

Legal Remedies For Breach Of E-Commerce Contracts And Related Offences In Cameroon: A Critical Analysis

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Abstract— With more and more business being conducted through electronic means, disputes stemming from conflicting interests or malice become inevitable, as the internet has become a breeding ground for diverse abuses. These abuses range from contractual breaches and tortious acts to criminal acts. It follows that the use of the internet has given a different dimension to these disputes. However, as the famous maxim *Ubi Jus, Ubi Remedium* states, where there is a right, there is a remedy. Cameroon, following this trend, adopted a legal framework that provided a panoply of remedies available to victims of breaches of e-commerce contracts and related offenses to bring the aggrieved party as close as possible to the position he would have been in if there had been no abuse. The purpose of this article is to assess the efficiency of the present framework for remedying victims of e-commerce breaches and related offenses. The article thus examines the basis for liabilities in e-commerce and the remedies available to victims, bringing out the difficulties which render these remedies less efficient for the purpose. Several recommendations have been proffered by this article to improve the status quo.

Keywords—e-commerce, electronic transactions, remedies

RESUME

Avec de plus en plus de transactions commerciales effectuées par voie électronique, les litiges résultant d'intérêts conflictuels ou de malveillance deviennent inévitables, car Internet est devenu un terrain fertile pour divers abus. Ces abus vont de la rupture de contrat et des actes délictueux aux actes criminels. Il en résulte que l'utilisation d'Internet a donné une dimension différente à ces litiges. Cependant, comme le dit la célèbre maxime *Ubi Jus Ubi Remedium*, là où il y a un droit, il y a un remède. Le Cameroun, suivant cette tendance, a adopté un cadre juridique qui offre une panoplie de recours disponibles pour les victimes de violations du commerce électronique et d'infractions connexes, dans l'intention de rapprocher la partie lésée le plus possible de la position qu'elle aurait occupée s'il n'y

avait pas eu d'abus. Le but de cet article est d'évaluer l'efficacité du cadre actuel pour remédier aux victimes de violations du commerce électronique et d'infractions connexes. L'article examine donc les bases des responsabilités en commerce électronique et les recours disponibles pour les victimes, mettant en évidence les difficultés qui rendent ces recours moins efficaces à cet égard. Plusieurs recommandations ont été proposées par cet article pour améliorer le statu quo.

Mot-clé : commerce électronique, transactions électroniques, recours

INTRODUCTION

One of the reasons why it is always advisable to take proper care when engaging in a contract is the fact that a dispute may end up arising out of that particular contract. The concept of the dispute itself originates from the fact that each of us has our perspectives, our interests, our resources, our desires, and our fears. It is thus obvious, that as we engage in transactions, we sometimes find ourselves in disagreement about what has happened or about what ought to happen¹. We each have times when we feel others have hurt us, and we each have times when we are moved to act against real or perceived injustices². However, it is a general rule of law that where there is a right there is a remedy, embodied in the Latin maxim *Ubi jus Ubi remedium*. A remedy is a means given by the law for the enforcement of a right or the recovery of pecuniary compensation in place of performance.³ Thus basis for the enforcement of any remedy is the violation of a right (which leads to

¹ Michael L. Moffitt and Robert C. Bordone (2005), *The Handbook of dispute resolution*, a publication of the program on negotiation at Harvard School, JOSSEY-BASS A Wiley imprint, First Edition, United State of America. P. 1.

² Ibid

³ Amadou Monkaree, "Remedies Available to The Victims of Cybercrimes Under Cameroonian Law" conference paper, Faculty of Law and Political Science, University of Dschang. P. 8.

liability)⁴. This violation of rights or failure to observe obligation toward each other under the contract or disregard of regulation is the source of e-commerce disputes.

Broadly conceived, disputes represent disagreements between two or more parties in political, economic, or cultural arenas. It is the purpose of the present study to focus on economic disputes.⁵ The commercial world is one of such conflicting interests. The introduction of information and communication technologies has given a different dimension to commercial disputes. With more and more business being conducted through electronic means, disputes arising out of this conflicting interest or malice become inevitable.⁶

A product or service purchased through the internet may have some hidden vices, may not be delivered, and may be judged by the consumer as unsatisfactory and not meeting the requirements of fitness for purpose or may not be of merchantable quality.⁷ The use of new information technologies has brought about a new field of human and criminal activities or again unacceptable behaviors, which have rendered our societies highly vulnerable. Some of these obnoxious behaviors are, malware (malicious codes and software, including viruses, worms, Trojan horses, spyware, bots, and botnets) that is evolving and spreading rapidly to commit denial of services,⁸ sexual exploitation, and abuse of children and human trafficking, copyrights infringements, fraud, identity thefts, money laundry, defacement, unauthorized disclosure, scamming, defamation, and the likes.⁹ These have caused extensive damage to governments, companies, societies, and individuals. The difficulty of obtaining satisfactory redress may render recourse illusory. This explains why the legal framework applicable to e-commerce in Cameroon

offers a list of remedies open to victims of any breach of e-commerce or related offense. However, as mentioned above, the enforcement of these remedies is conditioned by the attribution of liability, acknowledged and endorsed by a court of law. The main difficulty that affects the process comes from the distance that separates the two parties¹⁰, the different legal frameworks, the cost and complexity of legal actions as well as the proof (evidence) of electronic commerce which is at the center of any process for attribution of liability by a court of law. As such disputes in e-commerce are broad in scale both in quantity and complexity.¹¹ The internet has challenged present normative tools used to regulate international commerce. The main reason behind the challenge may be forced to the internet's characteristics.¹² In this paper, we therefore examine the basis of liability in e-commerce before going to the remedies available to victims of breach of e-commerce and related offenses as well as the defenses or limits to the enforcement of these remedies.

I. The Basis of Liability in E-Commerce: Nature of E-Commerce Disputes in Cameroon.

The basis for liability in e-commerce lies in the rights violated. This explains the form of disputes in e-commerce. No matter the form it may take, the parties involved, e-commerce disputes are mostly contractual disputes. However, from the nature of the loss or injury caused to parties, and the nature of obligations owed to each other, e-commerce disputes may equally take other forms such as tortious liabilities, and criminal responsibility. To that effect, it is important to look into the possible disputes arising out of electronic commerce as they constitute the basis for liability in e-commerce. For example: Like ordinary contracts, e-commerce disputes could include contractual, tortious or criminal liability. Cameroonian law recognizes all these categories

E-commerce disputes are classified based on different standards. For example, classification can be made based on the topic of dispute: there are interconnection disputes, sales disputes, payment disputes, delivery disputes, infringement disputes, disputes concerning the use of trademarks belonging to third parties, etc. One can also differentiate between traditional commercial disputes, like disputes over the quality of goods purchased online, failure to deliver, errors in order taking, and failure to pay; and Internet-specific disputes over problems like posting on the Internet or issues with domain names.¹³ One can also look at e-commerce disputes from the perspective of the parties involved in the disputes. Here we can have disputes between internet users and internet service providers, disputes between

⁴ Violation of a right constitute the basis for liability in any disputes.

⁵ YUN Zhao, (2005), *Dispute resolution in electronic commerce*, Studies and Materials on the Settlement of International Disputes, Volume 9, Martinus Nijhoff Publishers, Leiden Boston. P.26.

⁶ UNCITRAL Report on the work of its 29th session, U.N. General Assembly Official Records, no.17 (A) 15/17, annex1;

⁷ These amount to contractual breach and to a certain extent may end up in a tortious liability (notably the tort of negligence and the rule of reasonable foreseeability develop in the case of *donogue V Stevenson*, in situation where the goods are defective)

⁸ Ales Zavrsnil, LL.D., "Cybercrime, Definitional Challenges and Criminological Particularities, Institute of Criminology, Faculty of Law, Ljubljana, Slovenia. Poljanski nasip 2, S1-1000 Ljubljana, Slovenia, Unpublished, P.3.

⁹ These amount to criminal offence punishable under the Cameroon Penal Code in Law No 2016/07 Of 12 July 2016 Amending Law No 67/LF Of 12 June 1967 Governing the Penal Code

¹⁰ Born from the most often international character of e-commerce.

¹¹ YUN Zhao (2005), Op.cit. P.7.

¹² Ibid

¹³ Ibid. P. 27.

businessmen (B2B e-commerce disputes), as well as disputes between businesses and consumers (B2C e-commerce disputes). No matter the mode of classification or method of appreciation of e-commerce disputes, they appear principally as contractual disputes as well as other disputes classified under tort and criminal law.

I-1. Contractual disputes in electronic commerce.

Contractual disputes refer to the assembly of disputes which result from the breach of a contractual provision.¹⁴ That is to say, failure to fulfill an obligation under a contract. When the contract is concluded, both parties have certain obligations. For example, the obligations of the sellers include delivering goods in conformity with the quantity and quality stipulated in the contract, as well as related documents, and transferring the property in the goods. Obligations of the buyer include payment of the price and taking delivery of the goods. Thus contractual disputes will arise when these obligations under the contract are not honored. This non-fulfillment of part or whole contractual obligation is what is known as a breach of contract. Contractual disputes in e-commerce are common between Internet users, and enterprises, against the Internet service provider for poor service, and misuse of private information. It is also common between e-businesses and e-consumers regarding the conformity of the goods, and between e-business and e-whole sellers and retailers on delay and failure to pay. Thus, a classification of contractual disputes in e-commerce is done from the perspective of the cause of action. Here, we have a breach related to the delivery of the goods, a Breach related to the conformity of the goods, a Breach related to the order (or acceptance of the offer), a Breach related to payment, a Breach related to payment as examined below.

The first seed of e-commerce disputes is planted at the contractual level characterized by the nature of online offers, acceptance, and consideration. Most e-commerce disputes in this light relate to the order or acceptance of the online offer. It is common in e-commerce for an e-merchant to claim not to receive the order of acceptance of the offer made by the e-buyer. This is equally a common source of dispute in e-commerce. It may happen that as a result of a network defect or other technical defect related to the internet or seller's platform, the acceptance or order of confirmation is not received with delay or not received by the seller. In such a situation, the valid question will be who shall be held liable in such a dispute? The seller claims not received the order while the buyer claims to have effectuated a valid order.

As a general rule, acceptance has no effect until it is communicated to the offeror. Communication here implies that the fact of acceptance must be brought to the notice of the offeror. To that effect, Section 12(3) of the 2010 law on e-commerce in Cameroon provides

that the order of confirmation of acceptance of an offer is deemed received by the offeror when he can access it. Any violation of this standard is thus a breach.

In the same light, Section 213 of the Uniform Act on Commercial Law provides that the acceptance of an offer or an order takes effect when the indication of acquiescence reaches the offeror. Acceptance shall not take effect if this indication does not reach the offeror within the time stipulated or, in the absence of a stipulation, within a reasonable time in the circumstances of the transaction and the means of communication used by the offeror. An offer that is transmitted electronically in real time must be accepted immediately, unless the circumstances imply otherwise, and provided that the recipient has consented, expressly or implicitly, to receiving such electronic communications of this format and under this address.

The effort made by the OHADA legislator at this level is highly appreciated in that the OHADA Uniform Acts are generally appropriate to a certain extent not only for transactions concluded by traditional means but also for those concluded electronically. The rules set out there seem to offer solutions, including in an electronic environment. Added to the Uniform Acts, OHADA Member States have taken initiatives, either at the national level or in the framework of regional organizations such as CEMAC to legally regulate electronic commerce. This adds to the effort made by OHADA law. However, much effort is still to be made to adapt the law to the current trends in electronic contracts. Even when the contract is validly made¹⁵ execution of the contract in terms of delivery is another good source of disputes.

In the second place, it is common that a breach of e-commerce results from the delivery of the good. The general rule is that there is no breach where there is no obligation. Thus a breach related to delivery of the good is a non-fulfillment of the obligation of delivery owed to the buyer. However the e-commerce law on e-commerce haven't foresee. How ever under the general law of contracts when a valid contract is made all parties are oblige to respect their engagement toward the other party. Therefore, a breach related to delivery is most often a seller's breach as the seller is the one in .

Article 31 of the UN Convention on the International Sale of Goods (hence referred to as CISG) delimeates the performance standards required of the seller. Overall, it provides four situations. If the parties agreed on a delivery location in a contract Article 31's implied language requires the seller to deliver to that location.¹⁶ As a result, Article 31, which specifies the place of "delivery," is only applicable if the parties have not agreed differently. However, if the

¹⁴ The authors description.

¹⁵ With online offer, acceptance and consideration together with other requirement for validity of contract are made.

¹⁶ See Ngwa Princewill. Op.cit. P. 127.

seller is not obligated by the conditions of a contract about delivery and the contract of sale includes carriage of the products, delivery is defined as handing over the items to the first carrier for transmission to the buyer. The seller's responsibility is satisfied upon transfer to the first carrier. Failure to give evidence of delivery in the absence of the signature of the buyer can forfeit the seller's claim to payment. However, liability for the carrier's failure to perform will not lie with the seller unless the seller has contractually undertaken the obligation to carry out the carriage of goods. Any failure in this respect gives the aggrieved party a right of action. This has been the basis of many e-commerce disputes. If delivery is a major source of dispute, note that conformity of the good is not the least.

Thirdly, a breach can arise concerning the conformity of the good. It is the seller's responsibility to ensure that the consumer is satisfied with the goods. Remedial phrases like "breach of warranty of condition" are not used in the UN Convention for the International Sale of Goods (CISG); instead, "the liability for defects under the CISG is part of the general liability for the non-performance of a contractual duty". Under the CISG, the presumption is that the goods "are fit for the purpose for which goods of the same description would ordinarily be used" and that they are "fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract." Accordingly, Article 35(1) CISG states that goods (only) conform with a contract if they are of the quantity, quality, and description required by the contract when they are of the quantity, quality, and description required by the contract unless the parties have agreed otherwise.

However, this presumption is subject to an express agreement among the parties to the contrary. Goods do not conform with the contract unless they are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely upon, on, or that it was unreasonable for him to rely upon, on the seller's skill or judgment. A seller will also breach its obligation if the goods do not possess the qualities shown out to the buyer in a sample or model, or if the goods are not packaged in a manner used for goods or that is adequate to preserve and protect the goods. The rule in Common law is that goods must meet satisfactory quality. The term satisfactory quality here refers to the fact that the goods meet the standard that a reasonable person would regard as satisfactory taking account of any description of the goods, the price (if relevant), and all relevant circumstances.¹⁷ Section 14(2B)(a to e) of the Sale of Goods Act provides a standard for the satisfactory quality of a good as follows;

¹⁷ See Section 14(2A) of the 1979 Act. Similar provision exist Under the 1982 Act precisely in Section 4(2) on transfer of good and Section 9(2) on the hire of contracts.

- a. Fitness for all the purposes for which goods of the kind in question are commonly supplied.¹⁸
- b. Appearance and finish good¹⁹
- c. Freedom from minor defects²⁰
- d. Safety²¹
- e. Durability²²

Accordingly, per Articles 45 and 74 CISG, damages may be demanded if the seller breaches any of his contractual duties. The buyer must inspect the items as soon as is practical under the circumstances so that they may determine whether the quality is appropriate.²³ The expiry date of this flexible time restriction is contingent upon several elements, including the chance to investigate, the work required, the availability of technological facilities, etc. It essentially begins to run at the time of delivery. If the buyer does not notify the seller of the items' nonconformity within a reasonable time after discovering it, he forfeits his right to depend on it²⁴. In turn, the "reasonable time," which is based on the specifics of each case, can be estimated at around one month, assuming there are no anomalies. In addition, a seller is not liable if the buyer knew or could have known of any non-conformity at the end of the contract; additionally, if the buyer does not follow the CISG's procedural requirements, courts will reject a buyer's claim of nonconformity. The burden is on the buyer to prove that the delivered goods do not meet a sample. As we advance in the execution of e-commerce payment have also been a source of dispute.

Lastly, one of the disputes at the center of electronic commerce is related to payment. It can either come as a result of the fact that the buyer has not effectuated payment on time, has refused to pay, or is unable to effectuate the payment.

Concerning delay in payment, it should be noted that Late payment may result in financial loss caused to the e-merchant. The e-buyer may have to pay an interest for that. This has been a ground for many e-commerce disputes. Equally, a dispute related to payment may result from the fact that the party is unable to effect payment either because of the merchant or of the buyer. For example, where a wrong account number or revoked key was issued. This has been the source of disputes in e-commerce.

¹⁸ Section 14(2A) (a). See also *Brown and Sons Ltd V. Craiks Ltd* (1970) 1 All ER823, See also *Millars of Falkirk Ltd V. Turpie* 1976 SLT66

¹⁹ See Section 14(2A) (b). See also *Berbsstein V. Pamson Motors LTD* (1987) 2 All ER 220, QBD M, H&P.

²⁰ See Section 14(2A) (c). See also *A de minimis principle*, the case *Millars of Falkirk Ltd V. Turpie* 1976 SLT66

²¹ See Section 14(2A) (d).

²² See Section 14(2A) (e). See also *Thain V. Anniesland Trade Centre* 1997 SLT (Sh Ct) 102,

²³ See Section 38(1) of the Convention for the international sale of goods

²⁴ See *Ibid* Section 39(1)

If payment cannot be delivered because of the customer, then he shall be liable to the e-merchant. A dispute may be caused by both parties; the merchant may claim he never received the payment and may ask for his goods to be returned at the customer's expense or for the late payment penalty to be made by the customer and not himself. The customer may cause a dispute claiming that he should not be held responsible for returning the goods or making the penalty payment since it would constitute extra expense and the fault was the merchant's for providing the wrong account number, therefore any fee should be paid by the merchant.

I-2. Other disputes arising from electronic contracts: Tort and criminal law

These refer to those disputes that arise due to non-observance of any statutory obligation on the part of the parties to the transaction. These disputes are non-contractual in the sense that they result from a violation of obligation imposed by law even though observance or not of the obligation may affect the contract. These disputes result in tortious or criminal liability. These are the common kinds of non-contractual disputes that may arise in electronic commerce including the tort of defamation, failure in data protection or violation of privacy, and violation of intellectual property, as shall be examined below.

Firstly, users of electronic mediums for commercial transactions, be it an enterprise or a consumer may be subject to defamation suits for defamatory material posted online. For example, if an enterprise publishes any defamatory statement on its website concerning a person of repute, or publishes a defamatory statement on the product of another enterprise, the author may be liable for defamation.

Defamation is a tort that gives room for the claim of damages and a criminal offense punishable with imprisonment and a fine under the Cameroon Penal code. In the case of *The People of Cameroon V. Ekume Otte Sakwe*²⁵, where the defendant Sakwe, a resident of Buea, was charged by the Judicial police for the publication of false information about three companies without being able to prove his allegations.²⁶ Moreover, the law punishes anyone who for financial gains, uses any means to introduce, alter, erase, or delete electronic data such as to cause damage to someone's else property²⁷. This was the situation in *The People of Cameroon V. Kadji Valery*²⁸. Here, Kadji a student of the University of Buea fraudulently acquired a sum of money from a lady in Yaoundé. The matter was reported to ANTIC which investigated it and traced Kadji's account at BICEC Buea which was credited with the sum of 1,090,000

²⁵ Court of First Instance of Buea (CFIB)/76/2015, unreported.

²⁶ Even though Sakwe was finally discharged by the examining magistrate for want of concrete evidence.

²⁷ Section 72, Cyber Law

²⁸ Court of First Instance of Buea/011A/2013 Unreported

CFA franc. With this, ANTIC held that Kadji could not have had such an amount in his account if not for scamming and so was charged under section 73[2] of the law²⁹. Unfortunately, the case was discharged for lack of evidence to show that the money in his account was obtained from illegal acts. This is one of the complications of proving scamming and other cyber crimes in Cameroon.

The second form basis for e-commerce dispute here relates to infringement of intellectual property. The enterprise may be subject to trademark infringement suits if it infringes a registered or otherwise legally recognized trademark. For instance, in the US, if the enterprise has registered a domain name that corresponds to a registered or common law trademark, the enterprise might be liable for copyright infringement if it uses copyrighted material above fair use, and without permission. For example, an enterprise provides an online English-Hindi dictionary facility to its users. Another enterprise subsequently publishes another online English-Hindi dictionary facility.

Last but not least is the Failure in Data Protection which has equally been a strong basis for liability in e-commerce. The enterprise may be liable for sharing or revealing confidential data on customers. For instance, if the services provided by an enterprise are of such a nature that the law mandates that the enterprise must provide data protection to the customers. Failure to observe such a mandate may give rise to a liability.

II. Remedies Available for breach of E-commerce and other E-Commerce Related Offences

It is a general rule of law that where there is a right there is a remedy, embodied in the Latin maxim *Ubi jus Ubi remedium*. A remedy is a means given by the law for the enforcement of a right or the recovery of pecuniary compensation instead of performance.³⁰ The rule for the measure of damages in the law of contract is laid down in the case of *Hadley V. Baxendale*³¹ to the effect that where two parties enter into a contract and one of them fails to honor his obligation under the same, the victim of the breach is entitled by way of a remedy, damages or compensation to (1) Those arising naturally according to the usual course of things; (2) abnormal damages that arise because of special or exceptional circumstances that they know or could contemplate at

²⁹ Section 73[2], cyber law provides "whoever deliberately accepts to receive electronic communications payment using a forged or falsified payment, credit or cash withdrawal card shall be punished in accordance with subsection 1 above"

³⁰ Amadou Monkaree, "Remedies Available to The Victims of Cybercrimes Under Cameroonian Law" conference paper, Faculty of Law and Political Science, University of Dschang. P. 8.

³¹ (1854).

the time of entering into that contract.³² Thus a breach of contract can be established even if there is no actual loss, as nominal damages may be awarded for a non-actual loss.

The main objective remedy in e-commerce like any other contract is *restitution in integral*. That is to say, it aimed at putting the injured party financially, as near as possible to the position he would have been if the contract had been properly performed. However, damage may something be an inadequate remedy. This explains why equity has proffered some other remedies in addition to damages. These remedies include; injunction, and specific performance. Besides damage and other equitable remedies, which correspond to contract and tort remedies, criminal law has provided for some remedies such as imprisonment and fines.

II-1. Remedies in contract

Even though the main remedy for breach of contract is an action for damage, equitable remedies such as injunction and specific performance have been given a special place in providing redress to victims of breach of e-commerce.

II-1.1. Claim for damage

In line with the primary objective of the law of contract, the main remedy for breach of contract is damages. This serves as a remedy for the injury or loss incurred as a result of the breach of contracts. According to Section 74, CISG uses a simple but powerful formula, "damages consist of a sum equal to the loss, including loss of profit suffered as a consequence of the breach". Damages claimed by victims of breach of contract can either be specific damage or general damages (nominal damage). Damages are special when they are justifications that make them easy for the courts to assess and they are general or nominal when it is not quantifiable and can only be assessed by the discretion of the court or by estimation depending on the fact of the case. Even though Section 74 of CISG has not provided nominal where parties have not suffered any quantifiable injury or loss, it is the consensus view of international case law and legal writing that the loss in the sense of Section 74 can include immaterial or. Intangible loss, such as the loss of goodwill.³³ Thus the main remedy for a breach of an e-commerce contract is an action for damages, be it specific or nominal damages. Similar provisions exist under the OHADA Uniform Act on General Commercial Law(UAGCL) in sections 252 and 253 which provide for damages as remedies for such breaches.³⁴

According to Article 61, the failure to perform any obligation under the contract of sale may justify a claim for damages, independent of the existence of a

fault of the buyer. This leaves space for a wide application of this remedy. However, it should be mentioned that the buyer is not responsible for damages caused by his non-performance where his failure to perform is due to an impediment beyond his control (*force majeure*)³⁵. Under English law, the compensatory aim of damage was summarized in the decision of Park B in the case *Robinson V Harman*³⁶ in that " the rule of English law is that where a party sustains a loss by reasons of breach of contract, he is so far as money can do it to be placed in the same situation concerning damages as if the contract had been performed. This clearly shows that English law adopts damage as the primary remedy for breach of contract.

However, may sometimes be an inadequate remedy. This includes situations where the breach causes a great hardship that only specific performance can correct, or where the goods are unique and impossible to obtain elsewhere. This explains why from the perspective of CISG performance is the primary remedy while English law adopts damage as the primary remedy. Looking at the hardship caused by a breach of e-commerce either as a result of non-delivery or delivery of non-conforming goods, we submit that specific performance should be given more value as a remedy in e-commerce disputes. Besides the claim for damage which is the primary remedy for breach of contract or tort, the practice of commerce has adopted other remedies to rescue victims of breach of commercial contracts. These remedies are more or less similar to equitable remedies under English law. These remedies have received a legal blessing from the Convention for the International Sale of Goods (CISG), as well as OHADA Laws.

II-1.2. Equitable remedies

Equitable remedies accompany the primary remedies of breach of contract(damages). This is because, in some cases, damages cannot bring the aggrieved party as close as possible to the position he would have been in had the contract been executed properly. These include remedies such as specific performance, injunction, the right to terminate or avoid the contract, the right to reduce the price, and the like as shall be better explained below.

An action for specific performance provides one of the most convenient remedies in e-commerce disputes. Under Section 46 of the CISG, the buyer may demand delivery of substitute goods if the lack of conformity of the goods constitutes a fundamental breach and if he gives notice under Section 39 or within a reasonable time thereafter. This appears to be a remedy for the breach of e-contract related to the delivery of goods not conforming with the description of the contract. So too it may be a suitable remedy for the breach related to non-delivery by the seller. The

³² Ibid. P.8.

³³ Larry A. Dimatteo (2014), et al, International Sales Law
A critical analysis of CISG jurisprudence 134

³⁴ See also Section 249.

³⁵ See Section 79 of CISG.

³⁶ (1848) 84 N.H 114

provision of Section 46 of the CISG reinforces the obligation of delivery provided in Section 30 of the CISG. According to this provision, the seller must deliver the goods, hand over any documents relating to them, and transfer the property in the goods as required by the contract and this Convention. If the seller does not comply with any of these duties, the buyer has the right to require a performance. In the same light Section 250 of the OHADA UAGCL where the goods do not conform to the contract, the buyer can demand redress from the seller within a reasonable time. This redress sought from the seller is most often a replacement of the good where the defect constitutes a fundamental breach.

The right of action for specific performance is not reserved for the buyer. The seller can also have a right of action for a specific performance where he is a victim of a breach of an obligation under an e-contract. This includes disputes related to failure to pay or delay in payment by the buyer.

Moreover, the right to avoid or terminate the contract occupies an important place in the process of remedying victims of e-commerce breach in the sense that in the case of gross violation of a contractual term by one party, the aggrieved party automatically has the right to terminate the contract. The buyer shall apply to the competent court to cancel the contract: where failure by the seller to comply with any of his obligations or these provisions constitutes an essential breach of the contract;³⁷ or where the seller again fails to deliver the goods within the additional time limit granted³⁸. This stand is adopted by the OHADA UAGCL in Section 254³⁹.

However, where the seller has delivered the goods, the buyer's right to consider the contract terminated shall be forfeited where he fails to terminate it within reasonable time:

In case of a late delivery, from the time when he knew that the delivery had been made; - in case of a breach other than the late delivery and Where the seller delivers only part of the goods or where only part of the goods delivered comply with the contract, the provisions of Articles 251 to 254 shall apply regarding the part that has not been delivered or that does not comply with the contract.

More so, fixing a new time for performance equally provides some redress to the victim. Note that fixing an additional time is a rule addressed to the parties and is not the judges or arbitrators that grant to the

parties a period of grace.⁴⁰ Section 47 of CISG provides the buyer's right to fix an additional time for performance for the seller and is equally mirrored in article 63 CISG which provides the seller's right to do so concerning the buyer.

Under Article 47, the buyer may fix a reasonable period of additional time for performance by the seller. During that time, the buyer may not resort to other remedies unless the seller has noticed to the buyer that he will not perform within the time fixed by the buyer⁴¹. However, the buyer shall not on that account lose his right to claim damages for the seller's delay in performing his obligation.⁴² The same rule applies to the buyer about the seller. The seller can fix a period of grace where the failure to perform is from the buyer. However, the buyer shall not lose the right.

Again, as a matter of remedying a breach by the seller, the buyer has been given the right to reduce the price. This is a purely buyer's remedy used to serve the contract in alignment with the general pro-contractual spirit of the CISG.⁴³

- According to Article 50 CISG, where nonconforming goods have been supplied, the buyer may elect to keep nonconforming goods delivered by the seller and reduce the price accordingly. The contract is adjusted just as if the subject matter of the contract had from the onset been the nonconforming goods delivered. The effect of price reduction is to preserve the contract per the general pro-contractual spirit of the CISG.

- The buyer can elect to keep nonconforming goods delivered by the seller and unilaterally reduce the price just as if the subject matter of the contract had from the onset been the nonconforming goods delivered. By reducing the price, according to Article 45(2) CISG, the buyer is not deprived of any right to claim damages by exercising his right to reduce the price.

However, where damages are claimed in combination with a price reduction, damages can only be awarded for loss other than the reduced value of the goods since this loss is already reflected in the price reduction. Under Article 50, the buyer can reduce the price of goods that do not conform to the contract, even if the price has already been paid. To reduce the price, the buyer must simply disclose the reduction.

Another remedy under this heard is the right to return non-conforming goods. A buyer can only require and claim delivery of substitute goods if he is in a position to return the non-conforming goods originally delivered to him. According to Article 82(1) CISG, 'the buyer loses the right to declare the contract avoided or to require the seller to deliver substitute

³⁷ See from Section 251- 255 of CISG.

³⁸ See Section 251 of OHADA UAGCL

³⁹ This section is to the effect that; The buyer shall apply to the competent court to cancel the contract: where failure by the seller to comply with any of his obligations or these provisions constitutes an essential breach of the contract;³⁹ or where the seller again fails to deliver the goods within the additional time limit granted

⁴⁰Section 45(3) and 61(3) of CISG.

⁴¹ Ibid 47(2)

⁴² See section 251 of UAGCL

⁴³ Larry Dimatteo, Op.cit. P. 135.

goods if it is impossible for him to make restitution of the goods substantially in the condition in which he received them⁴⁴.

II-2. Remedies in tort

A tort is a wrong whose victim is entitled to redress either by way of compensation or otherwise.⁴⁵ Where the victim of a cybercrime suffers personal injury, he may bring an action in Battery⁴⁶ Assault⁴⁷, or false imprisonment.⁴⁸ Where those incurred by the victim are as a result of Negligence, he can bring an action in the tort of negligence under the Rule in *Donoghue V. Stevenson*.⁴⁹ Where the injury is mental, the victim can bring an action under the tort of Nervous shock.⁵⁰ Where the injury is a property loss, an action can be brought under the tort of conservation of the property. Where the injury is damage to property or loss to property an action can lie in trespass to chattels or conversion. Where the injury is to reputation, an action can lie in Defamation^{51 52},

However, the most common torts committed in e-commerce are the torts of: deceit⁵³, defamation, conversion, and negligence. The remedy for these tortuous acts is an action for damage. Here too, the damage can be nominal or specific. Damages in tort are special when there are justifications that make them easy for the courts to assess and award and they are general when it is not quantifiable and can only be assessed by the discretion of the court or by estimation and subject to special cases. Damages in the law of torts are recovered once and for all.⁵⁴ The victim cannot bring a second action on the same facts simply because his injuries prove to be more serious than was thought when the judgment was given.⁵⁵ This Rule was laid down in *Fetter V. Beale*.⁵⁶

II-1.3. Remedies in criminal law

Criminal remedies in electronic commerce-related offenses are punishable by imprisonment and fine. Criminal offenses committed in e-commerce may take the form of purely commercial crimes and other

cybercrime. The 2010 law on electronic commerce in Cameroon provided for offences punishable with imprisonment and fines under Sections 44 and 45. The 2010 law on cyber security and cyber criminality has added some crimes related to electronic transactions and has attached punishment to them.⁵⁷ Equally, Punishments here are imprisonment and pecuniary fines.⁵⁸ However, depending on the gravity of the injury caused, the penalty can extend to a death sentence.⁵⁹ Thus remedies in criminal law can be classified into death sentence, imprisonment, and fine as well as accessory penalties. According to Cameroonian laws on e-commerce and that on cybersecurity and cyber criminality which refer to the penal code to punish e-commerce-related offenses, a natural guilty under this law shall be punished by either the death penalty, imprisonment, fine⁶⁰ as well as accessory penalties⁶¹.

In the first place death penalty is the harshest penalty that criminal law provides e-commerce e-commerce-related crimes. Even though the 2010 law has not specifically mentioned the death penalty, it refers to the penal code to punish e-commerce-related offenses.⁶² Therefore a seller who intentionally supplies defective goods or goods that do not conform to the sample and end up leading to the death of the consumer may be liable for capital murder under section 276 of the penal code, where premeditated outcome for example, and punished with death sentence. A death penalty to a corporate body may be interpreted as a complete ban from exercising any e-commerce activity. To that effect, the penal code has provided for the dissolution of corporate bodies guilty of such criminal offenses. Section 25(2) provides that "dissolution shall be a capital punishment against a corporate body. the judgment shall refer such corporate body to the competent court for winding up at the instance of the legal department"

The second place of criminal remedies for e-commerce-related crimes is imprisonment. Imprisonment according to Section 24 of the Cameroon penal code is the loss of liberty during which the offender shall be obliged to work, subject to any contrary order of the court for reason to be recorded. Imprisonment is the primary sanction for a criminal offense. Thus any natural person guilty of e-commerce-related offences that fall within the scope of criminal law may be punished with imprisonment. The term of imprisonment will depend on the

⁴⁴ Section 82(2) of CISG

⁴⁵ See *S.C.M. (U.K.) Ltd V. Whittall and Sons Ltd*, (1971) 1 Q.B. 337 cited in *Amadou Monkaree Op.cit*. P.5.

⁴⁶ See *Cole V. Turner*. Cited in *Amadou monkaree Op.cit* P.6.

⁴⁷ *R. V. St. George*.

⁴⁸ *Bird V. Jones*.

⁴⁹ (1932) A.C. 562 H.L.

⁵⁰ *Mc Loughlin V. O'Brian* (1983) A.C. 410.

⁵¹ See *Eyo V. Eastern Nigeria Newspaper* (1963) 7 E.N.L.R. 144 at 146.

⁵² See *Amadou Monkaree Op.cit*. P.6.

⁵³ Where a merchant or a scammer sell to the buyer goods that does not exist.

⁵⁴ *Windfield and Joloweiz, op.cit?* P.552.

⁵⁵ See *Amadou Monkaree. Op.cit*. P.8.

⁵⁶ (1701) 12 Mod, 542.

⁵⁷ See Sections 60-89 of the 2010 law on cybersecurity and criminality.

⁵⁸ Ibid

⁵⁹ See Section 21 of the Cameroon Penal Code.

⁶⁰ See *ibid*, as well as section such as sec 276 On capital murder.

⁶¹ See Section 30 Of penal code for accessory penalties

⁶² See section 45 and 46 of the 2010 law on e-commerce in Cameroon.

categorization of the offenses.⁶³ So far as corporate bodies as concerned, the corresponding penalty for imprisonment is temporal suspension. This measure can be imposed by the court either as a principal penalty or an accessory penalty.⁶⁴

The third position in the classification of criminal remedies from e-commerce-related crimes is occupied by fines and financial penalties under which a convict pays some amount of money specified by a judgment into the state treasury.⁶⁵ Fine most often accompanies the principal penalty. Sections 45 and 46 of the 2010 e-commerce law have provided for a fine as a remedy for a breach of e-commerce or its related offense or disregard of e-commerce regulations.⁶⁶ Fine as a penalty applies to both natural and artificial (corporate) persons with no practical difficulty unlike imprisonment and death penalties.

In addition to the above principal criminal penalties for e-commerce-related crimes, we have accessory penalties that play a supportive role. Accessory penalties⁶⁷ apply to both natural and corporate bodies guilty of e-commerce-related offenses under Cameroonian criminal law. These penalties include forfeiture⁶⁸ publication of the judgment⁶⁹, closure of the establishment⁷⁰, community service⁷¹, and confiscation⁷².

The difference between remedies in criminal law and remedies in tort and contract is the fact that the remedies in tort and contract provide some relief to the victim in terms of monetary gain that he may obtain in the form of damages for injury suffered or loss. Criminal remedies seem not to give any actual benefit to the victim, as the fine goes to the state coffers and imprisonment costs harm to the accused but does not repair the loss caused to the victim. This may gratify the anger of the victim of cybercrime but leaves him without compensation if he has incurred personal, mental, or loss of property. Fines go to the coffers of the State and our courts do not have powers to award compensation of right. So punishment cannot be very effective as a remedy to a civil party who has lost money or his dignity to hackers. If we take as it is that the aim of punishment is deterrence, we will find that scamming is very lucrative and hackers can afford to commit the offenses and pay part as fines to the State." In this light, we recommend

⁶³ To that effect, see section 21 of the Cameroon penal code.

⁶⁴ See Section 25 (3) of the penal code

⁶⁵ See section 25(1) of Cameroon penal code

⁶⁶ Equally see Section 556-572 of the criminal procedure code which contain additional provisions with regard to payment of fines to be made at the registry of the court.

⁶⁷ Section 19 of the penal code

⁶⁸ Ibid Section 30

⁶⁹ Ibid Section 33

⁷⁰ Ibid Section 34

⁷¹ Ibid Section 18 (1)

⁷² Ibid Section 35(5)

very long jail terms for example 20 years without the option of fines.

III. Defense available in e-commerce disputes/ Limit to the remedies

Many defenses are open for the accused party in an action for breach of e-commerce and other related offenses. These defenses limit the application of the remedies available to victims of e-commerce breaches and related offenses. The defenses include among others; the time limit for request, the return of non-conforming goods, the case of *force Majeure*, a notice of non-conformity, and reasonableness.

III-1. Time Limit for Request

As a general rule for any dispute to be entertained in a court of law, it must be brought within a reasonable time. Article 46(2) CISG entitles the buyer to request substitute goods either in conjunction with notice given under Article 39 CISG or within a reasonable time. According to Article 39(1) CISG, the buyer must give notice of nonconformity within a reasonable time after he has discovered it or ought to have discovered it otherwise he loses the right to rely on a lack of conformity of the goods. If the buyer does not combine his request for delivery of substitute goods with the notice of non-conformity according to Article 39 CISG, he must make his request for substitute goods within a reasonable time thereafter. In determining reasonable time, the time used by the buyer for giving the notice of nonconformity according to Article 39 CISG is to be taken into consideration.

III-2. Return of Non-Conforming Goods

A buyer can only require and claim delivery of substitute goods if he is in a position to return the non-conforming goods originally delivered to him. According to Article 82(1) CISG, 'the buyer loses the right to declare the contract avoided or to require the seller to deliver substitute goods if it is impossible for him to make restitution of the goods substantially in the condition in which he received them'⁷³. However, this will not apply if (a) the impossibility of making restitution of the goods or of making restitution of the goods substantially in the condition in which the buyer received them is not due to his act or omission; (b) if the goods or part of the goods have perished or deteriorated as a result of the examination provided for in Article 38 CISG; or (c) if the goods or part of the goods have been sold in the normal course of business or have been consumed or transformed by the buyer in the course of normal use before he discovered or ought to have discovered the lack of conformity.⁷⁴

III-3. Reasonableness

According to Article 46(3) CISG, the buyer has the right to require the seller to remedy the lack of conformity by repair, 'unless this is unreasonable

⁷³ Section Section 82(2) of CISG

⁷⁴ See *ibid*.

having regard to all the circumstances.' The buyer's interests in repair should be weighed against the seller's expenses and if there is an objective disparity then repair would be unreasonable.⁷⁵ A good example of unreasonableness is when the cost of repairing the breach (be it substituting the good, specific performance, and so on) is excessively expensive and the corresponding benefit to the aggrieved party is minimal. Most often, it is the responsibility of the defendant to prove the defense of unreasonableness.⁷⁶ The court shall thus appreciate.

III-4. Case of force Majeure or act of God

It is a general principle that no party shall be liable for failure to comply with any of his obligations where he proves that such failure was due to circumstances beyond his control such as an act of nature⁷⁷. However, if the failure to perform is a result of an act of a third party under his control (such as his agent) the party shall be held liable⁷⁸ and cannot claim *force majeure* as a defense.⁷⁹

III-5. notice of non-conforming goods

For a buyer to benefit from a reduction of price as a remedy for not conforming goods, he must have given timely notice to the seller about the non-conforming nature of the good per section 39 CISG, subject to Section 40 and 44 of the same convention which are all to the effect that where the buyer does not make a timely complain about the non-conforming nature of the goods, the seller can use that as a defense against a buyers action for nonconforming good. In one case⁸⁰ involving a contract between an Italian seller and a German buyer, for the purchase of a granite stone, a price reduction was not granted because the buyer could not prove that he had given notice to the seller about the non-conforming nature of the good per Section 39 of the CISG.

IV. CONCLUSION AND RECOMMENDATIONS

Technology advancements, such as the development of computer software, and the internet have reshaped human behaviour. It presents numerous advantages to the commercial field thanks to the facility of data transmission. This has facilitated the development of online shops, the emergence of internet content providers as well and a new field known as web influencer marketing which has contributed significantly to improving our quality of life. However, the use of modern information technology has created a new area of human and criminal actions, which hold our society hostage and create great suffering for victims. These victims are legally entitled to remedies. Cameroonian law provides for

these remedies both in criminal and civil law. The purpose of remedies in contract law is where possible to put the plaintiff in as good a position as he would have been had there been no breach. There are however several limits or defences to the exercise of these remedies. Added to that, the plaintiff must articulate with some degree of diligence and certainty the remedy he is demanding. Such remedy must not be limited and the plaintiff must prove that he has made reasonable effort in mitigating the damage or loss or injury suffered.

Moreover, the criminal remedies appear to be insufficient. As a result, it is advised that criminal remedies be enhanced such that jail is preferred over fines, and that the people be educated about their legal rights. In addition, investigative experts should be trained to overcome the obstacles of demonstrating evidence in court. Civil remedies have been discovered to be more appropriate and efficient, but they are not known or used by the victims. Thus, the people should be sensitized and educated upon. Again, more value should be given to accessory penalties such as confiscation, forfeiture, temporal or complete band, and publication of judgment as it will deter e-merchant or business from engaging in an act punishable by law. It will equally help e-buyers know dangerous and uncertain e-commerce platforms and businesses.

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⁷⁵ NGWA Princewill. Op.cit. P. 237.

⁷⁶ See Section 46 of CISG

⁷⁷ See Section 267 of the OHADA UAGCL

⁷⁸ See the latin maxim *qui facit per alume facit per se*.
Meaning he who act through another act by himself.

⁷⁹ See Section 268 of the OHADA UAGCL

⁸⁰ Landgericht Stendal (Germany).