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The Recovery of Debts Inherent in Cheques without Cover in Cameroon via the OHADA Simplified Recovery Procedure and Enforcement Measures

Akama Samuel Penda[1], Nji Keneth Ndikum[2]

[1]Senior Lecturer, Head of Department of English Law, University of Maroua, Cameroon
[2]Assistant Lecturer, Department of English Law, University of Maroua, Cameroon

ABSTRACT
The vast number of commercial transactions that take place daily in the modern business world will be inconceivable without negotiable instruments like cheques. This is the reason why the recovery of debts inherent in cheques without cover has been given the attention it deserves within the CEMAC Region under the OHADA Uniform Act on Business Law. The OHADA Uniform Act on Simplified Recovery Procedure and Enforcement Measures has instituted a procedure in the member states of the OHADA zone to recover debts of a company when it eventually goes bankrupt or when it winds up. It should however be understood that all the member states of CEMAC are OHADA signatories. This ipso facto means that Cameroon being a member of CEMAC, with its bi-jural nature, where the Common Law and Civil law legal systems operates in the Former West Cameroon and Former East Cameroon respectively, both parts of the country are bound to implement the OHADA Uniform Act in their various jurisdictions. The Uniform Act on Simplified Recovery Procedures and Enforcement Measures was issued on the 10th of April 1998. Like the Uniform Act on Securities, this Act overlaps the bound of pure business law in that it effects a general reform of civil procedure in relation to recovery and enforcement. The reform was indispensable; of the OHADA Member States, only Mali had, in 1994, put in place a modern system that was suited to present-day economic and social conditions. Otherwise, the relevant legislation dated, at best from the 1970s and in several cases from colonial times. The OHADA Uniform Act governs commercial companies and Economic Interest groups. Since banks are commercial companies governed under Public Limited Companies (S. As), they are equally governed by the OHADA Uniform Act. Thus, this paper questions the potentials of the OHADA Simplified Recovery Procedure and Enforcement Measures in relation to the special mechanisms for the Recovery of Debts inherent in cheques without cover in Cameroon.

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1. Background Considerations

A cheque is an instrument on which the customer, acting as principal, instructs the bank, his agent, to perform a specific act, which is the payment of a determined amount of money to the order of the payee or the bearer[4]. As such, it constitutes an instruction or order given by the customer to the bank, which is his agent. It is a mandate and the bank is, therefore, under a duty to observe the terms of the authority or mandate, conferred on it by the customer[5]. Here, the cheque retains a fundamental character of an unconditional order to pay a specific amount[6]. In a nutshell, a cheque is an unconditional order in writing, drawn by one person upon another person who is a bank, signed by the drawer, requiring the bank to pay on demand of a certain amount of money to him or to the order of a specified person or to the bearer[7].

The law on cheques applicable in Cameroon is in line with the above definition. Cheques in Cameroon are governed by the CEMAC Regulation of 2003 relating to Systems, Means and Incidents of Payment[8]. Without proffering a standard definition of a cheque, the above Regulation states that a cheque must contain a pure and simple mandate to pay a specified amount[9]. As such, it is payable at sight or on demand and as a matter of fact, it constitutes an

[4]Juglart (M.) & Ippolito (B.), *Traite de Droit Commercial: banques et bourses*, Tome7, 3e edition par Lucien M. MARTIN, Paris, Montchrestien, 1992, 352.
[5] Ellinger (E.P) & Lomnika (E.), *Modern Banking Law*, Second Edition, New York, Oxford University Press, 1994, 296.
[6]Mbah Tidong (E.), *The Law of Cheques in Cameroon*, Doctorat de Troisième Cycle, University of Yaounde II, 1991, 17.
[7] Ellinger (E.P) & Lomnika (E.), *Modern Banking Law*, op. cit., 307.
[8] "Regulation No. 02/03/CEMAC/UMAC/CM of 4 april, 2003.
[9]"Le mandate pur et simple de payer une somme déterminée", See Article 13(2) of "Regulation No. 02/03/CEMAC/UMAC/CM of 4 april 2003"

unconditional order, since it is not subject to acceptance by the drawee, even if a bank may visa it[10]. This means that unlike a bill of exchange that may be accepted by the drawee before it becomes bound to it, no such acceptance is required for a cheque[11]. Therefore, the bank is obliged, both in contract and in law, to pay cheques. Failure to do so is a breach of contract between the bank and the customer to which the customer may seek legal redress.

As authoritative as this view on cheques may appear, the bank hardly accomplishes this duty without coming across a number of legal and practical problems of considerable significance[12]. The bank's duty to pay cheques is therefore qualified, and it is subject to several limitations. The first restriction on the bank's duty to pay cheques relates to the place of payment. The duty arises only if the instrument is presented at the branch where the account is kept. The bank's duty to pay cheques may be abrogated by law. For instance, upon the issuing of a *garnishee* order[13]or injunction restraining payment or *mareva* injunction[14]or upon the customer's bankruptcy[15]or, in case of a company, upon its winding-up[16]. The bank's duty may also be limited if the cheque is marred with irregularities. The mandate may equally be determined when the customer countermands payment[17]. Above all, the bank's duty to pay cheques is lifted if the amount of the cheques exceeds either the balance standing to the credit of the customer's account or the ceiling of agreed overdraft facilities. This last event has received notoriety and in such a situation, generally, the cheque is issued without cover or without adequate or free cover. When this happens, it puts in question the bank's obligation to honour the customer's cheque.

The bank's obligation to pay cheques drawn on it by the customer in required form on presentation arises if there are funds available in the customer's account. Though some controversies may arise as to what constitutes available funds or account in credit, the classic view is that the customer's account is regarded to be in credit if there is a balance in his favour or an existing agreement by the bank to allow an overdraft[18]. In other words, funds in the customer's account may accrue either on the basis of an actual balance standing to the credit of the account or on the basis of an agreement for an overdraft[19]. Therefore, before paying a particular cheque, the drawee should ensure the banker has already agreed (or is willing) to permit an overdraft[20].

Despite the above assertions, at times, it may be difficult to say whether the customer's account is in credit or not. For instance, when the banker has received funds payable to the customer by whom he has not had time in the ordinary routine of business to credit the customer's account. Another example can be seen where, in case of remittance for collection, the amount of the standing is credited to the customer's account and there is no agreement for an overdraft. If there are no funds available any cheque issued by the customer will bounce[21].

The view of unavailability of funds is extended under CEMAC law. The CEMAC lawmaker has meticulously specified other acts or events which constitute unavailability of funds, some of which are posterior to the drawing of a cheque. They include withdrawal of all or part of the funds after issuing a cheque and unauthorized countermand of payment. Other acts constituting unavailability of funds include cheques issued on a closed account and cheques drawn in disregard of banking or judicial prohibition. These acts are punished with the same penalty as that of the offence[22]of cheque without cover[23]. They constitute unavailability of funds, since they are done, the cheque will not be honoured, though the bank has the option to pay part of the cheque[24]or its

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[10]Article 16 of "Regulation No. 02/03/CEMAC/UMAC/CM of 4 april 2003".

[11]Unless a bill is payable on demand, it is usually required to be presented for acceptance following which the acceptor becomes the party primarily liable to the holder. A cheque is not ordinarily required to be presented for acceptance, and the drawer is always the party primarily liable on his cheque, see IROKALIBE (I.J.G), Law of Banking in Nigeria, Lagos, Malthouse Press Limited, 2007, 216.

[12]**Mbah (E.)**, "*Cheques and the Law in a Bi-jural State, Cheques Drawn on Accounts with Inadequate Credit: a Comparative Study of the Application of the English and French Legal Concepts in Cameroon*", Annales de la Faculté des Sciences Juridique et Politiques, Université de Dschang, 1998, 150-166, spec. 153.

[13]See sections 83 et seq. of the Sheriff and Civil Process Ordinance, 1948 (for Anglophone Cameroon) and article 295 of "Code de Procedure Civile et Commerciale" (for Francophone Cameroon).

[14]See Order 20 of the Supreme Court (Civil Procedure) Rules, 1948.

[15]See sections 278 and 384 of the Insolvency Act, 1986.

[16]Section 127 of the Insolvency Act, 1986; section 227 of the Companies Act, 1948. It should be recalled, however that the Uniform Act Organising Collective Proceedings for Wiping Off Debts in its section 68(4), authorizes payments by negotiable instruments (Cheques inclusive) during collective proceedings.

[17]The bank's duty is only lifted if the countermand is authorized by the law. The various instances where countermand is authorized are loss, theft or fraudulent usage or falsification or counterfeiting of the cheque and when collective proceedings for redress or liquidation are initiated against the payee or the bearer. The drawer should immediately confirm the countermand in writing, see articles 46(2) and 238(4) of "Regulation No. 02/03/CEMAC/UMAC/CM of 4 april 2003".

[18]Chorley, *Law of Banking*, 6th Edition, London, Sweet and Maxwell, 1974, 73.

[19]Ellinger (E.P) & Lomnicka (E.), *Modern Banking Law*, op. cit, 334.

[20] Holden (J.M), *The Law and Practice of Banking: Banker and Customer*, 5th Edn, London, PITMAN Publishing, 1991, 264.

[21] Kelese (G.N), *Special Mechanisms for the Recovery of Debts Inherent in cheques without Cover within the CEMAC Zone*, RDJ-CEMAC, P. 139

[22]The offence is punished with imprisonment from six months to five years or fine from 100.000 CFAF to 2.000.000 CFAF or both such imprisonment and fine see article 237 of "Regulation No. 02/03/CEMAC/UMAC/CM of 4 april 2003." Formally, this offence was punished in Cameroon under sections 253 and 318 of the Penal Code.

[23]Art. 238 of "Regulation No. 02/03/CEMAC/UMAC/CM of 4 april 2003".

[24] Ibid, article 48.

whole amount where funds in the customer's account are inadequate[25].

Where a cheque is issued on an account without cover, its beneficiary who is partially paid or not paid at all may *apriori* be considered as a victim of the issuer's reprehensible conduct[26]. Does the victim have a remedy in this circumstance? The answer for this fundamental question may vary depending on the law applicable. Indemnification of the victims of cheques without cover has since been a major problem in France because there was no legal guarantee for payment of cheques. Today, the question is viewed differently. First, because the payment of cheques of certain amounts is guaranteed and second, because there is a system of information without cover[27]. This means that the bearer of a cheque without cover probably may have no right of action because he was negligent to inquire for information about the drawer or because the payment of cheques without cover of a certain amount is guaranteed legally[28]. This is not the case with Cameroon since there is no legal guarantee of payment of cheques of certain amounts and also because the mechanism of information is such that the population hardly has knowledge which can help avoid receiving cheques without cover. The law offers some protection to the beneficiary of the cheque in this circumstance, by giving him the right to recover from its drawer the amount represented by the cheque. The victim is, therefore, in a good position to take a legal action against the issuer to that effect. Nevertheless, the beneficiary will forfeit his right of recovery, if he had any reason to believe that the cheque had no adequate or free cover, or that the cover had been withdrawn either totally or partially and went ahead to accept it, he can even be penalized[29].

The tendency has always been for the beneficiaries of cheques without cover to consider the conduct of the issuers as an offence. As such, it concentrates on the prosecution of the drawers of such cheques during which they may bring alongside a civil claim. The consequence of this has always been the prolongation of the procedure, which is detrimental to the victim of the offence. This method of recovery poses a problem in that, the victim will feel less protected and even more frustrated if at the end of the day the criminal action fails with the consequential failure of the civil claim. Even if he chooses a civil action[30], this also will be time consuming. How then can the beneficiary of a bounced cheque in Cameroon avoid these prolonged and tedious procedures and recover the amount represented by the cheque rapidly and easily? This is easier if he employs special recovery measures and procedures under CEMAC and OHADA[31]laws. Unfortunately, these special procedures have drawbacks that are inimical to their application. In this paper, we shall examine them critically and make suggestions for their amelioration.

The right of the beneficiary of a bounced cheque to recover its amount against the issuer is based on the contractual relationship between the drawer and the payee. When the cheque is drawn, it constitutes a written proof of an obligation between the beneficiary and the issuer. Equally, it constitutes the commencement of proof by writing. Based on this, he may claim the payment of the amount of the cheque or its balance, interest, cost of procedure and other costs[32]together with damages[33]. The beneficiary can recover the debt inherent in the cheque by employing recovery measures specific to cheques, or through the simplified procedure of an injunction to pay.

2. Recovery of Debt through Procedures Specific to Cheques

The recovery of the amount of cheques issued without cover falls within the domain of the law known in French as "droit

[25]Mbah (E.), "*Cheques and the Law in a Bi-jural State; Cheques Drawn on Accounts with Inadequate Credit…*" op. cit., 150-166.

[26]This appellation appears inappropriate in jurisdictions where the issuing of a cheque without cover no longer constitutes an offence.

[27]Juglart (M.) & Ippolito (B.), T*raite de Droit Commercial: Les Effets de Commerce: Lettre de Change, Billet a Ordre, Cheque,* Tome 2, 3eme Edition entièrement refondue par Jacques Dupiclot et Didier Guerel, Paris, Montchrestien, E.J.A., 1996, 328.

[28]Article 131-82 of the "Code Monétaire et Financier" in France; Article 73-1 du Décret-loi de 1935 formally applicable in Francophone Cameroon obliges the banks to pay cheques without cover of amounts less or equal to 15 Euros. This provision is of public order and cannot be altered by a contrary agreement, see Jeantin (M.) &Le Cannu (P.), *Droit Commercial, Instruments de paiement et de Crédit, Entreprises en Difficultés*, Paris, Dalloz, 2003, 41.

[29]Like the French Legislator (article L. 163-2 alinéa 2, du Code Monétaire et Financier), the CEMAC lawmaker has envisaged the possibility of prosecuting a beneficiary who receives a cheque knowing that it is not covered and punishes those who accept counterfeited or falsified cheques with knowledge of the fraud (article 206 and 238 of "Regulation No. 02/03/CEMAC/UMAC/CM of 4 april 2003" respectively).

[30]Moralis (J.L), "*Le Cheque sans Provision en Droit Camerounais*", Revenue Camerounaise de Droit, No. 4, 1973, 147-160 spec. 159.

[31]OHADA is the French acronym for "Organisation pour l'Harmonisation en Afrique du Droit des Affaires", translated in to English as Organization for the Harmonization of Business Law in Africa. See Gueye (B.), Tall(S.N), Kamto (M.), "*Traite du 17 October 1993 Relatif a l'Harmonisation du Droit des Affaires en Afrique*", inIssa-Sayegh (J.), Pougoue (P.G) & Sawadogo (F.M) (Coords), OHADA: *Traite et Actes Uniformes Commentes et Annotes*, 4e Edition, Juriscope, 2012, 19-74; Pougoue (P.G), Présentation Générale et la Procédure en OHADA, Coll. Droit Uniforme , Yaoundé, PUA, 1998. Laws adopted within the framework of OHADA are known as a Uniform Acts, see Martor (B.) et al, Business Law in Africa: the and the Harmonization Process,2nd Edition, London, GMB, 2007: Martor (B.) et al , Le Droit Uniforme Africain des Affaires Issu de l'OHADA, Paris, Editions du Juris-Classeur, Litec, 2004, Pougoue (P.G) (Dir), Encyclopedie du droit OHADA, Lamy, 2011.

[32] Article 60 of " Regulation No. 02/03/CEMAC/UMAC/CM of 4 april 2003."

[33] The payment of damages is only possible if the victim can show proof of prejudice and that the damage is caused by refusal of payment or partial payment of the cheque. This is claimed usually during the prosecution of the offender or in an ordinary civil procedure. Where there is no special damage, the beneficiary's right to recovery is limited to the amount of the cheque.

cambiaire". The right to recover the amount of the cheque is based on the fundamental claim, which the cheque was out to settle. Recovery is made against either the issuer or the endorser of the cheque. Due to the problems and possibly the prejudice that recovery through normal court procedures may cause to the beneficiary, the CEMAC legislator has provided simplified recovery measures that are specific to cheques. These recovery measures are not exercised before the court, but they only get to the court if they were effectively carried out and yielded no fruits. Here the beneficiary proceeds by way of protest or certificate of non-payment

2.1. Debt Recovery by Means of Protest

Protest is an ancient method of recovery of unpaid bills introduced in England by the Bills of Exchange Act 1882[34]. As used in England, a protest is not a means of recovery so to speak, but a formal proof of non-acceptance or non-payment of a bill[35]. Here, a protest is a declaration by a notary in a formal document under seal to which is annexed the copy of the bill[36]. Most often, before the declaration is made, the notary may begin by noting. Noting is a process whereby, the unpaid bill is handed to a notary. He or his clerk will present it again to the drawee for acceptance, or to the acceptor for payment, or to the bank where it was accepted payable. If the acceptance or payment, as the case may be, is still refused, the bill is then noted. The notary's initials, the date, the charges for noting and a reference to the notary's register, should be included where full particulars of the noting are kept. He also attaches to the bill the answer, if any, given by the drawee or acceptor. This procedure is required to be completed before the protest, though in theory, a bill may be protested within the prescribed time without first having been noted, in practice, it is more convenient to have it noted first[37]. Protest as described here is conceived as a preparatory stage towards litigation against the issuer of the bill and it is not used in matters of cheques.

The French Legislator in the "Decret-loi de 1935", though with many modifications, adopted the protest as introduced in England. Protest is an authentic deed written by the bailiff or notary. In France, protest as used in the case of cheques without cover has different objectives and effects. It is a means of recovery of the amount of a cheque whose cover was found to be inexistent, inadequate or inalienable. The CEMAC lawmaker has adopted this evolution and has regulated protest as a means of recovery of the amount of a bounced cheque. It has specified the formalities for a protest and when it can be dispensed with.

2.1.1. The Formalities for Establishing a Protest

Protest is an authenticated deed that establishes the non-payment of a cheque presented in record time[38]. As an authenticated deed, it is established by a notary public or bailiff at the residence of the beneficiary of the cheque. The beneficiary can use this authenticated deed to take legal actions against the drawer of the cheque to procure its payment. Protest must be made before the due time for the presentation of the cheque[39], under penalty of forfeiture. If presentation is made on the last day of the deadline, protest should be made the following working day[40]. The beneficiary must notify the drawer within four days following the day of the protest. Where the cheque bears a clause "sans frais"[41], the notification of the drawer is made on the day of its presentation[42]. The notification of the drawer of the cheque by the bearer can be done in any form, even by simply returning the cheque to the drawer[43]. Though this may facilitate the task for the beneficiary, it may create difficulties of proof of notification if the issuer insists that he was not informed. In order to avoid this problem, the bearer of the cheque should personally hand it over to the issuer of the cheque. This implies that notification by phone call, for example, may not be the best since it may be difficult to prove. The lawmaker has mitigated this difficulty of proof of notification when the latter is to be done by the notary or bailiff. If the cheque bears the name and residence of the drawer, the notary or bailiff should notify him of the reasons for refusal of payment within two days by a registered letter[44].

The beneficiary must be diligent in making the protest, if not he will be considered as a negligent beneficiary, though he can still take a legal action against the issuer and those jointly and severally liable for the cheque. The protest notified to the drawer of the cheque contains a written transcription of the cheque and endorsements as well as summons to pay. It discloses the reasons for refusal to pay and in case of partial payment, the amount that was paid[45]. Through this means, the beneficiary may obtain payment of the amount of the cheque, interest at the legal rate, and cost of the protest.

The difficulty here is that the legislator has not specified the due time for the summons to pay. The law states simply that the notary or bailiff must within fifteen days, by registered letter with acknowledgement of receipt, transmit two copies of the protest under penalty of criminal sanctions, cost and damages to the parties to the registry of the court of residence of the debtor. One of the copies will be forwarded to the Legal Department[46]. This provision leaves so many questions to be determined. Does it mean that once the

[34]Bills of Exchange Act 1882, section 51.
[35]Holden (J.M), *The Law and Practice of Banking: Banker and customer*, op.cit, 308.
[36]Bills of Exchange Act 1882, section 51(7).
[37]Holden (J.M), *The Law and Pracitice of Banking: Banker and Customer*, op. cit., 311.
[38]Article 55 of "Regulation No. 02/03/CEMAC/UMAC/CM of 4 April 2003.
[39]A cheque that is payable at the place of issue must be presented within eight days; a cheque issued and payable in one of the CEMAC states must be presented within twenty days; a cheque issued in one of the countries of CEMAC and payable in another country must be presented within forty five days; and a cheque issued out of the CEMAC zone must be presented within sixty days, see article 43 of "Regulation No. 02/03/CEMAC/UMAC/CM of 4 april 2003".
[40]Article 56 of "Regulation No. 02/03/CEMAC/UMAC/CM of 4 April 2003".
[41]Loosely translated in to English as "return without cost". This kind of clause has no equivalence as far as practice under English law is concerned.
[42]Art.57 (1) of "Regulation No.02/03/CEMAC/UMAC/CM of 4th April 2003".
[43]Ibid, article 57(4).
[44]Ibid, Art. 57(2).
[45]Ibid, Art. 70.
[46]Ibid, article 72.

protest is established the notary or bailiff must accomplish the above procedure within fifteen days? Does it mean that the procedure is accomplished fifteen days after the drawer of the cheque has failed to respect the summons to pay? Does it mean that the fifteen days constitute the duration of the summons to pay?

The CEMAC legislator does not provide answers to the above questions. In our opinion, the fifteen days do not constitute the duration for the summons, since the notification of the protest does not entail summons to pay, as it is the case with the notification of certificate of non-payment. The West African Economic and Monetary Union's[47]legislator has made a great evolution in this respect. Unlike its CEMAC counterpart, the UEMOE lawmaker considers that the notification of a protest constitutes summons to pay[48]. Under the CEMAC law, the summons is contained in the protest and may enjoin the debtor to pay within any time but the time must be situated within the fifteen days. Usually, the summons to pay will enjoin the debtor to pay within eight days, failure of which the creditor will proceed as specified by the law. In addition, we do not think the procedure is carried out once the protest is established. In fact, the protest will be transmitted to the court registry only when the debtor has not respected the summons to pay. It follows that the protest may in the failure of amicable settlement, be used either to seize the court or to obtain a writ of execution.

If it is the endorser that is notified, the law provides that any endorser must within two working days following reception of the notification, notify the previous endorser indicating the names and addresses of those who did the notification and the process continues until it reaches the drawer of the cheque[49]. Whoever is bound to notify can do so in whatever form. Failure of notification commits whoever was required to do so, if there is prejudice caused by his negligence.

The protest must be established within the deadline prescribed by the legislator. However, where the due time is not respected due to an insurmountable obstacle such as a force majeure or legal prescription, the deadline will be prolonged. The bearer should inform his endorser of the force majeure immediately. The bearer should establish the protest immediately the force majeure is over. He cannot evoke a force majeure for purely personal reasons[50].

All those who are obliged to pay the cheque are jointly and severally liable towards the payee. He can recover the amount from them individually or jointly, without having to observe any order. An action commenced against any of the debtors liable under the cheque does not obstruct the payee from taking action against other debtors, even if their liability is posterior to that of the first debtor pursued[51]. The payee can claim the amount of the cheque, interest at a legal rate, beginning from the day of presentation and the cost of the protest or notification as well as any other cost that might have been incurred as a result of rejection of the cheque.

CEMAC law also makes the protest another condition for interim attachment (saisie conservatoire) of the property of the issuer[52]. This seizure may become definite if the issuer fails to perform his obligation within the specified time. However, the CEMAC legislator has not specified how the procedure of attachment is to be carried out and the court with jurisdiction in case of any contestation[53]. The provision of the Uniform Act on Simplified Recovery Procedures and Measures of Execution (UASRPME)[54]are, therefore, useful if such seizure is to be carried out. Despite the importance of the protest, it may be dispensed with.

2.1.2. Exceptions to Protest

The CEMAC legislator has offered the possibility of avoiding the formalities of a protest. In this respect, the drawer or endorser of the cheque may insert in it a clause "retour sans frais" or "sans protest" or any other equivalent clause. Such a clause dispenses the bearer of the cheque with the formalities of the protest[55]. If the clause is inserted by the drawer, it is valid against all the signatories of the cheque. The beneficiary of the cheque, therefore, can commence any procedure for recovery of its value without showing proof of having accomplished the formalities of a protest.

Some researchers[56]have doubted the wisdom of this exception provided by the law. It is practically useless. No drawer will insert such a clause in a cheque indicating that the cheque risks not to be honoured. A payee who receives a cheque bearing such a clause may even be penalized for receiving a cheque with knowledge or reasons to believe that there is no cover. He may forfeit his right of recovery except he can establish that as a prudent payee, he personally requested the issuer to insert such a clause.

The above mechanism of avoiding the costly and long process of a protest is contractual but there is a legal mechanism of doing so. In this perspective, the bearer of the

[47]UEMOA is the French acronym for "Union Economique et Monétaire de l'Ouest Africain" translated in to English as the West African Economic and Monetary Union.

[48]Article 105(2) of "Regulation No. 15/2002/CM/UEMOA relating to Systems and mode of payments in member state of UEMOA".

[49]Article 57(3) of "Regulation No. o2/03/CEMAC/UMAC/CM of 4 April 2003".

[50]Ibid, article 63.

[51]Ibid, article 59.

[52] Ibid, article 77.

[53] Tchinda Mambong (C.C), *La Reforme de Paiement dans la CEMAC*, Mémoire de DEA, Université de Dschang, 2006, 114.

[54] Adopted at Libreville on 10 April 1998, Commentaire, Diouf (N.), "Acte Uniforme Portant Organisation desProcédures Simplifiées de Recouvrement et des Voies d'Exécution" in Issa-Sayegh (J.), Pougoue (P.G) &Sawadogo (F.M) (cords), *OHADA: Traite et Actes Uniformes Commentes et Annotes*, 4e Edition, Juriscope,2012, 975-1118; Fonkwe (J.E) & Asuagbor (L.) in collaboration with Francois Anoukaha, Uniform Act Organising Simplified Recovery Procedures and Measures of Execution, Paris, Juriscope, 2007. See also Anoukaha (F.) Et Tjouen (A.D), *Les Procédures Simplifiées de Recouvrement et les Voies d'Exécution en OHADA, Coll. Droit Uniforme*, Yaoundé, PUA, 1999; Assi-Esso (A.M) & Ndiaw Diouf, OHADA: Recouvrement des Créances, Coll. Droit Uniforme Africain, Bruxelles, BRUYLANT, 2002.

[55] Article 58 of "Regulation No. 02/03/CEMAC/UMAC/CM of 4 April 2003.

[56] Ripert (G.) & Boblot (R.), *Traite de Droit Commercial: Effets de Commerce-Banques et Bourse, Contrats Commerciaux, Procedures Collectives*, Tome 2, 16e Edition, LGDJ, 2000, 269.

cheque may not be required to show proof of a protest in case collective proceedings are initiated against the issuer of the cheque. The CEMAC legislator does not provide for this exception in matters of cheque, as it has done for bills of exchange[57]. However, it is a law affair that when collective proceedings are declared against a debtor, all measures of recovery against it and pending lawsuits are suspended[58]. As such, it will be illogical to require that the beneficiary of the cheque should show proof of a protest. The unpaid cheque alone is enough justification for the declaration to the receiver or liquidator of the beneficiary's claim against the drawer.

The formalities for establishing a protest are cumbersome and costly. Its cost and other inconveniences can only be avoided if the bearer of the cheque is exempted from establishing it. This makes recovery by means of protest quasi effective and explains the reason why the legislator has provided for another most effective means known as certification of non-payment.

2.2. Recovery of Debt by Means of Certification of Non-Payment

This means of recovery in France in 1985[59]had as objective to put an end to the multiplication of cheques without cover[60]. The protest was expensive to establish but less effective. For these reasons, it was not used popularly. That is why in 1985, the French legislator introduced another most effective means of recovering the certification of non-payment. The certificate of non-payment is issued by the drawee immediately the cheque is rejected or upon request by the beneficiary or bearer of the cheque in conformity with the form and within the protest, which is still indispensable in the exercise of legal actions specific to cheques popularly known in French law as "recours cambiaires"[61]. The CEMAC legislator has also adopted certification of non-payment as a means of recovery for cheques without cover, giving some limited indications on how it is established.

2.2.1. The Establishment and Notification of a Certificate of Non-Payment

The CEMAC Regulation governing cheques enacts that in case of failure to regularize the non-payment of a cheque either by paying the same within 30 days following the first presentation or by providing cover within the same period, the drawee on the request of the bearer, shall issue a certificate of non-payment. At the expiration of this period, and in case of rejection after a new presentation of the cheque, the drawee shall send (address) a certificate of non-payment to the bearer of the cheque[62]. This provision may seem confusing but the interpretation is simple. It means that before the expiration of thirty days after the first presentation, the certificate is issued on the request of the payee and it is issued automatically upon rejection on second presentation after the thirty days.

The CEMAC legislator like its French counterpart obliges the bank to issue an attestation of rejection stating the reasons for rejection immediately it refuses payment of the cheque or latest four days after rejection[63]. This is advantageous to the payee because he may need to show proof of such failure to pay or rejection of the cheque in other instances or proceedings. The bearer of the cheque has the option to request for a certificate of non-payment immediately or at any time before the expiration of the thirty days after the first presentation of the cheque and the bank is obliged to inform the payee of that right. The certificate of non-payment is notified to the issuer of the cheque by an act of the notary or by an act of any person with the power of enforcement and the notification is tantamount to a summon to pay[64].

The notary or bailiff or any person with the power of enforcement, who has not received proof of payment of the amount represented by the cheque and costs within fifteen days following notification, shall authenticate the certificate of non-payment[65]. The authenticated certificate of non-payment shall be forwarded to the Registrar-in-chief of the competent court or any competent judicial authority, which without any other act of procedure and cost shall stamp on it an executory formula. The certificate of non-payment to which is affixed the executory formula constitutes a writ of execution permitting the beneficiary to proceed by any means of enforcement within 8 days[66]. This provision of the law is appealing but is marred with so many errors and omissions.

2.2.2. Errors and Omissions of the Legislator

The provisions of the regulation governing the establishment of a certificate of non-payment are flawed with omissions. The legislator is not precise on certain deadlines. The payee has the right to request for a certificate of non-payment before the expiration of thirty days after rejection on first presentation of the cheque, but the legislator does not state the due time within which the drawee must issue the

[57]Article 119 of "Regulation No. 02/03/CEMAC/UMAC/CM of 4 April 2003.

[58]See the OHADA Uniform Act Organising Collective Proceedings for Wiping Off Debts (UACP), Sections 149 and 150.

[59]See the Law of 11 July 1985 as consolidated by Law No. 2001/1168 of 11 December 2001 with its Decree of implement No. 2002/694 of 20 April 2002.

[60]Jeantin (M.) & Le Cannu (P.), *Droit Commercial, Instruments de Paiement et de Crédit, Entreprises en Difficulté,* op. cit. P.84.

[61]Ripert (G.) & Roblot (R.), *Traite de Droit Commercial : Effets de Commerce Banques et Bourse, ContratsCommerciaux, Procédures Collectives,* op. cit. 269; Juglart (M.) & Ippolito (B.), Traite de Droit Commercial : Les Effets de commerce: Lettre de Change, Billet a Ordre, Cheque, op. cit., 349.

[62]Article 199(1) & (2) of "Regulation No. 02/03/CEMAC/UMAC/CM of 4 April 2003".

[63]Article 230 (2) of "Regulation No. 02/03/CEMAC/UMAC/CM du 4 April 2003."; article 34 of the French Decree of 22 May 1992.

[64]Article 199 (3) of "Regulation No. 02/03/CEMAC/UMAC/CM of 4 April 2003." The CEMAC legislator is in line with its UEMOA counterpart, which considers that notification of a certificate of non-payment constitutes a summons to pay, see article 123 (3) of Regulation No. 15/2002/CM/UEMOA relating to systems of Payments in the member states of l'UEMOA".

[65] The UEMOA lawmaker has opted for rapidity and serenity in the procedure by reducing the time to ten days, see article 123(4), of Regulation No. 15/2002/CM/UEMOA relating to systems of Payments in the member states of l'UEMOA.

[66]Article 199(4) of "Regulation No. 02/03/CEMAC/UMAC/CM of 4 April 2003.".

certificate. We presume that the bank will issue the document immediately the application is made. It also talks of the second presentation of the cheque without stating the time within which the second presentation must be made. Moreover, it has not specified the time within which the certificate of non-payment must be notified to the issuer or endorser of the cheque. All these are at the discretion of the payee but may be detrimental to the drawer or endorser who may have no idea that his cheque has been rejected.

In addition, the legislator fails to specify what will happen to any subsequent payments made by the drawer in to the account on which the cheque was drawn, after the certificate of non-payment has been established. We alsopresume that the bank will conserve the funds in view of subsequent payment of the cheque. The French legislator is more explicit on this issue. The drawee is imposed the obligation to use any money paid by the drawer subsequent to the issue of the certificate of non-payment to pay the bounced cheque integrally[67]. This position is appealing as it goes a long way to secure payment of the cheque.

The certificate of non-payment is required to be forwarded to the registrar-in-chief of the competent court or judicial authority for the insertion of the executor formula. A major difficulty here is that the legislator has not specified the competent court or judicial authority. We may imagine that the court with jurisdiction is that of the place of payment of the cheque or resident of the debtor or that of the place designated by the parties in their contract. The competent judicial authority will be the President of the court of First Instance or any judge designate by him, acting as a judge in urgent matters or interlocutory proceedings (juge de refère). The French lawmaker has moved a step forward in accelerating the procedure by providing that the bailiff can insert the executory formula on the certificate of non-payment if the cheque is not paid within the fifteen days[68].

It is also pertinent to observe that the certificate of non-payment offers the payee the right to carry any means of enforcement. This means that he can seize any property of the debtor unlike the protest which permits only the attachment of movable property[69]. Unfortunately, CEMAC law has not regulated enforcement measures. So, recourse is made to enforcement measures regulated by the Uniform Act on Simplified Recovery Procedures and Enforcement Measures[70]. However, there may be a problem (conflict laws) if the holder of the certificate of non-payment goes directly to attach the realty of the debtor. Under the above Uniform Act, except where a debt is guaranteed by a mortgage, the creditor cannot attach the real property of the debtor without first seizing his personality. As such, in our opinion, though the certificate of non-payment allows for the seizure of any property of the drawer, the payee must begin by attaching his movable property. This reasoning is supported by the fact that the OHADA Uniform Act prevails over CEMAC law in this domain[71].

Unlike its French counterpart[72], the CEMAC legislator has not provided for publicity of both the protest and the certificate of non-payment. Whereas, such publicity could be another mechanism for preventing the subsequent issuing of cheques without cover by the unscrupulous drawer.

Comparatively, certification of non-payment is far better than protest. The procedure is less costly and rapid; the payee can obtain a writ of execution within the shortest time possible. One researcher[73]has described the procedure as "super simplified".

Actions by way of protest and certificate of non-payment are time barred after six months from the last day the cheque was supposed to be presented for payment. However, if the beneficiary has forfeited his right to recover the money by means of protest or certificate of non-payment, he can proceed by way of simplified procedure of an injunction to pay.

3. Recovery of the Debt through the Simplified Procedure of an Injunction to Pay

An injunction to pay is a simplified and accelerated procedure for the recovery of an unquestionable debt due for immediate payment. Recovery of debts inherent in bounced cheques through the simplified procedure of an injunction to pay was introduced in Cameroon by Law No. 89/019 of 29 December 1989, to modify and supplement certain provisions of Ordinance No. 72/4 of 26 August 1972 on Judicial Organization[74]and Law No. 89/021 of 29 December 1989, fixing the Simplified Recovery Procedure for Civil or Commercial Debts[75]. The OHADA drafter has adopted this evolution. The Uniform Act Organizing Simplified Recovery Procedures and Enforcement Measures expressly provides that the injunction to pay procedure may be initiated where the commitment arises from the issuance of a cheque for which cover was found to be inexistent or insufficient[76]. By so providing, the OHADA lawmaker unlike

[67]Article L. 131-74 du Code Monétaire et Financier.

[68]Jeantim (M.) & Le Cannu (P.), *Droit Commercial, Instruments de Paiement et de Crédit, Entreprises en Difficultés,* op. cit., 85; (G.) & BOBLOT (R.), Traite de Droit Commercial: Effets de Commerce-Banques et Bourse, Contrats Commerciaux, Procédures Collectives, op. cit., 270.

[69]Jeantim (M.) & Le Cannu (P.), *Droit Commercial, Instruments de Paiement et de Crédit, Entreprises en Difficultés,* op. cit., 84.

[70]See section 28 et seq. for general provisions on measures of execution, sections 54 et seq. on sequestration of property, sections 91 et seq. on seizure for sale, sections 153 et seq. on seizure-award of debts, sections 246 et seq. on attachment of real property, etc.

[71]See "avis de la CCJA du 30 avril 2001". Rec., P. 14 (an opinion emitted on request by the government of côte d'Ivoire); "avis de la cour de Justice de la CEMAC du 9 avril 2003 sur l'avant projet de Règlement CEMAC relative aux systèmes, Moyens et Incidents de Paiement", Rec., P. 9-19 (an opinion emitted on request by the Governor of BEAC).

[72]Article 37 of Decree of 22 may 1992.

[73]"Super simplifiée", see Lenoir (A.), "*Texte Introductif a la Loi sur les Instruments de Paiement*". Cited bySidi Moukam (L.), *La Sécurisation des Moyens de Paiement dans la Zone CEMAC*, Mémoire de DEA, Université de Dschang, 2007, 49.

[74]Section 16(f); see commentaries Pougoue (P.G), Tchokomakoua (V.) & Annoukaha (F.), Juridis Info, No. 2, 1990, 5-12.

[75]See section 3: see also POUGOUE (P.G), "Commentaire de la Loi No. 89/021 du 29 Décembre 1989 fixant une Procédure Simplifiée de Recouvrement des Créances Civiles ou Commerciales"., Juridis Info No. 3, 1990, 37-41, spec. 39.

[76]UASRPME, section 2(2)

its French counterpart makes a unique application of the procedure of injunction to pay in matters of cheques. In France, the procedure can no longer be adopted in matters of cheques because the new French Civil Procedure Code does not provide for it[77]. It is important to point out that in OHADA member states, this procedure was recognized for the other negotiable instruments and not for cheques[78]. The inclusion of cheques in the procedure is an innovation, which offers a lot of protection to victims of bounced cheques within the OHADA zone. This inclusion is justified by the frequency of cheques issued without cover in OHADA countries[79]. Based on the unpaid returned cheque or an attestation of partial payment or protest, the beneficiary can apply for an injunction to pay. The outcome of an injunction to pay is determined by its conditions and formalities.

3.1. The Requirements of an Injunction to Pay in Matters of Cheques without Cover

The procedure of an injunction to pay like any other has its own basic requirements. In this perspective, the claim of the beneficiary of the cheque must meet the conditions required by the Uniform Act. The Uniform Act has provided for both conditions of substance and conditions of form.

3.1.1. Conditions of Substance for an Injunction to Pay

The distinction between substantive conditions and formalities in the procedure of an injunction to pay may not be very relevant, since most often, the consequences of non-respect of any of the conditions, whether of substance or form, are the same. The distinction therefore, is more formal than real. Substantive conditions relate to the nature of the debt and the competent court.

3.1.1.1. Conditions as to the Nature of the Debt

Generally, it is required that for the procedure of an injunction to pay to be successful, the debt must arise from a contract, which is certain, liquid and due[80]. These conditions need not be tested in matters of cheques. A cheque issued by a drawer in favour of a payee is for an amount certain in money and is due for immediate payment since a cheque is payable at sight[81]or on demand. A cheque as a means of payment is often based on a contractual relationship between the drawer and the payee. It is a written confirmation of a debt due from the drawer to the payee. The payee's right to recover the amount of the cheque is, therefore, based on this confirmation of the claim.

Specifically, the Uniform Act expressly states that the procedure may be introduced where the commitment arises from the issuance of a cheque whose cover was found to be inexistent or insufficient[82]. The only additional conditional which the payee should prove, are that he is entitled to the proceeds of the cheque and that he regularly presents the cheque to the drawee within the prescribed deadline and it was dishonoured due to inexistent, inadequate or inalienable cover. In brief, the bank must have dishonoured the cheque for any reason[83]. The application for an injunction to pay should be made to the court with jurisdiction.

3.1.1.2. The Court Competent to Grant an Injunction to Pay

One of the most important determinants for the success of court proceedings is the jurisdiction or competence of the court. The injunction to pay procedure is not an exception[84]. Traditionally, distinction is made between territorial jurisdiction (competence *ratione luci*) and material jurisdiction (competence *ratione materiae*) of the court.

As concerns territorial competence, the Uniform Act is clear and precise. It is the court of residence or place of abode of the debtor (drawer). Parties may derogate from these rules of jurisdiction through the election of residence in their contract[85]. In the latter event, residence will be elected during the signing of the contract that may give rise to a cheque in subsequent dealings between the parties. It cannot be done at the signing time of the cheque because cheques are meant to be paid as soon as they are presented, one cannot imagine that at the moment the cheque is being drawn, the drawer and the payee who receives the cheque which is dishonoured on presentation, will be deemed to have been aware that there was no cover or that he had reasons to so believe. However, one question that ensues is whether the election of residence can be made when the cheque is dishonoured. It seems difficult, especially as the issuer may not be aware of the commencement of the procedure of injunction to pay. In any case, since the law does not prohibit such subsequent agreement, the parties may do so any time thereafter.

Lack of jurisdiction may be raised only by the court to which the matter is referred or by the drawer during the examination of the opposition filed by him. It must be mentioned that the court may not be prompt to raise its lack of jurisdiction as this rule is strictly respected only in criminal matters as a rule of public order.

Concerning material jurisdiction, the Uniform Act is silent. It generally talks of "competent court" (jurisdiction competente). The national legislator determines the competent court. The French Decree of 25 August 1937 that was applicable in French Cameroon before the advent of the Uniform Act did not apply to cheques. Law No. 89/021 of 29 December 1989 repealed the restriction by the 1937 Decree and extended the injunction to pay procedure to cheques[86]. Its section 3 states that the competent court to receive the

[77]Article 1405 of the new French Civil Procedure Code.

[78]Brou (K. B.), "*La Pratique des Procédures Simplifiées de Recouvrement Issues de l'Acte Uniforme portant Organisation des Procédures Simplifiées de Recouvrement et des Voies d'Exécution*" (2007), Communication au Séminaire du 12 mai 2007 (GRAND BASSAM), ohadata D-07-22.

[79]Assi-Esso (A.M.) & Ndiaw Diouf, OHADA, *Recouvrement des Créances*, op. cit., 15.

[80]See UASRPME, sections 1 and 2(1).

[81]Article 42 of "Regulation No. 02/03/CEMAC/UMAC/CM of 4 April 2003.

[82] UASRPME, section 2(2).

[83] See Pougoue (P.G.), "*Commentaire de la Loi No. 89/021 du Décembre 1989 fixant une Procédure Simplifiée de Recouvrement des Créances Civiles ou Commerciales*" (1990), op. cit., 37-41, 39.

[84]See Mbunja (Y.), *"Injonction de Payer: Juridiction Compétente",* Juridis Periodique, No. 39, 1999, 89-92.

[85] UASRPME, section 3; section 2 of Law No. 89/021 of 29 December 1989.

[86]Under the French Decree of 25 August 1937, the procedure of injunction to pay was available only for civil and commercial claims not exceeding 250.000CFAF.

request for an injunction to pay in matters of cheques is the High Court irrespective of the amount of the cheque.

The provisions of the 1989 Law relating to the court with jurisdiction as far as the injunction to pay procedure is concerned have been repealed by Law No. 2006/015 of 29 December 2006 on Judicial Organization[87]as amended[88]. Consequently, recourse is made to its section 18(b), which gives the High Court competence to recover, by way of simplified procedure, "all unquestionable, liquid and due commercial claims, of whatever amount, whether the obligation arises from a cheque, a promissory note or a bill of exchange".

There has been a lot of controversy surrounding the above provision of the law. The fundamental question of determining the competent court in case of a civil debt whose commitment arises from a cheque has always been posed. This controversy is more glaring in Law no. 2011/027 of 14th December 2011 amending no. 2006/015 of 29th December 2006 on Judicial Organisation. It states simply that the High court shall have jurisdiction "in commercial matters" to hear and determine "unquestionable, liquid and due commercial matters" claims, of whatever amount, specifying whether the obligation arises from a cheque, a promissory note or a bill of exchange"[89], without specifying whether it is by way of simplified procedure or not. The legislator is not clear on the competent court to recover civil claims whose obligation arises from a cheque. The overriding doctrinal opinion is that the High Court is competent once the engagement arises from a cheque irrespective of whether it is commercial or civil[90]. This opinion is justified by the fact that commitments arising from cheques fall within the domain of law known as "droit cambiaire", which is essentially commercial.

Nonetheless, not everybody shares the above opinion. In fact, one Cameroonian senior legal practitioner[91]has stated emphatically that,

"Since the enactment of Law No. 96/10 of 5thAugust 1996, the High Court has no exclusive competence to hear applications for injunction to pay when the debt arises from a cheque, promissory note or bill of exchange. The court of First Instance is equally competent on condition that the amount is equal to or less than five million francs".

The above conclusion is based on Law No. 96/10 of 5th August 1996 that amended Law No. 89/021 of 29 December 1989 on Simplified Recovery Procedure for civil or Commercial Debts. The former states that the competent court in matters of injunction to pay is the ordinary court or that which is chosen by parties in their contract[92]. This means that the parties may equally choose the Court of First Instance, or that the latter may be competent, based on the amount of the cheque, if the transaction is purely civil.

The above view of this legal practitioner seems to be justified by the reforms of 2011. By stressing on the division between "commercial" and "civil" matters[93], the legislator seems to distinguish implicitly between commercial and civil debts arising from cheques. However, in the absence of express mention by the legislator, this paper is of the opinion that the High Court no longer has exclusive competence in matters of cheques without cover. This reasoning is based on the fact that simplified procedure for an injunction to pay has never been obligatory to the creditor, and if he chooses to initiate ordinary civil proceedings, the competent court will be determined by the amount of the cheque. Thus, if the claim exceeds ten million francs, the High Court is competent and the Court of First Instance will have jurisdiction if it is less than or equal to ten million francs[94]. This may equally be the case with simplified recovery procedure for a bounced cheque that is out to settle purely a civil claim. Nevertheless, it is necessary for the lawmaker to settle this ragging controversy because it may pose practical problems in the future. In any case, while waiting for the legislator to clarify the doubts, the Supreme Court should rule on the issue. This controversy is not seen in the formalities for an injunction to pay.

3.1.2. Formalities for an Injunction to Pay

The formal conditions for the procedure of an injunction to pay are clearly stated by the Uniform Act. They relate to the form and the mode of seizure of the competent court. It should be mentioned, however, that the procedure though intended to be rapid, faces some obstacles which may stifle it

3.1.2.1. The Form and Mode of Seizure of the Competent Court

The request for the grant of an injunction to pay is made in writing. Section 3(1) of the Uniform Act on Simplified Recovery Procedures and Measures of Execution provides that the request is made by petition. The petition is filed or sent by the petitioner or his representative to the registry of the competent court, together with the cheque or its certified true copies[95]. It must indicate the exact amount of the claim, an account of its components and its basis. It also contains the full names, professions and residences of the parties or, for corporate bodies, their legal forms, names and registered offices.

In Former West Cameroon, a similar procedure that was applied was what was known as the undefended list. According to this procedure, the applicant was required to attach to the application, in addition to the above documents, an affidavit which stated that in the deponent's belief, there was no defence to the claim[96]. Failure to observe the requirements of the petition made it inadmissible, unlike

[87]Commentaries, Anoukaha (F.), *"La Reforme de l'Organisation Judiciaire au Cameroun"*, Juridis Periodique, 2006, 45-56.
[88]Law No. 2011/027 of 14 December 2011.
[89]Section 18 (1).
[90]Anoukaha (F.) Et Tjouen (A.D), *Les Procédures Simplifiées de Recouvrement et les Voies d'Exécution enOHADA,* op. cit., 17; Pougoue(P.G.), "Commentaire de la Loi No. 89/021 du 29 Décembre 1989 fixant une Procédure Simplifiée de Recouvrement des Créances Civiles ou Commerciales", op. cit. 37-41, spec. 39.
[91]Mbunja (Y.), "*Injonction de Payer: Juridiction Compétente",* op. cit. P. 92.
[92]Section 2.
[93]See section 18 of Law No. 2011/027 of 14 December 2011.
[94]Section 15(1) and 18(1) of Law No. 2006/015 of 29 December 2006 as amended.
[95]UASRPME, section 4.
[96]SCCPR, Order III, Rule 9.

failure to observe substantive conditions which was sanctioned by nullity of the acts[97]. The affidavit is no longer necessary today because the law clearly states that the debtor has no defence. In any case, whether nullity or inadmissibility, the consequence is that the procedure is perturbed and may no longer achieve its purpose. This may not be the only inconvenience of the procedure.

3.1.2.2. The Inconveniences of the Procedure

The procedure generally raises two major preoccupations – the cost and the time limit within which the judge must act. As to the cost of the procedure, the Uniform Act is silent. The question to be determined is whether the OHADA legislator intended the procedure to be free of charge. The popular opinion is that the OHADA lawmaker intended national laws to govern the issue[98].

In Cameroon, section 2 of the 1989 Law on simplified recovery procedure requires that the claimant should pay a certain fixed deposit. Some researchers[99]are of the opinion that, since deposit is generally required in civil matters, the above provision of national law is still applicable. This provision may be justified by the fact that the Uniform Act does not state expressly that the procedure is free of charge. However, the major problem in Cameroon is that of determining the amount of the deposit since the above law has not stated any amount[100]. The deposit is fixed arbitrarily and often lead to swindling of litigants[101].

Nevertheless, in our opinion, the requirement of deposit defeats the intention of the legislator, which has been to simplify the procedure. If the petitioner must pay a deposit, it should be predetermined. Some have drawn from the practice in Former East Cameroon to propose 5% of the amount claimed[102], yet, others have opined that it should be proportional and not fixed[103]. A combination of the two suggestions may be preferable. A deposit of 5% should be prescribed for a specified minimum amount, but should not be constant. The percentage should vary with increase in the amount claimed. In fact, it should be inversely proportional to the amount, that is, as the amount increases, the percentage should diminish[104].

In relation to the time limit granted the judge, the Uniform Act too is silent. The legislator should have stated the time within which the judge must rule on the petition. As the law stands, he has the discretion to act depending on the circumstances of the case. Given that the OHADA legislator intended the procedure to be very rapid, we suggest that the time limit for applications on motion should be applicable here. Court orders in urgent matters are often made within fifteen days and appeals against them may be made even before eight days[105]. Whatever the case, the outcome of the injunction to pay procedure varies.

4. The Outcome of the Procedure for an Injunction to Pay

Under normal circumstances, if the conditions for an injunction to pay are fulfilled, one will expect that the payee should recover his dues. However, whether the procedure of the injunction to pay yields fruits or not, depends on the decision of the court and the conduct of the drawer.

4.1. The Decision of the Court

Upon examination of the petition, if it is justified or unjustified, the judge grants an injunction to pay or rejects it respectively. The rejection or injunction to pay may be partial or total. It may be partial if the funds in the issuer's account were insufficient to pay the entire debt so that he can collect what is fixed by the court and add to what is in the account. This is an innovation as in the former law, the judge had no right to modify the application; it was either granted or rejected[106]. If there are no funds in the account at all, the court will have no reason to grant an injunction for partial payment. The originals of the file are returned to the applicant and certified copies are conserved at the registry. If the application is rejected, the judge indicates "rejected" and signs and the documents are returned to the applicant.

Where the injunction is granted, the certified true copies of the petition and the injunction to pay issued must, on the initiative of the payee, be notified to the drawer by an extrajudicial act within three months following its date of issue, under the penalty of being declared null and void. Notification is personal and not by any alternative means[107]. The notification of the injunction must contain a summons to either pay the payee a fixed amount, interest and registry

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[97]See Ipanda, "Le Régime des Nullités des Actes de Procédures depuis l'entrée en Vigueur de l'Acte Uniforme portant Organisation de Procédures simplifies de Recouvrement et des voies d' Exécution (a la lumière de quelques décisions récentes)", ohadata D-07-22.

[98]Anoukaha (F.) et Fjouen (A.D), *Les Procédures de Recouvrement et les Voies d'Exécution en OHADA*, op. cit., 18.

[99]Ibid

[100]The practice in Cameroon is that in civil proceedings, the amount is determined at 6% of the claim.

[101]Njinga Tchoungnia (G.), *Les Problèmes Juridiques lies au Recouvrement des Créances de Somme d'Argent des Entreprises,* Mémoire de DESS, Université de Douala, 2004, P.30.

[102]Mazanou (C.), *Les Procédures Simplifiées de Recouvrement dans le Droit OHADA*, Mémoire de Maitrise, Université de Dschang, 1998, P. 58.

[103]Medamkam Toche (S.J.), *La Sécurité du Déposant Dans le Système Bancaire de la CEMAC*, Mémoire de DEA, Université de Dschang, 2006, P. 71.

[104]Kelese (G.N), *Special Mechanisms for the Recovery of Debts Inherent in Cheques without Cover within the CEMAC Zone*, RDJ-CEMAC, P. 159.

[105]Article 185 Code de Procédure Civile et Commercial Camerounais.

[106]Fonkwe (J.F.) & Asuagbor (L.) in collaboration with Francois Anoukaha, *Uniform Act Organising Simplified Recovery Procedures and Measures of Execution*, op. cit., 17.

[107]By insisting on personal notification, the legislator cures a serious mischief inherent in the former law, where objection was inadmissible after 15days even if service was only alternative, see T. Boniface c/NZITOUO Thomas, TPI Yaounde (unreported); Hon. Tamfu v. Ikunde Peter Rex Lyonga, CASWP/21m/2000 of 28/06/2000 (unreported); Fonkwe (J.F.) & Assuagbor (L.) in collaboration with Francois Anoukaha, Uniform Act Orgainsing Simplified Recovery Procedures and Measures of Execution, op. cit. P. 21-24.

fees as specified, or enter an opposition where the drawer wants to avail himself of a defence. The opposition has the effect of referring the initial request and the whole case file to court. Failure to respect this provision renders the notification void. The same fate will befall the notification if it fails to indicate the time limit for opposition, and the court before which it should be made and the form it must take. It also indicates that the issuer can take cognizance of the documents produced at the court registry and that he will no longer have any remedy if the opposition is not done within the prescribed period[108]. Once the notification is done properly, the drawer is expected to act.

4.2. The Conduct of the Drawer of the Cheque

The success of an injunction to pay procedure depends on the attitude of the issuer of the cheque. When the injunction is granted, the drawer of the cheque has principally three patterns of behavior *Inter alia*; He may decide to stay quiet, execute the injunction immediately or oppose it. In case the drawer immediately honours the injunction, it simply attains its goal and the matter ends. By so doing, one may be tempted to conclude that the drawer at the time of drawing the cheque did not know he had insufficient funds in his account, by his immediate honouring of the injunction.

The injunction to pay is an order and where the drawer of the cheque stays quiet for the specified time, the order nisi will be made absolute. The Uniform Act provides that if within fifteen days the issuer neither executes the injunction nor formulates an opposition, the payee will verbally or through writing file a request at the court registry for the insertion of an executory clause[109]. This is done within two months following the lapse of the period for opposition under penalty of being declared void[110]. The president of the court simply signs the injunction and orders the registrar to insert an executory clause. Once this is done, it acquires the status of a court judgment and cannot be challenged on appeal.

If the issuer decides to oppose the injunction, opposition is made before the court that issued the injunction to pay within fifteen days by an extrajudicial act[111]. This time may be extended in two situations-if the distance is taken into account and if the drawer was not notified personally. In the latter case, the opposition is admissible up to fifteen days following the first act of notification, or following the first act of performance. The issuer under penalty of forfeiture and in the same act as that of the opposition shall serve a summons on the payee to appear before the competent court on a fixed date not exceeding a period of thirty days from the opposition.

[108]UASRPME, sections 7-8.
[109]Ibid, sections 16-19.
[110]Kelese (G.N), *Special Mechanisms for the Recovery of Debts Inherent in Cheques without Cover within the CEMAC Zone*, RDJ-CEMAC, P. 159.
[111]This procedure differs with the undefended list in that under the undefended list in that under the undefended list, the summons was served on the defendant who had five days to indicate his intention to defend the suit. It was only when he failed to do so within the required time that the summons was heard undefended, see SCCPR, Order III, Rule 11.

Henceforth, the Uniform Act requires that following opposition, the court to which the opposition is referred to must attempt a conciliation of the parties. The duty of the court to attempt conciliation is mandatory[112]and where it fails to observe it, any decision arrived at will be quashed on appeal and retrial will be ordered[113]. If conciliation is successful, the President of the court must draw up a conciliation report signed by the parties, one copy of which shall contain an executory clause. In the event of failure of conciliation, the court is bound to rule immediately on the petition for recovery, even in the absence of the issuer who filed the opposition, by a decision which shall have the effect of a court judgment after trial. The decision can be appealed against within thirty days according to ordinary law procedures.

5. Concluding Remarks

Protest, certification of non-payment and the injunction to pay are aimed at securing rapid recovery of the amount of a cheque whose cover was found to be inexistent or insufficient. These procedures suffice to obtain payment from the drawer of the cheque without any stress. However, practically, this is not always the case. The drawer of the cheque may not be able to pay or may refuse payment after notification of a protest, certificate of non-payment or an injunction to pay. In all the above procedures, the beneficiary of the cheque has the same remedy. He will request the court or the competent judicial authority to insert an executory formula affixed and transforms the document to a writ of execution and the payee can go ahead to execute on the property of the drawer. Even in the case of an injunction to pay where there was opposition, if the applicant is successful and he is not paid, he will proceed in the same manner to obtain payment. Moreover, the beneficiary of the cheque can still initiate ordinary civil proceedings to secure payment if he waives these specific procedures.

The CEMAC and OHADA legislators are hailed for the great efforts made towards securing quick recovery of the value of cheques issued without cover, by enacting special and simplified recovery procedures for this purpose. Despite these efforts, these special measures or procedures have loopholes that hinder the objective of facilitating the payment of the payee, thus defeating the intention of the legislators. The lawmakers should initiate reforms to address the various lacunae pointed out above, especially those relating to deadlines. This will improve on the procedures and make them more efficient and rapid. Though the law says *apriori aposteriori derogat*, that is, the new law replaces the old law over the same matter; there is no doubt that the laws formerly governing cheques both in Former West Cameroon and Former East Cameroon were replaced by the CEMAC and OHADA laws. This write up therefore wishes to crave the indulgence of the Cameroon's legislature to enact laws in order to remedy the above procedural defects in the recovery of debts inherent in cheques issued without cover in Cameroon, while waiting for a uniform law in future.

[112]See the South West Court of Appeal's decision of 13/03/2008 in SIC CACAOS v. Soppo Soppo Jean, Suit No. CASWP/04/2006 (2009) 1 CCLR 1-126 at 31-46.
[113]See the South West of Appeal's decision of 14/12/2006 in BICEC v. Louis Ghoundep Shalo, Suit No. CASWP/04/2006 (2009) 1 CCLR 1-126 at 48-53.