular practice for financial institutions, specifically, to enter into Joint Venture Agreements (JVAs) with FinTech companies or start-ups for the purpose of payment and financial solutions. FinTech companies are relevant in providing solutions to financial payment services, serving governments, local banks, and telecommunication companies, amongst others, and have therefore changed the face of the provision of financial services through these innovations.

Several financial institutions and institutions in other sectors that view FinTech as a threat to their orthodox means of carrying out their activities, have fully embraced this innovation. This has resulted in multiple engagements between such institutions and the FinTech companies. The requirement of these partnerships is now a compulsory one as it is no longer optional, to stay in business and this is where a JVA becomes of necessity.

By a JVA, certain points of concern would be discussed and agreed upon, such as the aim of the collaboration, what the business objective is for each party, what the preferred lifespan of the relationship should be, the ownership interest in the product, and value for work to be done, amongst others.

3.5. Partnership Deed/Agreement

While JVAs are usually formed to meet a specific goal or purpose, a Partnership Agreement is wider than that in scope. A Partnership Agreement is one of the underrated agreements in many sectors, including the tech space. As a result of the regular changes that occur in the FinTech space, a Partnership Agreement is highly recommended to exist between developers, and other experts who have decided to work as a team on different projects. Such agreement can provide for adequate remuneration for each partner if a partner decides to exit the team mid-way into the project. It will address issues of profit and loss, ownership rights over products, procedure(s) to step out of the

partnership, percentage of control over the partnership, and how decisions can be reached, amongst others.

The absence of an agreement of this nature accounts for the biggest disagreements that can break such companies after breaking even.

3.6. Financing Agreements

Agreements of this nature are of high importance, especially with the knowledge that tech is not cheap and most often than not, external funding is required to bring products to conclusion. Agreements which are likely to be required for funding would be, Peer-to-Peer (P2P) service operator and lender agreements, P2P lender and borrower agreements, loan agreements, and so on.

3.7. Product Development Agreements

This is an agreement which is likely to be requested by clients who engage a FinTech company. The agreement is to ensure that the instruction or intended product to be developed is clear and the outcome meets expectation. This is also of advantage to the company since it will ensure the client is confined to the initial agreement on the product to be produced.

3.8. Outsourcing Contracts

On certain occasions, FinTech companies may require certain aspects of the development of a product to be outsourced for various reasons. It is important to have a clear understanding of the instruction and stay on the same page for both the outsourcing party and the party to whom the service is outsourced to. Therefore, such an agreement is required.

3.9. Licensing and Collaborative Agreements

An agreement of this nature is used to assign rights, specifically intellectual property rights, in products which are made by joint inputs. Several intellectual property rights, such as patent, copyright, etc. exits from the creation of FinTech products which are best discussed and assigned at the earliest opportunity.

Other agreements which may be executed include Corporation Agreements, Vendor Agreements, Investor Agreements, Shareholders Agreements, Co-founder Agreements, etc.

4.0. IMPORTANT CLAUSES OF A FINTECH CONTRACT

Depending on the type of agreement required to be executed in each case, the following clauses must be included to ensure full protection of the parties to the agreement. The novelty of the industry does not give room for certain omissions, as there are no hard and fast rules to certain legal questions, no custom of trade to be followed, therefore failure to include the position of parties to such agreements may lead to endless and avoidable legal disputes.

The following clauses are identified as clauses of high importance which parties must agree to, and which are essential in the agreement to be executed. Take note that the following clauses are not stated to be the most important clauses of any agreement, but compulsory clauses to be included in certain types of FinTech agreements by virtue of the interconnection between what the clauses are to capture and what a FinTech agreement requires.

These clauses include, but not limited to;

4.1. Indemnity Clause

This is a clause used to limit or redirect consequences of legal, regulatory, or contractual violations which may occur. A major reason why an indemnity clause may be handy is the inadvertent or careless breach of regulatory laws which can occur as a result of new laws or amendments to existing laws. As a result, FinTech companies may also need to ensure that indemnity clauses are included in their agreements to protect them from fines and punishments for which they are unaware.

4.2. Intellectual Property Clause

This is a very important clause to determine whose side the ownership of the rights in the products would reside. This is necessary to avoid

claims of infringements and settle matters pertaining to copyright, design, trademarks, and patents.

4.3. Limitation of Liability Clause

This clause is used to reduce the responsibilities of parties if damage has been occasioned as a result of the act of any of the parties to the agreement. Parties fix liability to the extent of their involvement and accept to take responsibility to the extent that their decisions and choices occasioned. Absence of this clause may result in a party bearing liability beyond that envisaged when contracting. Matters that may be specifically covered under this clause include breach of data and confidentiality, identity theft, technology failure, amongst others.

4.4. Business Terms

Clauses under this heading are included to ensure business continuity in the event of unexpected disruptions. Such clauses will address what should be done in the event of such huge errors and whose responsibility it is to fix the same, the time frame to get such resolved, cost implication and other necessary factors.

4.5. Confidentiality Clause

As already addressed above, this can take the form of a full contract or may be included as a clause in a contract. By virtue of the nature of FinTech, this is a necessary clause to be included to prevent huge economic and other related losses as a result of spilling out information that should have remained classified. The absence of this clause is also capable of resulting in extended and prolonged disputes where not properly managed. A breach of this clause can occur in various forms, and any party to a FinTech arrangement may become guilty of such breach. For this reason, it is advised that terms are clearly spelt out and professional advice is obtained before actions are taken.

4.6. Internal Controls

It is suggested that contracts to govern FinTech relationships possess clauses that will require audit to ensure activities are carried out within the best standard procedure as required to ensure efficiency,

professionalism, and optimum service delivery. Such internal control clauses will serve as a check to all parties to such arrangement and ensure they serve with the best professional attitude as can be obtained.

5.0. CONCLUSION

No error should be made; the importance of law and legal practitioners to FinTech goes far beyond contract/agreement drafting, review, or negotiation. There are other roles legal practitioners play in the FinTech industry. However, the focus of this paper is on agreements.

While the importance of a binding and enforceable contract is emphasized across industries, another point that must not be neglected is ensuring the appropriate agreements are executed and the appropriate clauses are contained in such agreements to ensure full legal protection for the parties to the agreement. An agreement which lacks the relevant clauses when called up is as good as no agreement. In all, the need to engage a professional with the requisite skill is of top priority before any engagement, as this is the only means to prevent avoidable liabilities.