International Journal of Trend in Scientific Research and Development (IJTSRD)
Volume 4 Issue 2, February 2020 Available Online: www.ijtsrd.com e-ISSN: 2456 – 6470

Legal Analysis in Relation to Authorised Banking Operations within the BEAC Zone

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ABSTRACT

Banks are catalysts to economic development. Any stable economy will depend upon how solid its banking system operates. Due to this, there is the need for good and effective reforms. Thus, in 1964, the Custom Union of Central African States (UDEAC)[1] was created with one of the main aims being to put in place a common market for the region and to harmonise the economic policies. Within such a common market, there should be free circulation of persons, merchandise, services and capital; several steps were taken to realise this goal. The banking sector was one of the areas that needed much intervention to ensure free circulation of capital and the financing of the economy. There were no common policies of control of banking activities in the zone. There was, therefore, need to harmonise the legislation of the member states in the domain of banking and finance, while conserving the option to take urgent measures in case of turbulence in the monetary domain. The Bank of Central African States (BEAC)[2] therefore, was founded in 1972 after the signing of the Brazzaville accords with one of the main aims being to harmonise banking activities. The member states, through this important institution, engaged in harmonising their policies relating to the exercise of the banking profession, control of financial establishments as well as distribution and control of credit. To realise this will, the constitution of BEAC gave it large competence to impose management norms on banks and financial establishments, give them technical assistance and ensure the respect of laid down rules.[3] This paper therefore questions the strength of the reforms put in place to guarantee effective banking operations within BEAC as well as its degree of applicability.

How to cite this paper: Akama Samuel Penda | Nji Keneth Ndikum "Legal Analysis in Relation to Authorised Banking Operations within the BEAC Zone" Published in International Journal of Trend in Scientific Research and Development (ijtsrd), ISSN: 2456-6470, Volume-4 | Issue-2, February 2020, pp.745-759, URL: www.ijtsrd.com/papers/ijtsrd30143.pdf

IJTSRD30143

1. Background considerations

The regulation of the banking sector within BEAC rapidly assumed greater proportions witnessing the intervention of the CEMAC[4] legislators shortly after independence. Today, influential norms in the domain of banking within CEMAC are either regional or community norms or are inspired by the latter. Such harmonisation of banking legislation is intended to ensure the securization of banking business in the zone.

The question one may be tempted to ask is what is a regional law? This question was properly answered within the meaning of European regional integration law. It is defined in that law as *"a body of material uniform rules applicable in member states of the Union, whose primary source is constituted by treaties of institutions and part derived from rules established by community institutions in the application of the treaties."*[5] This definition holds true for COBAC[6] laws regulating and controlling banking business within CEMAC, which shall be our point of focus.

Hence, on 16th October 1990, the member states of UDEAC signed a Convention[7] creating COBAC to ensure general control of banking activities.[8] Two years later, another Convention[9] was signed relating to the harmonisation of banking regulation on 17th January 1992. UDEAC was transformed to CEMAC on 16th March 1994 and it inherited the institutions of UDEAC. It should be understood that before then, the control of banking business within the CEMAC states was purely a national affair until 1972 when regional authorities began to intervene. Even the intervention of regional authorities was not serious until of recent.

Since 1993, the CEMAC legislators have put in undaunted efforts to add flesh to the almost dry bones of the 1990 and 1992 Conventions[10]. Thus, the first Regulations of COBAC

[1]Union Douanier des Etats de l'Afrique Centrale.
[2] Banque des Etats de l'Afrique Centrale.
[3] See sections 25 and 26 of the Constitution of BEAC.
[4] Central African Monetary and Economic Union
[5]Cornu (G.) (Dir), *Vocabulaire Juridique*, PUF, 1987, 172.
[6]Cornu (G.) (Dir), *Vocabulaire Juridique*, PUF, 1987, 172.

[7] Hereinafter referred to as the 1990 Convention.
[8]For the role of COBAC as Controller of banking activities, see Njoya Kamga (B.), « La COBAC dans le Système Bancaire de la CEMAC »(2009), 13 Annales de la FSJP-Université de Dschang, 85-100.
[9]Hereinafter referred to as the 1992 Convention.
[10]Kelese (G.N), Regional Integration Laws and Banking Security in Cameroon, Ph.D thesis, University of Dschang, 2014 P.1, unpublished.

were adopted in April 1993. The adoption of this text and its entry into force has had a great impact on banking activities in the CEMAC zone[11].

Once a bank has been approved by the banking commission, there are particular operations they are authorized to carry out. Findings reveal that banks do not carry the same operations as those of microfinance establishments[12]. Therefore, to understand this write up, our analysis shall dwell on both authorized operations granted to banks and those of micro finance establishments within CEMAC. This is because in 2002,[13]COBAC was given the power to control micro finance establishments in the BEAC zone.

Once banks as well as micro finance establishments have been issued an approval by the monetary authority, there are certain authorized operations that they can perform. For banks, such authorized operations will depend on whether the bank was approved as a universal or a specialized bank. While for microfinance establishments, this will depend on which of the category it falls into. This is to ensure that both banks and micro finance establishments perform these operations to the interest of their customers and members. Both credit establishments have put in place a control system to ensure conformity to the Authorized operations. COBAC has over 46 Banks to ensure that they properly respect their authorized operations within the CEMAC zone[14]. Cameroon has 13 banks[15], Central African Republic has four banks[16], Congo has 7 banks[17], Gabon has 9 banks[18], Equatorial Guinea has 4 banks[19] and Chad has 9 banks[20]. Regarding financial establishments, Cameroon has 9 in number[21], Congo has one[22] and 4 in Gabon[23], all under the control of COBAC. There exist over 800 micro finance institutions in the CEMAC zone, with about 600 present in Cameroon[24], all under the control of COBAC.

These credit establishments are approved to carry on the business of banking within the CEMAC zone, and are obliged to carry on their operations following the authorized banking rules. The authorized operations which credit establishments, particularly banks and microfinance establishments are authorized to perform, are divided into principal and accessory operations.

2. Principal and Accessory Operations of Banks and/ or Credit Establishments

The principal and accessory operations performed by banks are not limited only within the country where they are registered. Microfinance establishments on their part have been imposed certain conditions to carry out their principal and accessory operations. By virtue of Art. 8, of regulation No. 01/02/CEMAC/UMAC/ COBAC, the principal and accessory operations carried out by microfinance establishment in their capacities as financial intermediaries shall be limited within the country in which they are registered. As concerns foreign transactions (such as the buying and selling of foreign currencies and the issuing of traveler's cheques), the micro finance establishments shall request the services of a bank or a financial establishment of the same state. That is why in this write up, the authorized operations of banks cannot be treated separate from to those of microfinance establishments. This is because some authorized operations are granted to banks and micro finance establishments, and others are for banks only. Therefore, we shall examine the principal operations which can be performed by banks and microfinance establishments, as well as Accessory operations performed by both credit establishments.

2.1. Principal Operations

The principal operations performed by banks are the same as those performed by microfinance establishments of the first and second category. The principal operations to be performed by microfinance establishment are outlined in Art. 9 of Regulation No.01/02/CEMAC/UMAC/ COBAC, while

[11]Nah (T.F), The Banking Profession in Cameroon at the Crossroads: A Search for a better Control Mechanism, Annals of the Faculty of Laws and Political Science, Tome 5,2001 PP. 105-127.

[12]Kenmogne (S.A), La Protection des établissements Bancaire Contre la Défaillance en Afrique noire Francophone, Thèse de Doctorat, Université de Yaoundé II Soa, 2003.

[13]Following Law No. 01/02/CEMAC/UMAC/COBAC relating to the conditions for exercising and controlling Microfiance Activity within the Economic and monetary community of Central Africa.

[14]Rapport Annuel 2009 de la COBAC, 31st December 2009 statistics, P. 21-22. And Rapport Annuel 2018.

[15]Afriland First Bank (First Bank); Banque international du Cameroun pour l'Epargne et le crédit (BICEC) ; Citi Bank N.A Cameroon (Citibank) ; Commercial Bank of Cameroon (CBC) ; Ca SCB Cameroon (CLC) ; Ecobank Cameroon (Ecobank) ; National Financial Credit Bank (NFC Bank) ; Société Générale de Bank Cameroon (ISGBC) ; Standard chartered Bank Cameroon (SCBC) ; Union Bank of Cameroon PLC (UBC PLC); Union Bank For Africa (UBA) ; Banque Atlantique du Cameroun (BAC). Crédit Communautaire d'Afrique (CCA).

[16]Ecobank ; Bank populaire Maroco - Centrafricaine (BPMC) ; Commercial Bank Centrafrique (CBCA);Banque, sahélo-Saharienne pour l'investissement et le commerce-RCA.

[17]Banque Commerciale International (BCI) ; BGFIBANK Congo ; Credit du Congo (CDC) ; La Congolaise de Banque (LCB) ; Ecobank Congo ; Banque Congolaise de l'habitat (BCH) ; Banco Espirito Santo Congo (BESCO).

[18]Banque Gabonaise de Développement (BECIG) ;Banque international pour le commerce et l'industrie du Gabon (BICIG) ;BGFIBANK;Citibank N.A Gabon (Citibank);Financial Bank Gabon (FBG);Union Gabonaise de Banque (UGB) ;Banque de l'habitat du Gabon (BHG) ;Ecobank Gabon;UBA Gabon.

[19]Banco National de Guinea Equatorial (BANGE) ; BGF BANK Guinea equatorial ; CCEIBANK Guinea equatorial (CCEIGE) ; Société Générale de Banque en Guinea Equatorial (SGBGE).

[20]Banque Agricole et commercial (BAC) ; Banque Commerciale du Chari (BCC) ; Banque Sahélo Saharienne pour l'investissement et le commerce - Tchad S. A (BSIC-Tchad S. A) ; Commercial Bank Tchad (CBT) ; Ecobank Tchad S.A (Ecobank) ; Financial Bank Tchad (FBT) ; Société Générale Tchadienne de Banque (SGTB) ; United Bank for Africa Tchad (UBA Chad);Océanique Bank Chad (OBT).

[21]African leasing company (ALC SA), Crédit Foncier of Cameroon (CFC), PRO-PME Financement SA (PRO-PME), ALIOS ex SOCCA, Société Camerounaise d'Equipement et de Credit (SOGEC), Société Nationale d'investissement (SNI)

[22]Société Congolaise de Financement (SOCOFIN)

[23]BGFI-Bail, BICI-BAIL, FINATRA and ALIOS ex SOGACA

[24]Rappot Annuel 2009 de la COBAC, 31st December 2009, Pp. 21-22.

those of banks are outlined in Art. 1 of COBAC Regulation R-2009/02 fixing the categories of credit establishments, their legal status and authorized operations. The principal operations are the collection of savings/funds from the public or members, the credit operations/loan transaction, the delivery of guarantees in favour of other enterprises and financial investments, other resources and the putting at the disposal of customers means of payments.

2.1.1. The Collection of Savings/ Funds

All the category of banks mentioned in this work is authorized to carry out the collection of savings/funds, but not all the category of microfinance establishments are authorized so. Banks are authorized by Art 1 of the above mentioned text to collect funds from the public. These funds are gathered from the public or received from third parties, notably in the form of deposits[25], with the right to dispose thereof within the framework of its activity, provided that the said funds shall readily be available to pay back[26]. However, funds received or left in accounts by members of a partnership or sleeping partner holding at least 5 to 100 of the social capital, administrators, members of the directorate and supervisory committee or managers as well as funds from participative loans are not considered as funds gathered by the establishment from the public[27]. Looking at microfinance establishments, those of the first category are authorized to collect savings only from their members with the rights to dispose thereof within the frame work of their activity, provided that the said funds shall be readily refunded or repaid upon member's request. Microfinance establishments of the second category are equally authorized to gather funds from the public in the form of deposits. However, microfinance establishment of the third category are not authorized to collect saving[28]. For this third category of microfinance establishments funds such as guarantee deposits, sums deposited by customers to honour their commitments, borrowing, and sums deposited by shareholders, are not considered as savings[29].

2.1.2. Loan Transactions/ Credit Operations

According to Art. 3 of COBAC text governing their authorized operations, banks are considered as credit operations for or as any act whereby an establishment makes or promise to make funds available to persons or takes in the interest of the latter, an engagement by signature such as an endorsement, a security or a guarantee. Moreover, some are assimilated to credit operations, leasing operations, and in a more general way, all renting operations that can lead to sale. For microfinance establishments, Art. 9 (2) of Regulation No. 01/02/CEMAC/UMAC/ COBAC governing the activity of microfinance establishments, obliges them to make or promise to make funds available to a member[30], a third party or to take in the interest of the latter's engagement by signature such as an endorsement, a security or any other guarantee.

From the above, it is clear that formally both banks and microfinance establishments granting out credits to persons always demanded some sort of collateral[31]from individuals wishing to obtain loans from them. The New Uniform Act organizing securities of 15th December 2010 provides for various guarantees to secure the repayment of loans to protect the interest of creditors. The Uniform Act provides creditors with greater protection, in particular by requiring the registration of certain types of securities with the Trade and Personal Property Credit Register. One question that has already been raised is whether other securities which are not specifically mentioned in the uniform Act, but which are already in existence, or may be created in the future, would be admissible. The Uniform Act does not appear to exclude this possibility. Some member states may thus create or organize other types of securities[32]. This, notwithstanding, the Uniform Act provides for both personal securities and real securities.

2.1.2.1. Personal Securities

By Art. 4 of the Uniform Act on securities, personal securities constitute a guarantee of an obligation undertaken by a principal debtor in case the latter goes bankrupt or in case the beneficiary makes a first call. The Uniform Act provides for two types of personal security- the Surety-Bond[33]and the letter of guarantee[34].

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[25]Deposits as sum of money paid on the basis that it will be repaid with or without interest or premium either on demand or at a time or in circumstances agreed by or on behalf of the person receiving it. See Ellinger (E.P)and Lomnicka (E.), Modern Banking Law, 2nd Edn. Clarendon Press Oxford, 1994, P. 38.

[26]Art. 2 of COBAC Regulation R-2009/02 fixing the categories of credit establishments, their status and authorized operations.

[27]Ibid, Art. 2 (1) and (2).

[28]Art 9 of Regulation No. 01/02 regulation No. 01/02/ CEMAC/UMAC/ COBAC.

[29]Ibid, Art. 9 (1) para 3 and 4.

[30]According to Art. 2 para. 2 of Regulation No. 01/02/CEMAC /UMAC/ COBAC, first category microfinance shall grant loans only to their members. Those affiliated to a network shall only take a commitment in favour of an establishment affiliated to the same network.

[31]Collaterals are guarantees that a borrower offers to a lender during a loan operation and in case of default on the part of the debtor, the collaterals are taken over by the lender and this thus reduces his loss. See Laurence (S), Economic Bancaire, Edns la Decouverted, Paris, 1999, P. 52.

[32]In Cameroon for example, the code of public market which is organized by Decree No. 2004/275 of 24th September 2004, Art 79 of this Decree organizes the pledge of public markets. All public markets can be pledge under the form of a contract, more precisely by an act between the co-contractor of the administration, that is, the person executing the public market for the administration, and the third party known as the creditor. Secondly, life or death insurance contract are more and more given as security for Bank loans. The pledging of an insurance policy is the operation whereby the assured (insured) hands over his life or death insurance policy (contract) for debt. See Kalieu (E.Y.R), Droit des Garanties OHADA (Lecture notes, Masters II, University of Dschang 2014.

[33]According to Art 13 of the new uniform Act organizing securities, "surety-Bonds shall be a contract in which a guarantor undertakes, and the creditor accepts to perform a present or future obligation contracted by the debtors, if the latter fails to perform it himself. This undertaking can be contracted without the orders of the debtor".

[34]Ibid Art. 39, "a letter of guarantee shall be an agreement by which, at the request or on the instructions of the principal, the guarantor of the principal, the guarantor undertakes to

2.1.2.1.1. Surety-Bond

Under a surety-bond, the guarantor's obligation can be accessory to the obligation of the principal debtor depending on whether he is jointly and severally liable with the debtor or not. When the guarantor is not jointly and severally liable with the debtor, it can require the creditor to first pursue payments of the debt against the debtor's assets before making a payment under the surety-bond directly. But when the guarantor is jointly and severally liable with the debtor, the creditor may require payments to be made by the guarantor without first seeking for payment from the original debtor. However, it should be noted that according to Art. 23 of the Uniform Act, the guarantor is not jointly and severally liable with the debtor for the guaranteed debts.

2.1.2.1.2. Letter of Guarantee or Counter Guarantee

The Uniform Act has been innovative in creating a specific legal regime applicable to both guarantees and counter guarantees. An essential characteristic of the letter of guarantee or counter guarantee, by Art. 40 of the Uniform Act, is that it cannot be issued by individuals and any contravention of this prohibition will be null and void. It further creates obligations that are independent from the main contract in relation to which it has been given. This means that a guarantor under a letter of guarantee, unlike a guarantee under a surety-bond, is not entitled to raise defenses inherent in the debts that might be available to the principal under the main contract. Instead, he must pay immediately, without argument on the first call. Beside the above personal securities, we equally have real securities.

2.1.2.2. Real Securities

The uniform act provides for real securities over both movable and immovable property.

2.1.2.2.1. Securities over Movable Property

Art 50 of the Uniform Act defines securities over movable property as comprising possessory lien[35], pledge[36], pledging without dispossession[37], and preferential rights that are made up of general liens[38]and special liens[39]. Securities over movable property must be registered with the *registre du commerce et du Crédit mobilier* (trade and personal property credit register (TPPCR) either at the request of the creditor, the surety-agent or the debtor[40].

2.1.2.2.2. Securities over Immovable Property

The Uniform Act provides for only one form of security over real property, which is the mortgaged[41]. Property that can be mortgaged is determined by Art 192, according to which built or unbuilt land[42] and any subsequent improvements or constructions on the land may be mortgaged, as many other real property rights duly registered under the Land Tenue system[43]. Mortgages and pledges in the opinion of an author[44]are classic guarantees because they cover all kinds of credit, but mortgages are the most demanded by banks because they believe that it is a guarantee that can easily be constituted by the debtors[45]. Banks as well as microfinance establishments can equally give guarantees to other establishments. In case they have any surplus of resources, they can make financial investments.

3. The Awarding of Guarantees In Favour of Other Establishments and Financial Investments

The awarding of guarantees in favour of other establishments is outlined before proceeding to the financial investments.

pay a fixed amount to the beneficiary, upon the latter's first call or according to agreed modalities". "a counter-guarantee letter shall be an agreement by which, at the request or on the instructions of the principal or the guarantor, the counter guarantor undertakes to pay a fixed amount to the guarantor, upon the latter's first call".

[35]Ibid, Art 67 "Any creditor legitimately holding a debtor's asset may hold same depending full payment of his due, regardless of any other security, under the reserved of the application of Art 107, para. 2 of the present uniform Act".

[36]Ibid, Art 92, "a pledge shall be contract in which personal property is offered to the creditor or a third party agreed upon by the parties as security for a debt". From this definition, in the absence of the offering of the personal property to the creditor or a third party, there is no pledge. This is because with the offer, the creditor has possession that justify the pledge. See, Kalieu (Y.R, op.cit).

[37]Ibid, Arts 118, 120 and 126, Professional equipments, Motor vehicles, stocks of raw materials, pattern ship rights, transferable securities, intellectual property rights, a business , and a bank account may be pledged without disposing the debtor.

[38]Ibid, Art 179, "the general liens, shall confer a preferential right on its holders according to the provisions of Arts 225 and 226 of the present uniform Act".

[39]Ibid, Art 182 "creditors with special lien shall have, over the movable property allocated to them by the law as the basis of the mortgage, a preferential right which they shall exercise after distrait, according to the provisions laid down in Act 226 of the present Uniform Act".

[40]See Art 51 of the above uniform Act.

[41]Ibid, Art 1990 "A mortgage shall be a forcible or contractual real property and security given by the debtor as guarantee for present or future credits".

[42]An advantage which land enjoys over other forms of security is that, over a period of years it tends to increase in value. But the main disadvantage is that it is often difficult to make an accurate evaluation of land and building and if a customer mortgages to the bank, the house in which he lives, and subsequently makes default in repaying his over draft, the bank is usually reluctant to obtain from the court an order for possession, that is in order to realize its security. See Milnes (J.H), The law and practice of banking Volume II: Securities for bankers Advances, 7th Edn, Pitman Publishing, London 1986, P. 22/23.

[43]In principle, only property and other real rights that are registered with the land registering may be mortgaged, as a result, before a mortgage is taken out on a property, it should be verified whether the property is registered with the land registry. We were told that it is common for mortgages to be registered pending the insurance of a land certificate over the mortgaged property by the land registry.

[44]Kalieu (Y.R), Les Garantes Conventionnelles du Fournisseur de Crédit en droit Camerounaise, thèses de doctorat, Université de Montpellier I, 1995, P. 18.

[45]Kalieu (Y.R), op. cit, P.21.

3.1. The Awarding of Guarantees in Favour of Other Establishments

Banks and microfinance establishments can both award guarantees in favour of other banks and micro establishments. Where customers of a bank or of a microfinance establishment is award a contract by the government and contact his bank or microfinance establishments for guarantee and they do not have the required guarantee, the said bank or microfinance establishment asks for more guarantees which may be delivered to them by the requested bank or microfinance establishment. This operation does not, however, prevent microfinance establishments and banks from making financial investments in case of any surplus of resources realized.

3.2. Financial Investments

Art 9 (3) of Regulation No. 01/02/CEMAC/UMAC/COBAC provides that microfinance establishments with a surplus of resources are authorized to make financial investments in the commercial banks of the state in which they operate, and they are equally authorized to use such resources to subscribe for treasury bonds or bonds issued by BEAC. In Cameroon, Crédit Mutuel in Bafoussam-marché "A" places her surplus of resources at the commercial bank Cameroon (CBC) Ltd, while all cooperatives affiliated to CAMCCUL place their surplus of resources at the Union Bank Ltd. Banks with a surplus of resources are authorized to make financial investments with the banks of Central African States. However, this surplus of resources may come from the other resources of both establishments in order to enable persons transfer funds. Banks as well as microfinance establishments are authorized to issue means of payments.

4. Other Resources and the Issue of Means of Payment

We shall first of all start by examining the other resources of banks as well as those of microfinance establishments and equally the issue of means of payments.

4.1. Other Resources

Microfinance establishments according to Art 9 (4) of Regulation No. 01/02/CEMAC/UMAC/ COBAC are authorized to receive other resources as provided by their articles of association and the norms defined by the banking commission. The same does apply to banks. To enable their customers and other persons to transfer funds easily, banks and microfinance establishments do issue means of payments.

4.2. The Issue of Means of Payments

Both banks and microfinance establishments are authorized to issue means of payments[46]. Article 4 of COBAC Regulation R-2009/02 on the authorized operations of banks and Art 11 para 1 of the COBAC text on the conditions for the exercise and control of microfinance establishments, give them this right. Also, Art 12 Para 1 of Regulation No. 02/03/CEMAC/UMAC/ COBAC relating to the system, means and incidents of payment in CEMAC[47], defines means of payment as "any instrument, which whatever the medium or the technical process used, enables the transfer of funds by all persons". Since the issue of means of payments results in a removal of money from someone's account or fund, it is necessary for them to express their consent for it to be means of payment. Again, by Art 12 para 2 of the same Regulation, means of payments are made up notably of cheques, bills of exchange, promissory note, transfer, deduction, payment card, and plastic money. The use of the adverb "notably" makes it clear that the legal enumeration of these means of payments is far from being exhaustive[48].

With regard to microfinance establishments, a reading of Art. 11 para. 2 of the text regulating the activity of microfinance, shows that these means of payments shall only be used for fund transfers made within the country in which the establishment operates or among the establishments governed by this regulation. However, an examination of these means of payments will enable us to appreciate their role in the transfer of funds.

4.2.1. Cheques

No COBAC text provides a definition for cheques. A cheque has however been defined as "an unconditional order in writing drawn by one person upon another who must be a banker, signed by the person giving it, requiring the banker to pay on demand or at sight or on presentation, or expressing no time for presentation, a sum certain in money, to the order of a named person or bearer"[49]. Therefore, a cheque is a written order by which a customer requests his/her banker to pay out a fixed or a specific sum of money in his/her current account[50]. The transfer of a bank deposit from one person to another, by the handing over of a cheque is a common method of payment. The cheque itself is merely the instrument by which the bank is given instructions. However, it cannot reasonably be described as money, but the deposit that can be transferred does serve as money[51]. A minor can equally claim for the payment of an amount in a

[46]These means of payments go a long way to offer economic operators rapid and less costly services, and thus attract foreign investors and economic patterns, for example as to what concerns transfers, they need to be able to recover within a deadline the amount stipulated in a cheque. With regards to nationals they equally need to be assured that they will be paid the amount stipulated on a transfer received in settlement of a debt. See TchindaMabong (C.C), *La Reforme des Moyens de Paiement dans la CEMAC*, Mémoire de DEA, Université de Dschang, 2006, P.4.

[47]which is applied by banks and micro financial establishments, is because they are amongst the various establishments to apply this regulation

[48]Sidi Moukam (L.), La sécurisation des Moyens de Payement dans la zone CEMAC, mémoire de DEA, Université de Dschang, 2007, P.4.

[49]Mbah (E.) cheques and the law in a bi-jurial state; cheques drawn on account with inadequate credit; A comperative study of the Application of the English and French Legal Concepts in Cameroon, in Annuelle de la FSGP, Université de Dschang, Tome II, PUA 1998, P. 156.

[50]Current accounts are used by bank's customers for their regular financial transactions and cheques payable to a customer are usually remitted by him to the credit of his current account. Some customers even ask their depositors to pay the amount due them directly to the credit of their account. It follows that the customer's current account can loosely be described as a reservoir of his money used for paying funds both in to it and out of it. See, Ellinger (E.P) and Lomnicka (E.), op.cit, P. 165.

[51]Sayers (R. S), Modern Banking, 7th Edn, Oxford University Press, New York, 1967 P. 1

cheque under Art. 1312 of the civil code[52] applicable in Francophone Cameroon. Cheques are today a widely accepted form of payment despite the fact that they are not legal tender[53].

However, customers are not obliged to accept cheques as means of payment[54], but when the payment has to be done, in an amount that exceeds five hundred thousand francs cfa or part payment of a debt that is superior to this amount, payment has to be done through a cheque[55]. The amount mentioned above is increased to one million when the payment has to be carried out by non business persons[56]. All refusals to accept payments by cheque under these are sanctioned with a fine equal to 5% of the amount of payments refused[57].

According to Article 1 of COBAC Regulation MFE 2002/15, microfinance establishments shall be authorized to provide their customers with cheques payable at local levels[58]. Cheques issued to customers or to members of the microfinance establishments shall indicate, in addition to the obligatory mentions on cheques, their place of issue and of payment. The cheques drawn shall be payable only within the locality in which their drawer's account is kept[59]. Though reading from para. 3 of the text regulating the conditions for exercising the activity of microfinance, cheque booklets issued by microfinance establishments shall be meant exclusively for withdrawals within the same network. Moreover, a commercial bank will always be unwilling to cash a cheque drawn on another commercial bank and having as transit microfinance establishment where the beneficiary has his/her account. The banking commission shall be authorized to issue an order aimed at confirming the defaulting establishment to the above norm and shall be authorized to apply one or several disciplinary sanctions[60].

The duty to pay cheques by banks is a fundamental one, arising from the fact stated in the English case of *Foley v. Hill*[61]that the relationship between the banker and the customer is basically that of debtor and creditor. The bank's duty to honour or to refuse to honour a cheque is owned by the customer alone. The drawing of a cheque does not involve an assignment by the customer to the payee or holder of the instrument of a *chose* in action owned by the bank[62]. The bank may decide not to accept the cheque. However, this does not mean that the bank can dishonour cheques drawn on it with impunity. That is why if a bank wrongfully dishonours a cheque, an action could be brought against it for breach of contract by the customer.

The bank's duty to pay the customer's cheques is subject to certain limitations. These limitations are:

- The amount on the cheque must not exceed either the balance standing to the credit of the customer's account or the ceiling of agreed overdraft facility;
- The cheque must be presented at the branch of the bank where the account is kept;
- The banker's duty to pay the customer's cheques may be abrogated by law. This will occur when;

1. A garnishee order or an injunction is issued restraining payment;
2. The mareva injunction is made;
3. A customer dies or developes mental disorder;
4. A customer goes bankrupt or a company winds up;

- If the cheque is defective.

The above exceptions of the banker's duty to pay cheques will be explained in detail.

4.2.1.1. Availability of Cheques

The bank is under a duty to pay the customer's cheques only if the customer has adequate funds in the account on which the cheque is drawn. If the actual credit balances standing to the credit of the customer's account is less than the amount on the cheque, then unless on the basis of an agreed overdraft facility which will make up the difference, the bank is entitled to refuse to honour the cheque. There are situations where banks at initial glance find it difficult to determine whether or not a cheque is covered when presented for payment. This is because amounts paid into the customer's account by way of cash or of cheques payable to the customer's order or by way of periodic payments may not have been credited to the customer's account by the time the cheque is presented. Consequently, the amount that will be shown in the current account will depend on the amount of cheques processed at the close of the previous day plus periodic payments made at that same time. An example of this situation is where the balance in an account shows for instance 15 million francs cfa whereas there are 10 million francs cfa in cheque which makes it difficult to process them the same day. Banks are aware of this difficult problem and at times managers tend to be lenient in the exercise of their discretion to dishonour a cheque which appears uncovered when it is presented. Factors like the customer's records and situation in life are taken into account, and they require some extra caution. Cheques drawn on accounts out of this list will usually be paid irrespective of whether or not the amount on the cheque exceeds the available balance.

However, from the legal aspect of it, the bank's duty to honour the customer's cheques will depend on the actual state of the account at the time of presentation. This is because banks are usually given a reasonable time to credit their customer's accounts with any amount paid in by way of cash, or periodic payments or by means of cheques payable

[52]Tchinda Mabong (C.C), op. cit P. 27.
[53]Don (W.) and Wally (V), *Business of Banking and Financial Services*, 3rd Edn Northcote House Publishers Ltd, 1995, P. 105.
[54]Sidi Moukam (L.), op. cit, P. 6.
[55]Art. 3 of CEMAC Regulation No. 02/03/CEMAC/ UMAC/ CM of 4th April 2003 relating to the systems, means and incidents of payments in CEMAC.
[56]Ibid, Art. 4.
[57]Ibid, Art 5 and 6.
[58]According to Art. 2 of COBAC Regulation MFE 2002/15 to define the conditions for issuing cheques, a local level is defined "as the place where the drawers account is kept or the head quarters of micro finance establishments affiliated to the same network".
[59]Ibid Art. 3 and 4.s
[60]Ibid Art. 5 and 6.
[61](1848), 2HLC 28.
[62]Bill of exchange Act 1982 section 53 (1); Schroeder V. Central Bank of London Ltd. (1876) 34 L.T. 735.

to the customer's order. In the English case of *Marzetti v. Williams*[63], it was held that a four hour delay in the crediting of an account paid to the credit of an account constituted an unreasonable time.

In this case, the amount of £40 was paid by the customer in cash. If the customer's balance was based on amounts of cheques payable to him and remitted to the bank for collection, a different problem could have arisen. It will be worth recalling that the customer's account is credited before the cheque is cleared. Accordingly, the presentation of the cheque to the branch on which it is drawn occurs thereafter. The outcome is that if a cheque is dishonoured by the drawee's bank, the payee's balance with his/her own bank is reduced as the initial credit entry is reversed. It is thus obvious that an amount entered in the customer's account has not irreversibly accrued until the completion of the clearing process. Banks are entitled to dishonour the customer's cheque if it is drawn against uncleared effects[64].

4.2.1.2. Cheques must be presented at the branch where the Account is kept

Although a bank has a single legal personality, accounts are considered to be domiciled at the branch at which they are kept. This is to enable fast and easy verification of signatures on cheques and amounts available on the customer's account, and also to see if it covers the cheques presented. This principle was enunciated in the 19th century when communication between places was still very poor. Irrespective of the improvement in communication today, this 19th century law still remains unuttered. In the English case of *Wood-Land v. Fear*[65]a cheque was drawn on the G. Branch of the same bank, presented at this branch and received payment. When the B. Branch forwarded the cheque to the G. Branch, it turned out that it has been drawn against an inadequate balance. The S. Bank brought an action to recover the amount paid to the holder. It was held that the B. Branch had not been under an obligation to honour the cheque as the instrument was not drawn on it. Presentation for payment could be made only at the G. Branch. The B. Branch was accordingly treated as having taken up the cheque for collection. When the cheque was dishonoured by the G. Bank, the S. Bank as the collecting bank had a right of recourse.

Joachimson v. Swiss Bank Corporation[66]approved the principle that a cheque has to be presented for payment at the branch at which the account is kept and went on to say that a cheque would be honoured only if it is presented during ordinary business hours. Payment of cheques within a reasonable time after closing hours will not constitute a breach of the banker's duty to the customer.

The hardship resulting from the principle that a cheque needs to be presented at a branch at which the account is kept for payment can clearly be seen in the case of *Arab Bank Ltd v. Barclay's Bank (D.C.O)*[67]. In that case, the A. Bank maintained an account with the Jerusalem Branch of the B. Bank. When hostilities broke out between the Jewish and Arab communities, that branch had to be provisionally closed. Shortly after the end of the independence war, the branch which by then had fallen within the Israeli part of Jerusalem was opened. But under Israeli law, the funds standing to the credit of the A's Bank account became payable to the custodian for absentee property. As the A Bank was accordingly unable to make a valid demand at the Jerusalem branch, it claimed repayment of the amount involved in the B. Banker's head office in London. The House of Lords held that the A. Bank was not entitled to make a demand in London, as the amount standing to the credit of the customer's account was repayable only at the branch at which the account was kept. The debt was situated at this place. The A. Bank's right to demand payment was accordingly governed by the laws of the state of Israel, which also formed the proper law of the contract.

4.2.1.3. Garnishee Proceedings

Garnishee proceedings are usually instituted by a judgment creditor whose claim against a bank's customer has not been satisfied. The creditor applies to the court for an order under which all debts "owing and accruing" from the bank to the customer are to be attached for the purpose of satisfying the creditor's judgment against the customer. When an application for a garnishee order is made by a judgment creditor, the court, if it deems fit, first issues a garnishee order Nisi under which the bank then show cause why it should not pay the amount owed by the customer to the creditor. If the bank does not show cause, the court issues a final order requiring the bank to pay over an amount adequate to satisfy the customer's debt to the creditor. Once the bank pays to the creditor or into court the amount involved, the bank debts owed to its customer is discharged.

In Cameroon, for example, garnishee actions in former West Cameroon are covered by section 88 et Seq. of the Sheriff and Civil Process Ordinance. In former East Cameroon Garnishee action which is known as saisir-arrêt is governed by Article 295 of the "*code de procedure civile et commercial".* In the CEMAC zone today, garnishee under the OHADA Uniform Act on Simplified Recovery Procedures and Measures of Execution is known as an interim attachment. The OHADA legislator has facilitated the procedure to recover debts from the hands of a third party. Under the Uniform Act, where the creditor is in possession of a writ of execution, there is no requirement for an order of the court before garnishee proceedings are carried out[68].

The garnishee order attaches all the accounts opened by the customer with the bank. The court does not have the power to grant a garnishee order in respect of a balance maintained with a foreign branch of the bank and repayable in foreign currency. Consequently, the debt must be situated in the country concerned for the court to be able to grant a garnishee order.

[63]1830, IB.& ALD. 415.S

[64] Al Underwood Ltd v. Bank of Liverpool, (1924), 1K.B 775 cited by Nah (T.F), Some aspects of the contract between the Bank and the customer in Cameroon, a thesis of Doctorat de 3e cycle, University of Yaounde II SOA, 1996 P.66.

[65](1857) 7E. B, 519.

[66](1921) 3K. B 110, 127 Per Atkin L. J., cited by NAH (T.F), op. cit, P. 67.

[67](1954) A. C. 495.

[68]Manka (R), Attachment of Property: Innivations of OHADA to the Law Hitherto to Applicable in Former West Cameroon, Ph.D Thesis. University of Dschang, 2012, P.371, Unpublished

Once a garnishee order nisi has been granted by the court, the full amount standing to the credit of the customer's account is attached[69]. The bank consequently is unable to honour cheques drawn by the customer even if their payment would not reduce the balance in the account beneath the figure required to discharge the debt due to the judgment creditor.

There are however some orders nisi, where a specific amount is expressed at the ceiling attachable. In such a case, the bank earmarks the prescribed amount plus an additional sum to cover estimated costs and permits the customer to draw on the remaining balance. This principle was applied in the case of *Benchep Nfor Adamu v. Ndi Samuel Takop (SGBC, Garnishee)*[70]. Where the Bamenda High Court, granted a garnishee order nisi attaching 40.000frs cfa monthly from the salary of the judgment debtor until the judgment debt of one million two hundred thousand was discharged.

It is a principle of law as decided in *Heppenstall v. Jackson (Barclays Bank Garnishee)*[71]that money paid to the credit of the customer's account after the date on which the order is made and served cannot be attached. This principle has a problem concerning the attachment by an order nisi of the balance credited to the customer's current account. Does the order attach amounts of cheques credited to the account before clearance? In *Jones and Co v. Coventry*[72], it was held prima facie that the order attaches the balance as its stands including the component based on uncleared cheques. The decision in the Australian case of *Bank of New South Wales Ltd v. Barlex Investments Pty Ltd*[73] takes the opposite view, holding that the order does not attach amounts based on uncleared cheques as they are only provisionally credited to the customer's account. From the logic of it, the Australian decision looks more credible. The order nisi attaches only debts owning and accruing to the garnishment debtor in the hands of the garnishee. The amount of a cheque paid in to the customer's account does not become a debt due and accruing to him from the bank until the instrument is cleared. The proceeds of an unclear cheque are therefore not affected by the garnishee order, unless the customer is able to draw against them.

A problem usually crops up since the date on which the order is made is usually different from the date it is served on the bank. Which balance should be attached? The balance at the date of making the order or that at the date of service of the order on the bank? The Australian case of *Universal Guarantee Pty Ltd v. Derefink*[74]suggests that the balance to be attached should be that on the day the order was made. The order attaches the balance available at the moment, less the amount of cheques paid by the bank after that time but before the service of the order. E. P. Ellinger however suggests that the better view is that the garnishee order nisi attaches the balance available at the time the order is served[75].

As already mentioned, upon application by the judgment creditor of a garnishee order for service on a bank, if the court deems fit that the order should be made, it first of all makes an order nisi while waiting on the bank to show up so that it should not be made absolute. A number of situations are available where a bank can raise an objection for the making of an order absolute. These situations are:

- If there is a clash of priorities between the garnishee order and an assignment by the customer of the balance standing to the credit of his account. Rekstin's case[76]establishes that when an amount due to the customer from the bank is effectively assigned, the customer is no longer entitled to dispose of the chose in action involved;
- The bank will successfully raise an objection where the balance is standing to the credit of a trust account. Here, the bank has facts to explain that the customer is not entitled to the money in question in his own right;
- The bank can raise an objection for the making of an order absolute where it has a right of set off or a right to combine the credit balance in the garnisheed account with a debit balance accrued in another account maintained by the same customer. If the debit balance emanates from an overdraft of a current account, the bank has the right to exercise set off, for the amount is either known or readable ascertainable. The situation is however different in the case of a loan payable at some future date, since the amount is not due and claimable at the time the order is served. Most lending agreements confer on the bank a right to demand repayment in full, if a garnishee order nisi is issued against the customer. The right to set off would there upon accrue forthwith;
- If the bank has evidence that the balance standing to the credit account of the customer is jointly owned by himself and some other party, it can successfully raise as objection against making the order absolute. However, where there is a judgment debit due jointly/severally from a number of debtors, it is possible to garnish a balance standing to the credit of an account maintained by only some of them;
- The interest of the bank warrants that it raises an objection, if it realizes that the garnishment debtor is described in the order nisi under a name which differs from that under which he has opened the account.

4.2.1.4. Mareva Injunction (Interim Attachment of Property)

The Mareva injunction terminates the duty of the bank to honour the customer's cheques and makes transfer of funds on his/her behalf. The Mareva injunction is a new type of order named after the first case that attempted to define it[77]. It has been given statutory recognition in Order 20 et Seq of the Supreme Court (Civil Procedure) Rules 1948 in Cameroon. By virtue of the order, the High Court has the power to grant an interlocutory injunction restraining any party from removing from the jurisdiction or otherwise dealing with asserts located within the jurisdiction[78]. This

[69]See Art. 297 of code de procedure civile et commercial du Cameroun.
[70]Unreported judgment of suit No. HCM/13m/9.
[71](1939) 1K.B 585, 592.
[72](1909) 2K.B. 1029.
[73](1964) 64 S.R. (N.S.W) 274.
[74](1958) V.R. 51.
[75]Op. cit, P.273.

[76](1933) 1 K. B. 47).
[77]Mareva compania Naviera S.A v. International Bulk Carriers S.A (The Mareva), (1975), 2 lloyd's Report 509.
[78]The law that exist in former East Cameroon on this subject is governed by the code de procedure civile et commercial Art. 295 et Seq.

procedure has been facilitated by the OHADA Uniform Act on Simplified Recovery Procedure and Measures of Execution. As afore said, where the creditor is in possession of a writ of execution, there is no requirement for an order of the court before Mareva injunctions are carried out. However, where seizure is carried out as an interim measure without a writ of execution, such authorization of the court is mandatory[79]. The object of the Mareva injunction is to prevent a defendant from defeating judgment that may be given against him by dissipating his assets. For the court to grant this order, the plaintiff must establish two points. He must first of all be able to show that he is likely to obtain judgment. Secondly, the plaintiff must show that the defendant is the one likely to transfer assets out of the jurisdiction or that he may otherwise deal with them so as to make them unavailable or untraceable.

Unlike the garnishee order which is available to the judgment creditor as a matter of right as seen above, the court has discretion as to whether or not a Mareva injunction can be granted. Formerly, Mareva injunctions were regarded purely as interlocutory orders available before the final judgment was given. Today, there is authority that the courts have the power to grant it between final judgment and execution[80].

The injunction is not addressed only to the defendant, but it is also addressed to third parties who are believed to be in possession of any of the defendant's assets. In this light, the injunctions do sometimes enjoin the defendant's banker to freeze his/her account or to ensure that the balance is not reduced beneath a given figure. If a bank refuses to comply with such an order, it faces contempt proceedings. Sometimes, the order is not made in respect of a single specific account, but it is extended to the global balance due to the customer.

The order attaches both the existing assets and property acquired by the defendant after the date on which the order is made. Any fund paid to the credit of the customer's account thereafter is consequently attached.

Mareva injunctions must not impinge on the rights of third parties. If a third party can prove that the defendant's assets are in fact his own, the court will not hesitate to set aside the order in respect of the property. Where the bank proves that the balance standing to the credit of the defendant's account is trust fund, the court will set aside the order.

4.2.1.5. Customer's Death or Insanity

The relationship of the bank and the customer when it comes to the issue of cheques is that of agent and principal, the bank being the agent and the customer the principal. It is a well known principle under the law of agency that the mandate of an agent is automatically determined by the principal's death, and that the agent will be liable to the estate for any act performed thereof[81]. Therefore, the duty and authority of the bank to pay the customer's cheques are terminated once the principal who is the customer dies. This principle is clearly expressed in section 72(2) of the English Bill of Exchange Act 1882. Under this section, the bank's duty and authority to pay cheques is terminated when it obtains notice of the customer's death. The Act is silent on what will constitute notice. Obviously rumour would not suffice, but an announcement in a newspaper presumably would.

Once the bank obtains notice of the customer's death, it has to stop acting on his behalf. Cheques drawn by the customer before his death no matter how genuine and backed they are should not be honoured by the bank. Even payments made by means of money transfer must cease upon the customer's death.

This principle leads to hardship, as payments due to tradesmen have to defer until the completion of the necessary probate and administration proceedings. To remedy this hardship in countries such as the U.S.A and New Zealand, the law has been amended to authorize the banks to pay cheques presented within 10 days after it receives notice of the customer's death[82]. Even with this authorization, a person who claims to be entitled to a grant of letters of Administration or to be an executor of the deceased's will is entitled to order the bank to refrain from paying cheques presented within this period.

Since the bank's duty to honour the customer's cheques is terminated upon the death of its customer, and upon notice of death, is the bank obliged to accept any payment received for the credit of an account after the customer's death? This question crops up because as agent of the customer, the bank's mandate is terminated when the customer dies. Therefore payments into the account must be rejected. This is equally true with cheques paid to the credit of the customer's account but have not been cleared. Must the death of the customer terminate the duty of the bank to clear the cheques? If the law has to be strictly adhered to, this will cause a lot of hardship. It is suggested that in these last cases, the banks could still continue to act on behalf of the dead customer until an administrator is appointed.

As regards the insanity of the customer, there is no direct authority regarding the effect on the bank's duty to pay its customer's cheques. However, the decision in the English case of *Young v. Toynbee*[83]is to the effect that insanity of the principal terminates the agent's authority to act on his behalf. The relationship of banker and customer not being a pure relationship of principal and agent, it is not very certain that the principle enshrined in Young v. Tonynbee is applicable. The general view is that notice of the customer's insanity terminates the bank's authority to pay[84].

4.2.1.6. Bankruptcy of Customer

The moment the customer becomes bankrupt, his property is vested in his trustee in bankruptcy. For bankruptcy purposes, the customer's estate includes all property belonging to or vested in him at the commencement of the bankruptcy or acquired before his discharge.

[79]Article 54 of the Uniform Act.
[80]Orwell steel (Erection and Fabrication) Ltd V. Alsphalt and Tarmac (U.K) Ltd. (1985) 3 All E. R. 747.
[81]Companari V. Woodbum (1854) 15 C.B. 400.
[82]Uniform Commercial Code, S. 4-405(2); Bills of Exchange Amendment Act 1971 (N.Z) S. 2.
[83](1990) 1KB215.
[84]Hart, law of Banking 4th Edn, London, P. 303 Megrah, The Banker's customer 2nd Edn P. 76.

Since the amount standing to the credit of the customer's account constitutes a debt owed to him by the bank, for the purposes of bankruptcy to preceed such a debt is deemed to be an asset due to the customer. The bank however is entitled to set off against the amount due to the customer, any amount due to the bank for him, such as an overdraft. The balance which remains payable to the customer has to be paid over by the bank to the trustee.

When the English Bankruptcy Act 1914 was in application the banks were confronted to the problem of payment to the trustee of the net balance due to the insolvent customer. This amount was calculated as it stood at the date of the commencement of the bankruptcy, which date was "related back" to the first act of bankruptcy[85]. Consequently, if the bankrupt engaged in any transaction during the relation period, including operations on his current account, his trustee could challenge him. This meant that the duty of the bank to honour the bankrupt's cheques or transfer funds ended when the first act of bankruptcy occurred.

This is not the situation under the Insolvency Act of 1986- Section 278 of the Act provides that the bankruptcy of an individual "commences with the day on which the bankruptcy order is made". Unless the bank obtains an undue preference from the bankrupt, it needs not be concerned about transactions preceding the date of the bankruptcy order.

The exception to this principle occurs when any payment has been made by the customer before the date of the order, but after the presentation of the petition for adjudication. Section 284(1)-(3) states that such a payment is void, unless it is made with the consent of the court or is ratified by it consequently. Therefore banks have an interest not to honour cheques drawn by the customer after the presentation of the petition for adjudication.

If the payment is received by the payee in good faith, for value and without knowledge of the presentation, the provisions of section 284 (1)-(3) will be inapplicable. This is by virtue of sub-section 4 of the 1986 Bankruptcy Act in Britain. Since section 284 does not provide an express remedy against a bank that obeys its customer's instructions to pay cheques drawn after the date of the presentation of petition. The best thing for the bank to do is to defer payment until the proper steps have been taken.

Formally, if a bank paid a cheque drawn by its customer after the date of the making of the order but before the gazette order is noted by the bank, the bank would be held liable for all payments made. This was the view in *Re WigZell, ex P. Hart*[86]. But this position of the law has been reversed in *Re Wilson, exp. Salaman*[87]. Ignorance on the part of the Bank of the order will not attach liability on it for payments made. Section 284 (5) provides some protection to banks. Under it, after commencement of the customer's bankruptcy, a cheque is honoured by the bank, or some other payment is made by it at the customer's order. Here, the debit is maintainable except in two cases. The first is where the bank noticed the bankruptcy before it had paid the cheque or made the payment involved. The second is where it is not reasonably practicable to recover the amount involved from the payee.

Though the issues of cheques were not clearly regulated by the community legislator, as per Art 1 of COBAC Regulation MFE 2002/15, microfinance establishments shall be authorized to provide their customers with cheques payable at local levels. Art 2 of the said law defined the conditions for issuing cheques. By these, cheques can only be presented at the bank or microfinance where the account is kept. However, it should be understood that the issues relating to cheques without cover is well thrashed by the OHADA Uniform Act on Simplified Recovery Procedures. This has gone a long way to improve on CEMAC banking thus fostering banking integration in the CEMAC region.

4.2.1.7. Winding Up of the Company

When a company winds-up, the effect on the bank's duty to pay cheques is similar to that of the bankruptcy of a natural customer.

By virtue of Section 127 of the insolvency Act 1986 (section 227 of the companies Act 1948), any disposition of property made after the commencement of the winding up by the court is void. According to Section 129 which replaces Section 229 of the companies Act 1948, the date of the commencement of a winding up by the court depends on whether the proceedings were preceded by a resolution of the company to wind up or started with the presentation of the petition. In the former case, the winding up commences at the date of the resolution. In the latter, the relevant date is that of the presentation of the petition. Once the winding up of the company has commenced, a bank's duty to honour cheques drawn by the company is terminated. In Re London and Mediterranean Bank, Bolognesi's case[88]suggested that that cheques drawn by the directors after the commencement of the winding up of a company could not be attributed to it. However, under section 127 of the 1986 Act, the court has discretion to validate a transaction made after the commencement of the winding up. The bank's ability to obtain an order validating a transaction under this section probably depends on it not having had notice of the true facts.

Winding up of company within the CEMAC zone is governed by the OHADA Uniform Act on Commercial Companies and Economic Interest Groups. Art 862 para 1 is to the effect that, a joint venture shall be dissolved by the same events which terminate a private company. Para 2 further states that the partners may, however, agree in the articles of association or in a subsequent deed that the company will continue in business in spite of such events. Art 863 on its own part stipulates that where the company is of an unspecified duration, its winding up may come at any time after notification, by hand-delivered letter against a receipt or by registered letter with acknowledgement of receipt, from one partner to all the others, provided that the notification shall be in good faith and not at the wrong moment. All these are in a bid to regulate the winding up of companies in general and banks in particular in the CEMAC zone though banks can

[85]The non-payment of a judgment debt committed by the bankrupt within the three months preceding his adjudication. Bankruptcy Act 1914 S. 37.

[86](1921) 2 K. B. 835.

[87]Nah (T.F) op. cit, P. 79.

[88](1870) 1 R 5 ch. APP. 567.

only windup if it becomes bankrupt. Another means of payment is the Bill of Exchange.

4.2.2. The Bill of Exchange

Just as with the cheque, no COBAC text provides a definition for a Bill of Exchange. However, a Bill of exchange has been defined as "an order by which a person known as the drawer, request another person known as the Banker, to pay an amount of money on a precise date at the request of a designated beneficiary"[89]. A business person can buy a Bill of Exchange in his town of origin and the Bank gives an order to its correspondent in another town to pay a precise amount of money to the holder of the Bill of Exchange[90].

According to Article 79 of Regulation No.02 /03/ CEMAC / UMAC/UMAC/CM, a Bill of Exchange must include on and expressed in a language clear enough to express the intentions of the drawer. It is a mandate to pay a precise amount, indicating the name of the person who has to pay, known as the Banker, indication of the date of payment, that of the place where payment has to be done the name of the person to whom the order to pay is made, indication of the date and place where the Bill was created, the signature of the person who issued the Bill known as the banker. This signature is affix, either by hand, or non-hand writing procedure. This by so doing regulates the CEMAC banking sector thus fostering banking integration. No COBAC text equally defines a promissory note, which is another means of payment.

4.2.3. A Promisory Note

A promissory note "is an Act whereby a person called the subscriber takes upon himself to pay another person known as the beneficiary or by his order a precise amount of money"[91]. Art. 159 of Regulation No. 02/03 provide that the promissory note must contain the order clause expressed in a language clear enough. It is a pure and simple promise to pay a determined amount. It must indicate the date of payment, the place where payment has to be done, the name of the person to whom the order to pay is made, the indication of the date and place where the note is subscribed, the signature of the person who issued it, known as the subscriber. This is with a view to foster banking integration in the CEMAC zone. Payment or credit card is another means of payments.

4.2.4. Payment or Credit Card

To some authors[92]credit cards are cards issued by a bank to enable customers to purchase goods and services at certain specific shops, hotels, and restaurants. From a reading of Art. 166 para 1 of Regulation No. 02/03, "payment cards are all cards delivered by an approved establishment that enables its holder to withdraw or transfer funds". By para. 1 of the above regulation, credit cards are all cards of payments which result out of an express contract between the issuing establishment and the holder of the card by which the account of the holder is debited. The card is presented in the form of a plastic standardized format card, and carries the name and the commercial symbol of the issuing establishment as well as the name and signature of the holder, with a number on the card which is distinguished from the code number which is confidential[93]. The issuing establishment must sign a contract with the person she intends to deliver the card to and with the providers of goods and services who desire to accept it. The issuing establishment can equally refuse to deliver a payment card to a customer or demand the return of a card already deliver by her. The issuing establishment is bound, by art. 18, to inform all the persons to whom it has issued a card of the conditions for their use and possible sanctions in case of abusive use. Moreover, art. 169 further states that in case of abusive use of the payment card, the issuing establishment can within four (4) days that follows the discovery of the abuse enjoin the holder to return the card in his possession.

Credit cards such as "VISA", EURO "CARD", and "MASTER CARD" which are means of payment accepted in almost all the commercial establishments and banks of the world are the result of commercial evolution[94]. That is why the CEMAC region in February 2016 launched a new type of credit card known as GIMAC. This is intended to be used by bank customers within CEMAC to withdraw money from their accounts through any bank located within the CEMAC zone. Its use is still very rudimentary. Presently, it is being tested between NFC bank-Cameroon, GAB, BICEC and Ecobank. This is with a view to foster banking integration in the CEMAC region.

This sub-topic cannot be exhausted without mentioning credit tokens. Credit tokens are made up of Bipartite and Tripartite Credit tokens.

4.2.4.1. Bipartite Credit Tokens

Credit tokens are widely used in various types of transactions. The oldest form is a token which a departmental store or chain of petrol station supplies to its clients to enable them to obtain goods or services against its production. In such a bipartite arrangement, the card is used to charge the client's account with the issuer[95]. At present, these cards have been largely replaced by modern tokens. These fall into four groups.

The first is the "credit card" issued by a bank or a financial institution. The card holder can use it to purchase goods or to acquire services from dealers who display the issues insignia. The dealer supplies the relevant items against a docket in which the card holder authorizes the issuer to debit his account with the amount due. The dealer thus receives payment from the issuer, who obtains reimbursement from the card holder which may be made

[89]Galvada (C.H) et Stoufflet (J), Droit de Crédit, 2, Effets de Commerce, Chèques, Carte de Paiement et deCrédit, Litec, 1988, No. 9, P. 20 cited by Sidi Moukam (L), op. cit, P. 7.

[90]Sidi Moukam (L), op. cit .

[91]Kalieu (E.Y.R), Cours d'Effets de commerce et Droit Bancaire, (cycle maitrise), université de Dschang,2005, cited by Sidi Moukam (L), op. cit P. 8.

[92]Don (W) and Wally (V), Business of Banking and Financial Services, 3rd Edn Northcote House Publishers Ltd, 1995, P. 21.

[93]Sidi Moukam (L.), op. cit P. 70.

[94]Tchabo Sontang (H.M), *Secret Bancaire et lute contre le Blanchiment d' Argent en zone CEMAC*, Mémoire de D.E.A, Université de Dschang, Juin 2006, P. 32.

[95]For an excellent historical review, see Bergsten (E.E), Credit Cards. A Prelude to a cash-less society; (1967) and BC Ind. & Com. L. Rev. 485.

either when the account is submitted, in which case he does not incur a finance discharge, or by installments each of which must not be less than a given percentage of the balance outstanding at the time of payment. Where payment is made by installments, interest is charged on the balance due at the end of each billing cycle (usually a calendar month)[96].

The second card, frequently described as a T and E (Travelling and Entertainment) card, is a variant of the credit card. The procedure for its use is the same as that described above, except that the holder is expected to settle promptly each account submitted to him by the issuer. Such a card which is also known as a charge card, differs from the orthodox credit card in that the holder is not expressly granted credit facilities[97].

The third type of token is the "cheque card" or the "cheque guarantee card". In such a card, the issuer, who is usually a clearing bank, undertakes to pay cheques drawn by the customer provided certain conditions are complied with[98]. Cheque cards differ from credit cards in that the issuer undertakes to honour a negotiable instrument drawn by its customer, rather than to pay for his purchases or to reimburse advances made to him.

The last type of token is the "cash point" card, which is used by the customer in order to obtain cash from Automated Teller Machines (ATM cards). The token can further be used to make a balance enquiry and in the case of some banks, for paying cheques to the credit of their customer's accounts. Cash point cards differ from the other three types of token in one important aspect. In credit, charge and cheque card in any transaction between the card holder and the third party is evidenced by a document or docket. Authentication is based on the comparison of the cardholder's signature on the relevant paper and the signature placed by him on a space provided for this purpose in the card. He may further be asked to produce identification. In the case of cash point tokens, the customer identifies himself by typing a number disclosed only to himself and known as the "personal identification number" (PIN), on the keyboard of the terminal. The entire operation is therefore carried out through the machine[99]. Many banks and even some microfinance establishments within CEMAC use the ATM cards for transactions. This has enormously fostered banking integration in the CEMAC zone, since bank customers can cash money from their banks located within CEMAC.

4.2.4.2. Tripartite Credit Tokens

A credit card transaction involves three contracts. First, the central between the issuer and the card holder. Basically, the issuer undertakes to pay for the purchases made by the card holder within a specified credit limit. A wrongful refusal by the issuer to stand by this promise would thus constitute a breach of this contract. The issuer further agrees to the settlement of the amount outstanding from time to time by minimum payments to be made upon the presentation to the holder of each monthly statement. The holder agrees to reimburse the issuer in the prescribed manner and undertakes to pay the applicable credit charge.

The second contract is between the issuer and the dealer. It is based on a master agreement in which the issuer agrees to pay to the dealer the amounts due from card holders, provided the goods or services are supplied on the agreed terms. Basically, this means that the dealer cannot supply goods or services without making a credit enquiry if the price exceeds a given figure. The dealer is further expected to compare the signature appearing on the sale docket with the holder's signature on the car. The issuer obtains an agreed percentage of each amount paid under the card as a consideration for the services rendered to the dealer.

It has been suggested that the transaction is to be regarded as an assignment by the dealer to the issuer of the amount due from the card-holder. This analysis is unacceptable as the dealer supplies the goods or services to the card-holder with the view to obtaining payment from the issuer. The debt therefore is due in the first instance from the issuer and not from the card-holder. The better view is that the issuer makes a direct promise of reimbursement to the dealer in their master agreement[100]. The issuer's promise to the dealer is thus similar to that made by a bank out in a traveler's letter of credit.

The third agreement is between the dealer and the card holder. This agreement remains a contract of sale or a contract for the provision of a service, although payment is expected from the issuer. A difficult question arises in respect of this contract where the issuer becomes insolent. Is there a dealer's only right to lodge a proof for the amounts outstanding or can he demand payment from the cardholder? The question depends on whether or not the docket, signed by the card-holder, constitutes absolute or conditional payment of the amount for which it is made out.

Cases decided in respect of letters of credit suggest that the docket constitutes a conditional discharge, and that the card holder remains liable to pay the price of the goods to the dealer upon the issuer's insolvency[101]. But this analogy was rejected recently in Britain by *Millet J. in Re charge Card Services Ltd*[102]. His lordship held that the contract between a cardholder and a dealer was distinguishable from the contract of sale stipulating for the furnishing of a banker's documentary credit covering the price of the goods. The

[96]Access and Barclay card fall in to this group.
[97]Diners club and American Express issue such cards.
[98]Ordinary cheque cards are used for cheques drawn within the United Kingdom, where a customer requires a card for use abroad; he is issued a Euro cheque card, which guarantees the payment of cheques drawn within Europe.
[99]Cash point cards are issued by the clearers, although one building society-The Halifax has also introduced a card. Further initiatives by building societies are contemplated. It is further expected that some banks will unite their networks of teller machines.

[100]See the analysis of Lord Diplock in, 187, Metropolitan Police Commissioner V. Charles (1997) AC 177which, though concerning a cheque card case appears applicable also in the context of cards. See Dobson (A.P), Credit Cards. (1979) JBL 331.
[101]See e.g. sale continuation Ltd V. Austin Taylor & Co. Ltd (1968) 2 QB849; W.J. Alan & Co. Ltd V. EL Nasr Export and import Co., (1972) 2QB 139; 212; Maram Road Saw Mill V. Austin Taylor & Co. Ltd (1975) 1 Lloyd's Rep. 156, 159, noted in (1977) 40 MLR 91.
[102](1986) 3 ALL ER 289.

buyer, who affected documentary credit, had the rights to select the issuing bank. He could therefore be expected to bear the loss, if the bank chosen by him became insolvent and consequently, defaulted. By way of contrast, in cases involving credit cards, the parties agree that a specified procedure, namely payment by the specified issuer, is a valid means for the discharge of the debt incurred by the card holder. When the card is used to effect payments, the dealer agrees to accept the docket in lieu of the holder's personal payment obligation. The parties further agree that the docket signed by the card-holder is furnished to the dealer for which it is made out. Payments are equally made in the form of transfer.

4.2.5. Transfer

Transfer is an operation whereby a holder of an account under the orders of his customer, transfer funds to a determined beneficiary. In this operation, he (holder of the account) credits the accounts of the transferee and debits that of the transferor[103]. The transfer order that must be given in writing[104]must contain a mandate given by the customer to transfer funds whose amount is determined. It must indicate the account to be debited and the account to be credited, the execution date, the signature of the giver of the order[105]. The transfer order by virtue of art. 179 of Regulation No. 02/03[106]are irrevocable when there is already a debit of the account of the giver of the order. Deduction authorization is subject to the rules governing transfers.

4.2.6. Deduction Authorization

Art. 190[107] further states that, a deduction authorization is "an order whereby a debtor holder of an account, authorizes his creditor to deduct, on a certain date, funds on his account to settle his debts at least with a deduction opinion and orders the establishment holding the account to transfer funds indicated in the credit account of the creditor giver of the opinion". The deduction authorization given by the customer and which is presented to the establishment with the deduction opinion of the beneficiary is executed through a transfer that is subject to the rules governing transfers.

The deduction authorisation must include of the name and coordinating banking of the provider of the deduction opinion, his deduction opinion as well as his deduction opinion number given by the Central Bank, the name and the coordinating banking of the debtor giver of the order, the unconditional transfer order of funds, the transfer amount, the deduction period and the signature of the debtor giver of the order[108]. The debit of account of the giver of the order transfers with all rights, the funds object of the deduction order to the creditor giver of the deduction opinion[109].

[103]Art. 177 of Regulation No. o2/03/CEMAC/UMAC/CM of 4th April 2003 relating to the systems, means and incidents of payments in CEMAC.
[104]Sidi Moukam (L), op. cit, P. 61.
[105]Art. 178 of Regulation No. 02/03/CEMAC/UMAC/CM of 4th April 2003 relating to the systems, means and incidents of payments in CEMAC.
[106] Of the above law.
[107]Ibid
[108]Ibid, Art. 191.
[109]Ibid, Art. 192.

Plastic Money is yet to be accepted by all as a means of payments.

4.2.7. Plastic Money

From a reading of Art. 3 of COBAC Regulation R-2005/02 relating to plastic money, credit establishments and microfinance establishments are authorized to issue plastic money. Plastic Money is a means of payment which is a creditor order incorporated in an electronic instrument and accepted as payment by persons other than the issuer[110].
Plastic Money is more secure because of its access code, and low transaction cost. However, the risk as regards the use of plastic money is high given that use of fraud identities are permanent in the electronic environment and there is also the possibility of the use of plastic money for money laundering[111]objectives[112].

Banks as well as microfinance establishments equally authorized to provide some accessory operations to their members and customers respectively.

5. Accessory Operations

The accessory operations of Banks are well spelt out in art. 5 of COBAC Regulation R-2009/02 fixing the categories of credit establishments, their legal status and authorized operations. Those of microfinance are outlined in Art. 10 of Regulation No.02/03/CEMAC/UMAC/COBAC. From the critical look of their accessory operations, we realize that there exist accessory operations common to Banks and microfinance establishments and others specific only to Banks.

5.1. Accessory Operations Common to Banks and Microfinance Establishments

These operations are exchange transactions and the issuing of traveler's cheques, renting of safe compartments, training activities, placements, subscription, purchase, management, custody, and sale of stocks and shares and other financial products.

5.1.1. Exchange transactions and the issuing of travellers cheques

Exchange transactions is principally the buying and selling of foreign currencies. The issuing of travellers' cheques on its part is the undertaking to pay the specified amount of money to the order on the original holder (the purchaser) of the instrument as long as it tallies with that of the issuer. The details are assessed below.

A. Exchange Transactions

Exchange transactions are commonly carried out by banks and microfinance establishments. This is the buying and selling of foreign currencies, and the exchange of national currency from coins to paper money. However, it was discovered that though microfinance establishments do

[110] Ibid, Art. 193.
[111]Money laundering consist of all the methods used which are aimed at modifying the status of money resulting from an illicit activity. See, Tsobni Djoumetio (N .L), Prévention et Répression du Blanchiment des capitaux en zone CEMAC, mémoire de D.E.A, Université de Dschang, 2006, P. 3.
[112]Tchabo Sontang (H.M*), Les Aspects Juridique de la Monnaie Electronique dans la CEMAC*, in Annales de F.S.J.P, Université de Dschang, Tome 13, P.U.A, 2009, P. 230.

carry out exchange transactions, by art. 10 para. 1 of Regulation No. 01/02, the buying and selling of foreign currencies as well as the issuing of traveler's cheques is done in partnership with their banks partner[113].

5.1.1.2. The Issuing of Traveler's Cheques

In a traveler's cheques, the issuer undertakes to pay the specified amount of money to the order on the original holder (the purchaser) of the instrument or to the transferee, provided the signature executed by the original holder when he purchased the instrument tallies with the counter signature executed by him at the time he cashes it[114]. This requisite condition constitutes the common feature of all travelers' cheques, although the actual form assumed by them differs from issuer to issuer[115]. The promise or order that appears in the traveler's cheques is usually conditional; the issuer undertakes to pay the instrument only if there is correspondence between the two signatories executed by the original holder[116]. Traveler's cheques accordingly do not fall within the definition of one of the established forms of negotiable instruments such as cheques and promissory notes, for they are in all probability new species of negotiable instruments established by a general mercantile usage. Banks as well as microfinance establishments are involved in the renting of safe compartments.

5.1.2. Renting of Safe Compartments

A safe compartment is a metal box for storing valuable things, usually kept in a special room at a bank or a microfinance establishment. Banks like Microfinance Institutions do rent out the box to their customers to enable them preserve their valuable things or objects such as jewelries, precious metals and gold. The price paid for renting each of these boxes depends not only on the value of the item but also of its duration in the box. This is with a view to build up trust within the banking sector and as well foster banking integration within the CEMAC sub-region. Banks just like microfinance institutions are engaged in training activities.

5.1.3. Training Activities

Though from our research this does not feature as one of the accessory operations of banks, both banks and Microfinance institutions are involved in the training of their personnel and customers/members. This is mostly done through conferences, seminars and during the General Assembly meetings of microfinance establishments. None the less, these conferences and seminars are organized mostly by ANECAM to educate the microfinance establishments on COBAC regulations which are then expected to transfer this knowledge to their personnel and customers/members during their General Assembly. APECAM equally organizes sensitization conferences for the benefit of banks. This is in a bid to foster banking integration in the BEAC zone.

5.1.4. Investments, Subscriptions, Purchase, Management, Custody and Sale of Stocks and Shares and other Financial Products

These operations are provided for in Art. 5 para. 4 of COBAC Regulation R-2009/02. Though they do not feature in the list of accessory operations of microfinance establishments in their entirety, they are however performed by microfinance establishments, which can invest and subscribe for shares in an enterprise, as well buy and sell stocks for their customers and members. Though microfinance establishments are involved in the purchase of goods for customers, by reason of Art. 10 para 4 of this regulation, the transaction should match the activities of the said customers.

Besides the forgone, there are some accessory operations that are performed by banks only.

6. Accessory Operations Specific to Banks Only

By Art. 5 of COBAC Regulation R-2009/02, banks can give advice and assistance on matters relating to the management of one's finances or heritage (property), financial engineering and in a general manner, all services aimed at facilitating the creation and development of enterprises, with the exception of legislative text relating to the exercise of certain illegal professions. It is logical that this operation should be exercised only by banks given that to create and develop an enterprise, for example, requires huge finances which can be obtained only from banks and these banks are always obliged to give advice to persons wishing to create and develop enterprises .

7. Concluding Remarks

The term credit establishment may appear confusing if one considers a credit establishment as any institution carrying out credit operations. Credit operations are only one of the major banking operations; it is just customary that most credit establishments subject to banking legislation carry out deposit taking. The appellation is very much associated with the French perception of banking business, but credit establishment generally refers to all financial institutions carrying out credit operations[117]. The CEMAC legislator uses the term credit establishment to designate banks and financial institutions. This paper is concerned with banks, though microfinance establishments, especially those of the second category are not ignored, since they collect deposits from the public and also grant loans. While a bank is one of the credit establishments that can carry out all banking operations without distinction,[118] microfinance establishments carry out only specific services. However, due to the frequent use of the term credit establishment by our legislators, it has equally caused its intrusion in this context and the terms bank and credit establishment are, therefore, used almost interchangeably.

As discussed above, authorized banking operations are both principal and accessory. Under principal operations common to banks and microfinance institutions, we saw the collection of savings/funds, loan transactions, the awarding of guarantees in favour of other establishments and financial investments, other resources and the issue of means of payments. Under accessory operations common to banks

[113]Microfinance Establishments do have partner banks where they deposit their reserves. For example, the part Bank of all microfiance establishments affiliated to CAMCCUL is the Union Bank Ltd, while that of Crédit Mutuel is the Commercial Bank of Cameroon.

[114]Ellinger (E.P) and Lomnicka (E), op.cit, P.331.

[115]Tanue (L.C), op.cit, P.79.

[116]Ellinger (E.P) and Lomnicka (E), op. cit, P331.

[117]Kelese (G.N), op.cit, P.32.

[118]Article 3 of Decree nº 90/1469 of 9 November 1990, relating to the Definition of Credit Establishments.

and microfinance institutions, operations relating to exchange transactions and the issuing of traveler's cheques, renting of safe compartments, training activities, placements, subscription, purchase, management, custody, and sale of stocks and shares and other financial products were analyzed. Those accessory operations specific only to banks were not left out. It should be noted that all the above authorized banking operations are carried out over the watchful eyes of COBAC.

As far as this paper is concerned, it is realized that since the creation of Interbank Banking Group of Central Africa (GIMAC)[119] in 2013 and its implementation in 2016[120] as a means of payment within CEMAC member states, its application is still very rudimentary till date. GIMAC is a new bank card created in CEMAC, to permit its users to withdraw money from any bank through the automated teller machine, located within the six CEMAC member states[121]. Presently, it is being tested between NFC bank-Cameroon, GAB, BICEC, Ecobank and four microfinance institutions within CEMAC[122]. The Director General of GIMAC[123]recently acknowledged that GIMAC will permit users to effect transactions from card to mobile, from mobile to account, from account to card and others. He said close to one million CEMAC citizens own banking cards for international payments[124]and GIMAC will aim to define and establish the regulatory and security framework of the remittance ecosystem, as well as enhance interoperability between banks, public treasuries, postal and microfinance institutions and electronic money transmitters in the Economic and Monetary Community of Central Africa. If till date its implementation is ineffective, it is because the CEMAC legislators have not been able to enact good laws to back up this laudable effort. This work therefore recommends that strong and efficient laws should be enacted for GIMAC to function properly. Also, considering the rate of poverty plaguing the region, withdrawal should be made at a very low cost to encourage low income earners to be able to withdraw money from any bank within CEMAC. Proper sensitization should be made within the CEMAC member states to school the people about GIMAC and its advantages for many people are still very ignorant about the existence of GIMAC Card as a means of payment within the BEAC zone. Finally, more effective laws should be enacted to fight cyber criminality for such a venture to be realized. This will give some amount of confidence to its users in particular and the banking business in general.

[119]Groupement Interbancaire Monétique de L'Afrique Centrale

[120]Nji (K.N), *The Regulation of the Banking Sector as an Integration tool: A case study of the CEMAC sub-region*, Ph.D thesis, University of Yaounde II, unpublished 2018, P.211.

[121]Cameroon,Central African Republic, Congo, Gabon, Equatorial Guinea and Chad.

[122]www.kapital Afrik , Thursday 06/02/2020 at 11:18pm.

[123]Valentine Mbozo'o

[124]Jephté TCHEMEDIE,www.digital business Africa, Thursday 06th February 2020 at 10:26pm.