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RESOLVING CONSUMERS DISPUTES WITHIN THE CAMEROONIAN BANKING SECTOR: A LEGAL ANALYSIS

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A B S T R A C T

The government of Cameroon like any other, from the inception of the modern banking system has strived to guarantee an effective protection of consumers of banking services through diverse means. This has been through the implementation of legal and institutional mechanisms of control aimed at ensuring strict compliance to banking ethics and available legislations enhancing fairness and equality in the dispensation of services. Within the banking sector, Cameroon's integration into regional and sub-regional blocks such as OHADA and CEMAC has paved the way for a plethora of Sub-Regional Legislations and Institutions such as the COBAC and BEAC to complement available pieces of national legislations in the protection of consumers of these Services. The government in its endeavor to ensure the availability of an adequate mechanism of protection of all consumers, in 2011 put in place Law No. 2011/012 of 6th May 2011 on the Legal Frame Work of Consumer Protection in Cameroon to add to the lots of existing legislations. Despite this laudable and worth applauding initiatives all aimed at protecting the rights of the consumers, banking consumers still encounter hardship due to the consistent violation of their rights by the professionals of the field. These difficulties have even skyrocketed in the last two decades with the advent of electronic banking and the involvement of nonfinancial institutions in the streams of banking services which makes difficult the effectiveness of available pieces of legislations thus given way to the continuous and persistent rise of dispute in the Cameroonian Banking sector. Based on these setbacks, this paper aims at unveiling the available legal redress to consumers of banking services who are prone to such difficulties.

K E Y W O R D S

Bank; Services; Consumers right; Customer and Consumer.

INTRODUCTION

A cross section of the world's economy is financed by financial institutions. Thus it's paramount to ensure its continuity by way of protecting its users who have bestowed on them their trust. This will go a long way to enhance a comfortable and trust worthy business environment due to the reliability of the banking sector. The failure of this sector has had a negative effect on the global society as history holds in the great depression of the 1930s and the financial crises of the 1990s. Given that banking services are of vital importance to our today's economy, adequate legal mechanisms must be put in place to regulate their operations in the dispensation of their services to consumers both at the national and international levels. This is in order to protect the consumers from being exploited by the professionals of the banking domain and equally ensure the transparency and legality of those engaging in the dispensation of these services. To that effect, laws have been put in place both at the national and sub-regional level for such. In Cameroon, a plethora of pieces of legislations amidst Law No.2011/02 of 06 May 2011 on the Legal frame work for the protection of Consumers; Law No. 000005-MINFI of 13 January 2011 on Guarantee Minimum Banking Services, COBAC Regulation R-2009-02-on the fixation of categories of credit establishments their legal forms and their authorized activities, Ordinance No 90/003 of 27th April 1990 governing the liquidation process of financial institutions, repealed by article 17th of the 1992 convention have been put in place to ensure the fairness and transparency in the provision of banking services. Couple with these Legal framework is an arsenal of an existing institutional framework to ensure the strict respect and compliance of the legal instruments by the banking service providers. Amongst these institutions are the COBAC[1] and BEAC[2] as the main structures regulating banking activities within the CEMAC[3] sub region working in synergy with the Ministry of Finance and the local courts to ensure the respect of banking ethics and strict compliance with the existing legal provisions by the service providers. Despite these efforts, the situation of consumers is still very precarious and has even worsen with the advent of electronic banking and new service providers such as mobile network operators who have engaged in later times in the provision of financial services. These new technology and actors that have brought to place the unbanked and under banked have equally brought in new challenges such as cyber criminality and insiders fraud amongst others, that continuous to be a nightmare to consumers of banking services. These and others have therefor placed the consumers at the behest of the service providers, most especially giving the fact that the nature of their contract is one of adhesion.

It is equally vital to underscore that the concept of Consumers' protection has witnessed in the last two decades an increasing intervention by the government due to the expansion of the banking services and its providers through the creation and implementations of laws such as regulation No.01/02/CEMAC/UMAC/COBAC relating to the Conditions for the Exercise and Control of Microfinance Activities; Regulation No. 01/03-CEMAC/UMAC/CM of 4th April 2003 on the Prevention and Combating of Money Laundering and Terrorist Financing in Central Africa; Regulation No. 01/09/CEMAC/UMAC/COBAC OF 20th April 2009 creating the Deposit Guarantee Fund in Central Africa and Regulation No. 01/11/CEMAC/UMAC/CM of 18th September 2011 relating to the exercise of the Emission of the Activity of Electronic Money to name a few, all in

[1] Commission Bancaire de L'Afrique Centrale.
[2] Banque des Etats de L'Afrique Central.
[3] Communauté Economic et Monétaire de L'Afrique Central

responds to the problem of consumers related dispute. These efforts all aimed at protecting the consumer have been put to question due to the fact that consumers still suffer gross violation which either stems from insiders fraudulent activities, cyber criminals or mismanagement of some banks that have found themselves in crises thereby causing great lost to the consumers or the unlawful disclosure of customers information to name a few. This paper thus seeks to bring out the legal redress available to consumers of banking services in Cameroon in a circumstances in which they feel cheated or deem that their rights have been violated.

1.1 Conceptualization of Consumer

The definition of the term consumer is elastic. According to the **Molony Commity**, a consumer includes anyone who consumers goods or services at the end of the production chain[4]. Within the banking sector, the term consumer is made of two groups of persons. These are consumers who are customers and consumers who are not customers. The term consumer and customer within the banking sector at one point in time could be used interchangeably. However, there is more to a consumer than a customer[5]. A consumer includes both customer and others as mentioned above. Within the Cameroonian context, a consumer has been defined by Law No 000005/MINFI of 13 JAN 2011 on Guaranteed Minimum Banking Services as all physical persons who are customers in particular in the domain of banking services, that acts with a noncommercial aim and who has his principal residence in Cameroon[6]. Within the Serbian context, Serbian Law on the protection of financial service consumers considers a consumer to be a natural person who is using or who has used the financial services, or who approached the provider of financial services with an intention of using the services and who is using financial services for a purpose outside his trade business and profession[7]. This therefore connotes that a consumer within these legal frameworks must be one acting out of the scope nor purpose of business or profession but for personal consumption. This in fact seems to make complex the consideration of customer who fall within the ambits of consumers. However a definition has been attached to a customers. A customer according to Sheldon is any person keeping an account whether current or deposit with the bank[8]. On a case law perspective, the judicial committee of the *privy council of Taxation V. English Scottish & Australian Bank Ltd*, suffices as definition. In the case, a customer was defined as a person whose money has been accepted by the bank on the footing that he undertakes to honour cheques up to the amount standing to his credit. This is so irrespective of whether his connection with the bank is short or long standing[9]. It is evident therefore that a person becomes a customer of a bank when he opens an account with it. This seems to make sense, as the purpose for the creation of the account could either be for a savings or deposit account for which gains

[4]Joseph N.E, (2012/2013), Lecture notes on the law of consumer protection, University of Dschang, Faculty of law and political science, P.2.

[5] Bafuke E.N, (2020), The Protection of Consumers of Electronic Banking in Cameroon, University of Dschang, Faculty of law and political science, PhD Thesis P.10, Unpublished.

[6] Arrête n° 000005/MINFI of 13 JAN 2011 portant sur le service bancaire minimum "toute Person physique dans la clientèle des particulier qui, dans le cadres de service visés par le présent arrête agit dans un but non commerciale et qui a sa résidence principal au Cameroun ».

[7] Article 2(9)

[8]See H.P Sheldon Law of Banking P.75

[9] (1920) AC 683, *Ladbroke v. Todd,* (1914) 30TLR 433 and Co-V. Lloyd's Bank Ltd., (1932) 48 TLR 344.

could be business oriented or for personal usage. That said, where the purpose falls outside the scope of business or other productive aims but that of personal consumption, the customer would fall within the scope of the consumer protection law. Technically speaking therefore, a customer will be considered to be a consumer and the subject of the consumer protection law if he uses the financial services, or s/he approached the provider of financial services with an intention of using the services and who is using financial services for a purpose outside his trade business and/or profession.

1.2 Duties Emanating from Banking Contracts

The banking contract imposes some obligations on the parties thereto. These reciprocal obligations imposed[10] on both parties, constitute amidst others a mechanism of protection of parties to a banking contract. These duties generally are backed by rights which within the framework of the banking contract these rights could either be of a general or special nature. General rights properly speaking as the name implies, are rights enjoyed equally by every customer of a bank[11]. These rights are gained equally without distinction by customers upon the creation of an account. Contrarily, special rights are reserved to particular customers based on other determining factors[12]. These rights reserved for customers are held and used by them throughout their relationship with the bank and others even subsist after the termination of the banking contract, such as the duty of confidentiality. These rights therefore have proven over the years to be the cause of disputes within the banking sector, for the service providers always turn to act in disregard of such by not respecting their obligations, thus causing the day to day disputes.

A hand full of duties all being a succinct mirror image of consumers' rights have been identified to emanate from banking services particularly those linked to the honouring of cheques and the opening of accounts. In this light, the modern day position of the implied contractual obligations owed by banker to customers in the ordinary course of business requires a careful restatement along the following lines: the duty of reasonable care and skill; banker's duty of secrecy (with exceptions being compulsion at law; duty to the public to disclose in the bank's interest; disclosure with customer's consent)[13], statement of account by the bank; honour customers cheque; duty only according to customer´s mandate to pay; duty not to pay countermanded cheque; duty to repay; payment of cheque drawn by the customer; duty to rectify errors; duty not to cease to do business with customer except upon reasonable notice; duty to demand repayment of overdraft duty to give reference on customer´s credit and standing advice on investments; safe custody of valuables; duty of pre-contractual information;[14] duties of a collecting bank; duty to customers; duty to the true owner of the cheque. The violation of these obligations by the service providers be it directly or indirectly has acted as a foundation and a catalyst for the numerous litigations that have existed based on banking contractual disputes in Cameroon.

[10] Article 10 of Règlement no 02/03/CEMAC/UMAC/CM du 4 Avril 2003.

[11] Bafuke E.N, (2020), The Protection of Consumers of Electronic Banking in Cameroon, University of Dschang, Faculty of law and political science, PhD Thesis P.149, Unpublished.

[12] *Ibid* at P.140.

[13] See Fon Fielding F & Bafuke Evarestus N. (2020), The Bank's Duty of Confidentiality Under Cameroonian Law: Absolute or Qualified, Journal of Banking and Insurance Law, Vol. 3 No. 1.

[14] Serbian Law on Consumer's protection.

1.3 Justification of Consumers Protection

The changing financial landscape has brought with it new challenges for bank management, regulatory and supervisory authorities, from the reliance on technology to provide banking services with the necessary security. While Electronic Banking can provide a number of benefits for customers and even the banks themselves, the risks associated to this service exacerbates that of traditional banking[15]. There are a good number of reasons which can be advanced why banking consumers have to be protected. This is so because irrespective of the consumer protection law being the first of its kind in Cameroon which makes the consumer stands taller than the seller (in this case the service provider) as of the principle of *caveat venditor*,[16] the consumer still stands at a risky position since in a contractual relationship between a banker and customer it is always a contract of adhesion[17] putting the customer at a disadvantageous position leading to the principle of *caveat emptor*, that is buyer beware. The use of the internet in carrying out transactions has further exposed banking customers to so many risks makes the ignorant on what to do in case of a threat. The involvement of Mobile Network Operators in the dispensation of banking services brings further other impediments to deal with. In this regard, banking consumers are to be protected from constantly being victims to risks that could cause them loss.

2. ENFORCEMENT OF CONSUMER RIGHTS BY WAY OF A COLLECTIVE ACTION

The expansion of the banking sector and the multiplication of services offered by the banks, coupled with the increase rate of consumers have prompted the interest of consumers to concord. This problem of interest encountered by consumers can be quickly and easily resolve through the use of consumers association. In striving to protect their rights, consumers make use of a dual mechanism of protection through which they can vindicate for their rights violated. This could either be through a collective action or an individual action. Consumers' litigations could further be divided into two categories: those that concern the individual interest of the consumer and those that bring into place the collective interest of consumers[18]. This seems to make sense as this aspect has brought to place the emergence of a dual mechanism of protecting consumers' rights and thus resolving dispute as provided for by the 2011 consumer's protection law. This could be through a collective action or an individual action.

2.1 Collective action to enforce consumers' rights.

Given that nobody can render justice for himself and that nobody can be a judge and party in the same suit, the sanction of the law can only emanate from the public authority[19]. That is the reason why every right is backed by an action in law. The exercise of which will give way to a court action[20]or and out of court settlement through other legally approved means of dispute resolution mechanisms. It should

[15]Brian (M), (Sept. 2000) Why Don't Consumers Use E-Banking Products? Towards a Theory of Obstacles, Incentives and Opportunities, Federal Bank of Chicago, Emerging Payments Occasional Paper Series, (EPS-2000-1) p. 25

[16]Nzalie (J.E), Lecture notes on the Law of Consumer Protection, Department of Common Law, Faculty of Law and Political Science, University of Dschang, 2015/2016, p. 5 (unpublished).

[17]A contract of adhesion is one whose provisions have been totally prepared by one party leaving the other party to either contract on the terms provided or not.

[18] « Ceux qui concernent l'intérêt individuel d'un consommateur, et ceux qui mettent en jeu l'intérêt collectif de consommateur » Calais-Auloy J. et Temple H. (2011), *Droit de la Consommation*, précis Dalloz 8e Ed, P.515.

[19] *Ibid*, P.100.

[20]"Dont l'execise donnera lieu à un procès Malinvaud P. (2006) *Introduction a l'étude du droit,* 11e Ed., litec, P.351.

be underscored that consumer's litigation could be actual (has occurred) or eventual (occurrence in contemplation), hence a dual interest is ear marked to be protected. That is a collective interest and an individual interest[21]. The collective interest is assigned to a group of consumers while individual interest can only be evoked by the consumers in their individual capacities. The collective action is carried out by independent autonomous bodies created by consumers to fight for a common benefit of the consumers. These collective actions, are carried out by actors such as consumers association[22] and non-governmental organizations[23]. This action differs from individual actions because it targets the consumers as a whole and not a single dissatisfied consumer. Even though collective, the benefits are enjoyed by consumers in their numbers and individually. Thus, a collective action could be a curative for a nursing individual action or a pending action.

In the quest of achieving adequate protection, consumer associations make use of both preventive and protective measures. However, other measures of protection are equally available both to the consumers association and individual consumers such as court action (judicial method of protection), which could be brought either in crime, torts and/or contract or out of court settlement (extrajudicial method of protection). The implementation of this method of dispute settlement gives the consumer(s) the possibility to be reassured the protection of their rights in case of any violation(s).

2.1.1 The preventive procedure of resolving consumer's litigation

The economic platform today presents a new image. This is partly due to the fact that markets are characterized these days by massive production and distribution of goods and services. This system of massive production and distribution prompts the interest of consumers to always concord. The preventive mechanism therefore principally seeks to eradicate any future damage(s) that may be detrimental to the consumer. In fact, the main target of the preventive action is that of preventing a collective prejudice. Dreveau, points out that the prejudice is detached from the author of the action under reparation. It is not assimilated to him and does not represent him legally[24]. In effect, when a consumer association or NGO demands reparation based on the fact of the relationship that she protects, she does not do so as a substitution to the victim(s) she is representing[25]. Her action differs thus, from the individual action, given that the prejudice of a collective interest is not an addition to individual prejudice[26]. A collective prejudice, refers to a prejudice faced by a group of people with a common status. According to Marty and Raynaud, a collective prejudice is that which attains an undetermined number of individuals with a particular believe in such a way that we cannot say that he or she is particularly injured[27]. It should be noted that the collective prejudice is autonomous from the person who demands reparation. That said, the preventive procedure seeks to prevent damages that

[21] "L'intérêt collectif et l'intérêt individuel' Dreveau C. « Réflexions sur les Préjudices collectif », RTD. Civ, avril. Juin 2011.

[22] See Article 22 of the Law No. 90/053 of August 1990 equally see article 22 of Law No. 2011/012 of 6th May 2011 on the Legal Framework of consumers protection in Cameroon.

[23] The creation of NGOs in Cameroon is guaranteed by law No 99/014 of 22 December 1999.

[24] "Ce préjudice est détaché du titulaire de l'action en réparation. Il ne lui est pas assimile et ne le représente pas juridiquement». Cité par Dreveau, C. (2011), « Réfections sur le préjudice collectif », RTD. Civ, P.259.

[25] Bafuke, Op.cit note 11 at p.101

[26] Dreveau, C. (2011), "Réfections sur le préjudice collectif", RTD. Civ, P.259.

[27] "Celui qui atteint un nombre indéterminé d'individus a raison de leur appartenance aux croyances sans que l'on puisse dire que tel ou tel est particulièrement lésé ».cité par Dreveau (C.), *Ibid,* P.259

may be faced by a large proportion of consumers. However, it will be vital to see how such procedures function through the operation of its actors.

2.1.1.1 The characteristics of the preventive action

The preventive protection of consumer's collective interest invokes a dual action. These are: Action in suppression of an abusive clause and an action in cessation of an illicit act.

2.1.1.1.1 Action in suppression of an abusive clause

The insertion of a clause in a contract such as a banking contract exposes numerous consumers to be affected. The damage here resides in the danger to be faced by consumers as a whole. As a matter of fact, due to such an act and its gravity, consumers may be affected either directly or indirectly. An abusive clause produces a breakdown in the equilibrium of the contract, i.e., reciprocal obligations. The imbalance created is much significant that it is necessary to think of an action in suppression of abusive clauses in contracts. Subsection (a) of section 3 of 2011 law on the framework on Consumers protection consecrates in it the principle of protection. Section 3 (f) on its part consecrates the principle of participation according to which consumers have the right and the liberty to form consumers associations or organizations, that are benevolent autonomous and independent. This is to realize or participate in the promotion and defense of rights targeted by the 2011 law. This seems to make sense as it could be concluded that the authorization of consumers association bestows on them powers and gives them the latitude to bring up a collective action so as to suppress abusive clauses thereby protecting consumers from the ills of the professionals before the conclusion of the contract and during the performance of the contract. This action by consumers association has a peculiar characteristic. That is, it can only be preventive and collective[28]. This characterization is contrary to the general principle of procedure of court action wherein it is upon the commission of an offence and or the realization of the offence that gives way to an action. The acceptance of such an action is necessary to combat effectively and efficiently abusive clauses and subsequently pronounce their nullity. These associations could bring an action in front of a competent jurisdiction or arbitrary tribunal. It should be noted that this action does not affect already concluded contracts, but rather contracts that are yet to be concluded. The action put in place here does not concern only particular consumers but a collectivity of consumers of the banking sector. The judge in the light to appreciate the abusive character of the clause will perform an analysis *in abstracto* so as to see if the clause in question creates a significant disequilibrium towards a group of consumers.

2.1.1.1.2 Action for the termination (cessation) of illegal scheme

An illegal scheme is a manner of acting, behaviour, a plot of a fraudulent nature that is contrary to the law and public order. On a general note, it is contrary to the law (public order and good morals)[29] and could be seen in a restrictive commercial practice or an inequitable commercial practice an illegal scheme (unlawful character).

[28] Civ. 1re, 18 Sept.2008, No 06-22.038, D. 2008. AJ 2437, obs. X. Delpech: R. Mortier, Dr. Sociétes 2008, comm. No 246: N. Dupont, JCP 2008.II.10220.

[29] Cornu G, (2004) *Vocabulaire Juridique*, Association H. Capitant, PUF, 6e Ed., V. Droit de la consommation.

Association in addition to putting up an action to suppress abusive clauses can also elaborate a concrete action to eradicate or stop illegal schemes such as behaviours that counteracts with the law. Consumers association of the banking sector can petition the judge or any arbitrary tribunal in a bit to get hold of any measure that can eradicate such fraudulent and illegal acts of the professionals. This possibility is granted to them by article 27(3) of the 2011 law. The latter provides that "Preventive action shall be that which seeks to remove the threat of infringement of consumer's right. It may be lodged only by a consumer's association or a nongovernmental organisation". The latter is similar to that of the administration aimed at stopping fraudulent behaviours that are harmful or detrimental to the consumer. It is important to note that in Cameroon, the protection of consumer's right is firstly the matter of consumers associations, whereas in France, it is firstly the matter of the administration[30].
With regards to the suppression of abusive clauses in Cameroon, the most reliable way of its resolution is through amicable settlements. In effect, in the case of litigation, consumer's associations or NGOs should seize regulatory organs that establish the relationship between consumer's associations and consumers and the defaulting institution. It is important to note that during the trial process, the burden of evidence to the contrary of the allegation shall lie on the service supplier[31]. Decisions arrived at within the frame work of the proceedings instituted by the consumer's organisation or the NGO shall have all their beneficial effect on all consumers and may be evoked by a consumer or group of consumers to obtain compensation for the lost they suffered[32].

2.1.2 The protective procedure to settle consumers' disputes

This procedure entails bringing and out of court settlement of the consumers' dispute when the consumer(s) right(s) have already been violated or where a dispute has arisen or is already in existence between the parties to the contract. This method of settlement of dispute could either be solicited by the parties or provided to the parties by way of law. Extra judicial settlement will entail mediation and arbitration as the essential mechanisms for dispute settlement. This mode of settlement of dispute could be initiated by an individual consumer for his personal interest or the consumer association for a collective interest.

2.1.2.1 Extra Judicial Method of Enforcing Consumers' Right

An action for the enforcement of rights could be brought by an individual consumer who feels his rights have been violated by the service provider. This action could either be through a court settlement or an out of court dispute settlement mechanism. The choice however remains that of the party initiating the dispute. However, the 2011 framework law recommends more of an out of court settlement as the most appropriate for the resolution of consumers' disputes as it gives way for the creation of arbitrary tribunals at every sub divisional level. This initiative worth applauding should be noted is more of a paper based work that is yet to go operational, thus most arbitrary issues till date are handled by the Cameroon Professional and Employers' Organization[33] Centre. These out of court mechanisms consists of mediation and arbitration (and action here could be collective or individual) which solely are the focus of the 2011 framework law on consumers protection.

[30] Calais-Auloy. J et Temple. H, (2011), « Droit de la consommation », précis Dalloz 8e Ed, Pp566 et seq.
[31] Section 28 of the legal framework of consumers' protection law no 2011/012 of 06 may 2011.
[32] Section 29 Ibid.
[33] Commonly known by its French acronyme as GICAM (Centre d'abitrage du Groupement Inter-Patronal du Cameroun).

2.1.2.1.1 Arbitration

Arbitration[34]consists of bringing voluntarily litigation out of court, in front of one or many persons (arbitrators) selected by the parties who have upon them the obligation of resolving their disputes[35]. Any natural person or physical person may resort to arbitration with respect to any right on which he or she has free disposal. Thus, in cases of violation of consumers' rights, a consumer can bring the case in front of an arbitrary tribunal. Where the interest of the consumers concord, a collective action can be brought up either by the consumers association or NGO. The defense of the interest of consumer(s) before an arbitrary body may be individual or collective[36]. Collective defense in arbitration matters are left to be initiated by Consumers' Organization or NGO involved in consumers protection[37]. While Individual defense are to be carried or initiated by an aggrieved consumer or his successor[38]. The call for arbitration by Consumers Association or NGOs could either take one of the two form: it could be preventive or remedial[39]. A preventive action aims purposely at estopping the occurrence of a dispute which may stem as a result of a clause inserted in the contract by the service providers, contrarily the remedial action seeks to eradicate an already existing dispute. This seems to make sense as a preventive action under the 2011 framework law, is seen as that which seeks to remove the threat of infringement of consumers' rights[40]. Whereas a remedial action on the other hand, is that initiated to right a wrong which stems from the infringement of the rights of a consumer or group of consumers[41].

The application of arbitration generally as a dispute resolution mechanism stems from an arbitration agreements. This agreement is usually come through the insertion of an arbitration clauses by the parties in their agreements or by way of an instrument. This agreement between the parties could either be through expressed or implied terms and the arbitration clause may either be in the form of an arbitration clause[42] or of submission.[43] This logically infers that the arbitration agreement should and must be made either in writing, or in any other form evidencing its existence, in particular, by reference to a document containing the agreement.

2.1.2.1.2 MEDIATION

Alternatively, the parties' to contract may decide to go in for mediation in resolving their dispute or mediation might just be the most appropriate option at the behest of the competent state court and the parties thereto invited to adhere to. Mediation is one of the out of court methods of dispute settlement.

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[34] Meyer, P. (2002), « Droit de L'Abitrage », Bruylant Bruxelles, Collection Droit Uniform Africain,

[35] Calais-Auloy (J.). Et Temple (H), *Op.Cit*, Spéc.496.

[36] Section 26(1) of Law nº 2011/012 of 06 May 2011 on the Legal Framework of Consumers' Protection.

[37] Section 26 (3) *Ibid.*

[38] Section 26(2) *Ibid.*

[39] Section 27(2) *Ibid.*

[40] Section 27(3) *Ibid*.

[41] Section 27(4) *Ibid.*

[42] The arbitration clause is an agreement whereby the parties agree to submit to arbitration disputes which may arise out of or result from a contractual relationship.

[43] The submission agreement is an agreement whereby the parties to an existing dispute agree to settle it through arbitration.

The latter refers to any process, regardless of its name, whereby the parties request a third party to assist them in their attempt to reach an amicable settlement of their dispute, adversarial relationship or disagreement ("the dispute") arising out of a legal or contractual relationship, or related to such relationship, involving natural persons or legal entities, including public bodies or States[44]. This therefor connotes that "Mediation" refers to the process through which parties in dispute emanating from a legally binding contractual relationship resolve a dispute that must have emanated from such a contract or in connected to the contract, through the use of an appointed neutral third party known as a mediator[45]. This third party known as "mediator" could either be a natural or a moral person. This seems to make sense as the mediator is defined commonly as a person or an organization, which tries to get an agreement between people or groups who disagree with each other[46]. The term 'person' here could either be moral or physical, but the implication of organization within the definition logically is intended to refer to a moral person so that the former is treated as targeting solely physical persons because organizations generally are bestowed with a moral personality upon their creation. Within the OHADA, the term "mediator" means any third party requested to carry out a mediation, regardless of the name or profession of this third party in the Member State to the treaty concerned[47].

When there is a dispute emanating as a result of a banking contract, the parties to the dispute may choose mediation for the resolution of their dispute. Where this is voluntarily done by the parties, the form of Mediation will be conventional. However, if the parties had not settled their mind on such, mediation may be implemented, at the request or invitation of a state court (judicial mediation), of an arbitral tribunal, or of a competent public entity. That said, be it conventional or judicial mediation, the form could either be ad hoc or institutional and it is thus the choice of the latter that determines the applicable law and rules to be applied in resolving the parties' dispute.

The ends of ADR could either be fruitful or futile to the parties in dispute. Where the resolution meets the aspiration of the parties, the case comes to an end. Contrarily, if at the end of the process, a party to the dispute is still unsatisfied, the next best available alternative could be by initiating an action in court.

3. INDIVIDUAL ACTION FOR DISPUTE RESOLUTION VIA COURT LITIGATIONS

The judicial mechanism of settling consumer's disputes is by way of a court action brought by the aggrieved consumer. This method generally is used when Alternative Dispute Resolution Mechanisms (ADR) have failed to provide a concrete solution to the dispute the parties are confronted with. The choice of a court action should and must be properly fitted and file, without which it risk being disqualified for want of Action. This brings to mind the fact that the consumer's action could either be instituted as either a civil or criminal case, or jointly, by attaching a civil claim to a criminal case.

3.1 Civil Action

[44] See Article 1(a) of the OHADA Uniform Act on Mediation

[45]Bafuke E.N, (2020), The Protection of Consumers of Electronic Banking in Cameroon, University of Dschang, Faculty of law and political science, PhD Thesis P.249, Unpublished.

[46] Oxford Dictionary 6th Edition, p.733.

[47] See article 1(b) of the OHADA Uniform Act on Mediation.

A civil action being a noncriminal lawsuits generally aims at repairing the damage suffered by a party to the suite through the attribution of damages, could either be based on the grounds of an action in contract or a tortious liability.

3.1.1 Action in contract

The primary function of contract law is to secure for each contracting party the benefit of the bargain he has made. So in a breach of contract, the innocent party is entitled to the protection of his expected interest, that is, to be placed in the position he would have had if the contract had been performed[48]. This is achieved either by a degree of specific performance compelling the defendant to perform or by an award of damages representing the money value of the plaintiff's defeated contractual expectation. The conclusion of a contract and its performance brings into being mutual obligations to the contracting parties and the violation of which is actionable. Hence when the consumer has performed his own obligation(s), it is left for the banker to ensure that he does same. Failure by the banker to perform his obligations may lead to a breach of contract which is actionable in a situation where the breach is unlawful. In this situation the consumer's claim might be for a breach of an implied term of the contract, an action of breach of mandate etc.

A breach of contract may be actionable under the following grounds: Action for the breach of an implied term of the contract; action linked to the means of payment; actions in cases of irregularities in management of accounts. An epitome of an action of breach of contract could be seen where the bank wrongfully dishonours the customer cheque, the customer may claim damages for breach of contract. A Judicial recognition of this view in former West Cameroon is afforded by the case of *Azia Anthony v Société Générale de Banque du Cameroun (SGBC)*[49]. In that case, the plaintiff who had an account with the defendant bank drew a cheque of 500.000 CFA Frs. in favour of one Fon Mathew N. The cheque was returned unpaid although at the time, he was supposed to have adequate cover in his account. He therefore brought an action against the bank for breach of contract and negligence. It was held that since at the time the plaintiff issued the cheque of 500,000 CFA Frs. his account was in credit in the sum of 812.760frs CFA, the bank was in breach of contract by returning the cheque unpaid.

When the bank affects an unauthorised payment of the customer's cheque, the bank is not entitled to debit its customer's account with the amount involved unless it can plead one of the acceptable defences. If it debits the customer's account, an action can be brought by the customer against the bank for breach of mandate. An action for wrongful payment of cheque based on the bank's breach of mandate was successfully brought in the Cameroonian case of *Ngapou Alphonse Samuel V. BIAO (Cameroon)*[50]. The plaintiff in this case was operating an account with the Bamenda branch of the defendant bank. Since he was an illiterate, he engaged his brother-in-law named Payanda Maurice who helped him in running the account. But before any money could be withdrawn, from his account, he had to sign a cheque personally for that purpose as no other person was authorised to do. In due course, a letter purported to have been written by the plaintiff, instructed the bank to transfer money from his account to the account of GETRAL. This letter was not written by the plaintiff but rather by someone else and endorsed by the clerk of the bank. The defendant then debited his account with 41.405.104frs CFA. The plaintiff succeeded in retrieving this sum in an action brought against the bank in the

[48] *Ewan M, (2005), Contract Law, Palgrave Macmillan Law, 6th Edition, New York, NPN.*
[49]The unreported judgement of suit n° B/C/ A/47/881.
[50] Suit n° HCB/65/1988 (unreported).

Bamenda High Court. It was held in this case that a bank had no right to debit the account of a customer and thereby allow moneys' to be withdrawn from the customer's account without the customer's prior voluntary authorisation in writing and personally signed by him. The prior voluntary authorisation in writing could be by way of cheque, standing order, mandate or any other recognised mode of carrying out the customer's instructions.

Another ground of action under contract could be linked to the irregularities in the means of payment. Here, the depositors action in case of irregularities in means of payments are aimed at causing the bank to account for any prejudice suffered resulting from the non-respect of conditions for the issuing of the means of payment. The CEMAC legislator has regulated the conditions for the creation of cheques, and the dispensation of Electronic Money Establishment (EME) as other means of payment. By virtue of article 14(1) of the CEMAC Regulation of 04 April 2003, a cheque form in which any of the compulsory information is lacking is not considered as a cheque except in cases lay down by the Law.[51] As to other means of payment, they are created by contract between the bank and the depositor or customer and the non-respect of the condition for the conclusion of the said contract is sanctioned by nullity such as with e-banking contracts[52]. This may be the case where the consent of the depositor is procured by duress, error or fraud. The depositor may take action to set aside the contract based on those vices. However, where the fault does not emanate from the duty imposed by the law but by contract, the banker may be civilly liable based on the general principles of the law of contract. In this case, the condition for civil liability must be satisfied. These require that damages should be established and that there must be a causal link between the damage and the conduct of the e-banking service provider. In addition, the bank should not benefit from any circumstances exonerating it from liability. This generally includes force majeure and fault on the part of the depositor.

The courts of Cameroon are however always ready to come to the assistance of the customer who discovers an error in his statement of account or passbook. If the bank hesitates to correct the error, the customer can institute an action against the bank. In *Vicent Dango Tayong v Societe Camerounaise de Banque (SBC),*[53] the appellant Vicent Dango was a customer of the respondent bank. He had a credit balance of 2.124.849 CFA Frs. in his account on the 21st of June 1950. Since then, he had never asked for a loan or an overdraft from the respondent bank. Subsequently, the wrong entry was corrected. These errors may come when a customer's account had been credited with an amount smaller than that of an item payable to him, or when a customer's account is debited with an amount larger than that for which he drew a cheque. Such irregularities could equally surface where the amount of the customer's cheque had been fraudulently raised.

3.1.3 Actions in Torts

According to Salmond,[54] a tort is "a civil wrong, for which the remedy is a common law action for unliquidated damages[55] and which is not exclusively a breach of contract or a breach of trust or other

[51] A cheque must indicate the place of payment and when it fails, it is payable at the place indicated beside the name of the drawer or where there is no place at all, it is payable at the head office of the bank, See article 14(2) of the regulation of 14 April 2003.

[52] MEDAMKAM TOCHE (S.J.), La sécurité de Déposant Dans le Système Bancaire de la CEMAC, Mémoire de DEA, Université de Dschang, P 57.

[53] Suit no BCA/39/33 (Unreported).

[54] *STREET (H.), The Law of Torts, 4th Edition, London, Butterworth, 1986.*

[55] This are damages where the amount of money is not certain as in the cases of libel, slander and assault or battery. They arise from wrongs which threaten the injured party's moral or reputation. Unliquidated damages are awarded where a

merely equitable obligations." Distinct courses of action could be brought under an action for tort such as action in Defamation; Misrepresentation; negligent misstatement. Although English law does not recognize the existence of a general duty to disclose information during the process of contractual negotiation, the process of contractual negotiation is not left unregulated. Rather a duty is imposed not to make any fake statement of fact or law to the other contracting party and thereby to induce him to enter into the contract. A representation is a statement of fact, express or implied, anterior to the contract, which is intended to and thus includes the person to whom it was made to enter into the contract but is not at its time of making intended a promise, though it may later be incorporated as a term of the contract[56].Where a customer have been misled, he can plead estopple if he was misled or had reason to be misled for instance by the erroneous balance in his account. The principle was rigorously applied in the case of *United Overseas Bank v Tiwan*;[57] in that case a bank erroneously credited its customers account twice with the amount of a single remittance. The amount involved was substantial and the customer was not expecting any additional payment to one genuinely received for the credit of his account. Despite this, he drew on the balance accrued as a result of windfall. Thereafter, disputed the banks right to reserve the undue credit entry. It was held that the customer ought to have known that the unduly high balance shown in his account was incorrect. He was not expecting any additional payment of a substantial amount to the credit of his account and he was not entitled to shut his eyes to the facts staring him in the face.

In the nutshell, the dispute might have risen on the ground of defamation. Defamation is a generic expression representing two types of torts namely libel and slander. Libel consists mainly in written material while slander consists in spoken words or gesticulation. Gesticulation may take the form of facial mimicry[58].

In dishonoring a cheque, the banker usually writes on the cheque the reason why the bank cannot honour it. This practice sometimes exposes it to the risk of an action in defamation by the customer, drawer of the cheque. This action in defamation is tortious and damages can be awarded without proof of loss. Therefore where a non-trade cannot prove actual loss in an action of breach of contract, it is advisable for him to bring a join action for defamation and breach of contract if they are available.

A customer still within the confines of torts could bring an action in conversion. Here, the action will be against the collecting bank. The collecting bank's main risk of liability arises from the collection of a cheque from the wrong party, usually because the drawer's signature has been forged or because the signatory is an agent or employee who signed without authority or, though being authorized to sign, drew the cheque for his own benefit in fraud for his principal or employer. A bank which receives a cheque for collection for a party having no title to it is by the very act of receipt liable in conversion to the person then entitle to possession of the cheque. In presenting the cheque for payment, the

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plaintiff claims damages for breach of contract and the court assesses the money value of the loss suffered and grant this as damages. In other words unliquidated damages is an order by the court to a party in breach to pay the sum fixed by the court as compensation to the other party. Unliquidated damages can take one of the three forms :substantial damages which is a pecuniary compensation intended intended to put the plaintiff in the position he would have enjoyed had the contract been performed (restitutio in integrum); Nominal damages which is a small token awarded where there has been an infringement of a contracted right but no actual lost has been suffered; Exemplary damages are damages awarded when the sum is far greater than the pecuniary loss suffered by the plaintiff.

[56] Goode R.M (1995), *Commercial Law*, Penguin Books, England, 2nd Edition, P.112.

[57] (1976) T.W.L.R. 1964.

[58] See the case of *Youssoupoff v Metrogolwyru Meyer Pictures* (1934) 50 TLR 581.

collecting bank commits a further act of conversion; and having collected the cheque it exposes itself to an alternative claim for money had and received, for the plaintiff has the option of waiving the tort of conversion and suing instead in quasi contract for the proceeds of the property converted. The position is otherwise, of course, where the collecting bank itself acquires an overriding interest as a holder in due course.

At common law, the exercise of reasonable care by the collecting bank is no defence to a claim in conversion, for which there is strict liability; and to ameliorate the problem confronting collecting banks a measure of protection was conferred by Section 82 of the Bill of Exchange Act 1882 subsequently repealed by the Cheques Act 1957 and replaced by section 4 of that act. This protection was enhanced by the provisions of the Banking Act 1979 enabling banks to plead contributory negligence as a defense.[59]

3.2 Action in Criminal Law

The grounds for an action in crime are divided notably under two heads i.e. offences by commission and by omission. The material elements of an offence can be of a positive character (commission) or of a negative character (an abstention or omission). In this light, we distinguish offences by omission and offences by commission.

3.2.1 Offences by commission

An offence by commission includes: Fraud or fraudulent manoeuvres; Deception; Attempts on the patrimonial integrity of the Consumer, offences related to the regulation of prices; Publicity bearing false information; Failure to execute the contract as per its terms; Infringement on the patrimonial integrity of the consumer. Offences related to the regulation of prices; offence of usage; false Advertisement; Lapses or failures in the execution of the contract; Action on the breach of the duty of secrecy.

The bank is under an obligation to keep its customers affairs silent. The banks duty of secrecy was succinctly enacted by the Cameroonian legislator in ordinance No 85/002 of 31 August 1985 relating to the operation of credit establishments and was later on attributed more Judicial impetus by its consecration in Law No. 2003/004 of 21 April 2003 governing Banking Secrecy in Cameroon. This law in its article 3 indicates that banking secrecy consist of obligation of confidentiality imposed on credit establishments in relation to acts, facts and information concerning their functions. The penal code therefore punishes any violation of the above provision of the law if they are unlawfully carried out.

The criminal responsibility of the banker for the breach of the duty of secrecy is a rare phenomenon to come by because; either the banker obeys the duty scrupulously or resorts to amicable settlements if there is breach[60]. This may be because the penalty for the breach of secrecy may be very heavy and generally has a deterrent effect. In addition, intention which is a fundamental element in the determination of criminal responsibility is not easily proved[61]. However, if the customer can prove

[59] Section 47.Ordinary contributory negligence is no defense to a claim for conversion (Tort (interference with goods) Act 1997, s.11 (1)).

[60] TEISSIER (A.), (1999), *Le Secret Professionnel du Banquier*, Tome 1, Aix-Marseille, I.S.P.E.C., L.R.D.D., Presse Universitaires d'Aix-Marseille, P 135.

[61] CREDOT (F.J.), « Le Secret Bancaire » (1993), 21 Petites Affiches, 8-15, 8.

breach of the duty and that there is no amicable settlement, he can take a criminal action against the bank. It must be mention here that since the breach of the duty of secrecy has no physical act, it may hardly be noticed by third parties[62]. For this reason, prosecution of the banker may only be done by the customer, who may complain to the legal department or initiate private prosecution[63].

Before the intervention of the CEMAC legislator, the criminal responsibility of the banker for the breach of the duty of secrecy was anchored on the provisions of the Penal Code on professional and commercial confidence,[64] and the provisions of the 1985 Ordinance[65]. Article 42 of the 1992 Convention, while re-enacting the provisions of the Ordinance, subjects the managers, directors and employees of the banks to the professional confidence, under the conditions lay down by the Penal Code of the host State.

The Cameroonian legislator has equally extended the scope and has aggravated the sanction for the breach of banking secrecy. Indeed, section 23 of the 2003 Law on Banking Secrecy punishes any person guilty of the offence with imprisonment of three months to three years and or fine of from 1.000.000 CFAF[66]. The courts may further order the confiscation of the *corpus delicti*, forfeiture of public functioning relating to the credit establishment, closure of the establishment and or publication of judgment[67]. In addition to the above sanctions, the banker may incur disciplinary sanctions.

Another ground on which a consumer could equally bring a criminal action could be on false advertisement. Advertisement in Cameroon is governed by Law No. 2006/018 of December. It is important to note that advertisement is a legal act which involves the use of procedures such as: Posting; advertisement in specialized journal and through the media.

The aforementioned text requires businesses to carry out advertisements in clear and understandable manner, and advertisement should not contain incorrect information and/or information misleading about the terms under which the consumer uses these services. Thus an offence is committed when the financial service provider fails in his obligations by providing information that is misleading and incorrect about the service and the terms under which the consumer uses these services. Thus if the advertisement is not done within the limits of the prescription of the 2006 law, such will be treated as false. False advertisement therefore delivers poor information to the consumer as per article 22 of the law of 1990 and its reception in law no 008/MINDIC/DPPM of 07 March 1991 relative to anti commercial practices. False or erroneous advertisement as indicated in article 22 (a) of the 1990 law is that which has as result to induce the consumer into error[68]. Article 14 precisely, considers as false advertisement any advertisement that is susceptible to induce a consumer into making a wrong choice[69].

False advertisement can be realized by simple and fallacious allegation that aims at attracting consumers. It should be noted that the act of giving false information is considered as an offence and

[62] The difficulty stems from the fact that the public may hardly feel the effects and the offender may hardly be caught flagrante delicto like in other offences.
[63] The CPC provides for private prosecution in sections 157-158.
[64] PC, SS. 310 and 311.
[65] Section 45.
[66] See equally Section 310 and 311 of the Cameroon Penal Code.
[67] Section 28 of 2003 Law.
[68] "D'induire le consommateur en erreur" la publicité mensongère ou erronée comme l'indique l'article 22a de la loi de 1990.
[69] L'article 14 la loi de 1990. Considère comme mensongère "faite publicité susceptible de fausser le choix du consommateur".

is thus actionable. Section 32 of the 2011 on consumers protection law puts its succinctly clearly that whosoever gives false information on the quality of technology, goods or services supplied to a consumer shall be punished with imprisonment of from six months to two years or with fine of from 200,000(two hundred thousand) to 1,000,000 (one million) CFA Frs., or with both such imprisonment and fine.

Moreover, restrictive commercial practices that can have any negative effect on consumer's law such as the abuse of the dominant position, erroneous deceitful or abusive publicity are formerly restricted. In effect, these practices put in peril the patrimonial integrity of the consumer[70]. These attacks on the patrimonial integrity of the consumer is epitomised through the unjust enrichment of the professional over the impoverishment of the consumer which thus constitutes an offence(s). An offence is an act that is illegal as provided for by penal law. Hence for there to be an offence, it suffices that a prohibition or an injunction of the penal law has not been respected. These offences include: Offences on the regulation of prices; Offences related to the practice of prohibited sales.

An aggrieved consumer could equally base his action on the offence of usage. Article 9 of the 2011[71] law provides that "concerning the granting of loans to consumers for the supply of technology goods and services, the supplier or service provider must inform the consumer in writing about the cash price, interest amount, interest rate on arrears, number of installments, frequency and periodicity of such installments and total amount payable". Failure to respect this provision of the law is punishable as per article 325 of the penal code. This article provides as follows "Any lender demanding or taking interest or any other reward higher than the rate fixed by law for loans of the kind in question shall be punished with fine from five thousands to one million Francs"[72]. On a subsequent conviction within the meaning of section 88 of this code, the penalty shall be imprisonment for from fifteen days to one year and the fine shall be doubled.

3.2.2 Offences by omission.

An omission supposes a voluntary abstention. The professional has as of duty to provide the consumer with absolute information, concerning the contract. However, this is not his sole obligations, as he also owes consideration to the consumer. Hence when the consumer fulfils his obligation in the contract, the Banker (professional) has to do same. When the professional fails to inform the consumer, he will be held responsible for an offence of omission to inform. In like manner, when he fails to give his consideration, he can be held responsible for committing an offence of omission to consideration.

Most often than not, offences by omission are link to pre contractual information within the banking sector. These offences are linked to the duty to inform and to the execution of a banking contract. Amongst the principles of the consumer protection, the principle of information is of fundamental importance. The latter presupposes that consumers have the right to access to information which is necessary to help them make a good choice during any transaction. Thus there is information which is preliminary; information prior to conclusion of an e-banking contract; and information during the execution of the said contract. In effect, every supplier of banking services, must supply the consumer with reliable and truthful information in the two official languages (English and French).This information must respect the following criteria; It must be: adequate; clear and legible (readable).This

[70] Paragraph one of article 8 of law No 2011/012 of 6th May 2011 on the Legal Frame Work on Consumers Protection.
[71] Article 9 of law n° 2011/012 of 6May 2011 on the Legal Framework on Consumers protection.
[72] Section 325 (1) of the Cameroon Penal Code.

information provided must be in line with the kind of services offered by the bank and most especially details of the precise service the customer is in need of. This is to enable the customer to make an adequate and reasonable choice before the conclusion of the contract. It is important to note that the above mentioned criterion must be taken into account most especially in advertisement. Hence, every advertisement intended for consumers of banking services must be in conformity with the laws in place in the domain of advertisement[73]. The information given to the consumer is to permits him grant a clear consent on the subject matter. A consumer can thus bring an action on the grounds of either false advertisement leading him to consent or again, his action could be based on failure in the execution of the contract by the professional.

Information in consumer's law is very fundamental. It has to be clear and explicit. That is why the 2011 Legislator makes it clear in article 13[74] that "each technology, good or service supplier or provider must provide the consumers with correct, adequate, clear and legible information, in English and French concerning the goods and services offered to enable him make appropriate and rational choices before concluding a contract. In fact the customer shall have the right to obtain from the financial service provider in writing or another durable medium, free of charge, information data and instructions relating to his contractual relationship with the provider, in the manner and within the terms specified by the agreement. This same position is reechoed in article 3(c) of the general principle of consumer protection. Based on the aforementioned, it is thus obvious that every supplier of a service in Cameroon is required as an obligation to supply the consumer with information in English and French.

The conflict between consumers and professionals stems from an inequality in information. E-banking service providers know best the services put on the market while most consumers are incapable to judge and to compare these services themselves. The right to information has become a major and sensitive theme for the defense of consumers. Hence, he who fails to satisfy this obligation to information will be held responsible for fraud, misrepresentation and will be susceptible to punishments provided for by the penal code.

4. Conclusion

The above analysis has unravelled the legal procedure(s) available to the consumers of the banking sector to advocate for their rights either collectively or individually when ever they feel cheated by the professionals of the sector. This legal mechanisms have acted within the last decade as a catalyste to slow down the rampant disputes and acts of consistent violation of customers rights within the banking system. However, with the advent of the e-banking and the prolifiration of new actors in the provision of banking services, much is still required to be done to protect the rights of consumers. This is so because this new wind of technology has not only come with new challenges which could be contained by existing legal redress mechanism but has even made complex the situation because of the systematic difficulties to identify the criminal(s) behind the curtins to attribute liability and claim damages. Despite these modern day challenges, it would be all misleading and erronuous to affrim the inefficiency of the available legal redress mechanisms in the face of this new form of banking as the

[73] See Law No. 2006/018 of December, 29th 2006 governing advertisement in Cameroon.

[74] Law No. 2011/012 of 6th May 2011 on the Legal Frame Work of Consumer Protection in Cameroon.

available legal mechanisms have stifle, mitigated and made difficult the activities of most of those draining consumers of their resources. Hence the available recourse to consumers as of now is to take refuge in the available legal depensation and dispute resolution mechanisms to resolve their disputes and differences with the professionals of the sector.