CRIMINALISATION OF THE NON-REIMBURSEMENT OF LOANS ARISING OUT OF A CONTRACTUAL RELATIONSHIP: AN EYE VIEW OF LAW NO. 2019/021 TO LAY DOWN CERTAIN RULES RELATING TO CREDIT ACTIVITY IN THE BANKING AND MICROFINANCE SECTORS IN CAMEROON

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ABSTRACT

The difficulty of providing traditional collaterals of immovable properties such as land, house and other heavy machineries, have pushed many banks and microfinance institutions to provide loans even in the absence of collaterals which is a most probable guarantee for loan repayments. As such, the number of delinquencies is indisputably a challenging enemy of banks and microfinance institutions in Cameroon. It is either borrower's do not promptly repay their loans or deliberately default, leaving banks and microfinance institution to suffer the consequences. Before the Law No. 2019/021 to Lay down certain rules relating to credit activity in the banking and microfinance sectors in Cameroon, breach of a loan agreement could only be seen as a civil or commercial matter to which remedies such as damages and specific performance did apply. The introduction of penalties for loan defaults on the grounds of bad faith, use of fake or false documents by a borrower, attempt or destruction of evidence by a borrower is what makes the 2019 law peculiar. This act of criminalisation which is an innovation to the law regulating banks and microfinance institutions in Cameroon, long existed in some other countries. The worth of banks and microfinance institutions in a country: its ability to reduce poverty and

improve economic growth, justifies the need for criminalising the non-reimbursement of loans when it results from deliberate default on the part of the borrower. The absence of penalties for deliberate defaults will increase the number of bankruptcy of banks and microfinance institutions.

***Keywords**:* criminalization, non-reimbursement, loan default, bad faith, prescription, discontinuance, and contractual.

INTRODUCTION

In every country, the financial sector is often regarded as the ‘‘engine of growth’’.[i] The importance of capital to the soundness of any bank or microfinance institution cannot be over emphasized. Credit determines the level of investment in an economy, and credibly illustrates the business friendliness of an economy.[ii] Capital functions as cushion when bad shocks do occur making it less likely for the credit institution to fail, thus adding to the safety and soundness of the financial institution.[iii] As such, the absence of a comprehensive legislation to protect banks and microfinance institutions will leave many of them on a constant search for financial assistance. A contract is a legally binding agreement that defines and governs the rights and duties between parties. A loan agreement like any contract reflects the elements of offer and acceptance, consideration, and legality of the object.[iv] A loan agreement stands as evidence that money was given out as a loan and not a gift. A loan agreement therefore, is a binding contract between a borrower and a lender which regulates the mutual promises made by each party. Generally, lenders offer either secured or unsecured loans.[v] The common remedies for breach of contract in Cameroon are damages and specific performance.[vi] Considering that such loans are mostly unsecured, default can easily spread from handful of loans to a significant portion of the portfolio.[vii] However, considering the risk that characterise lender/ borrower relationship, and the importance of the existence of credit institutions, the Cameroon legislator adopted law no. 2019/021 which aims at protecting banks and microfinance institutions against defaulting borrowers. Generally, this law sets to guard against

depository funds, protecting the payment system, and reducing the cost of individual bank insolvency which has a negative effect on the growth of the economy. The first two articles of this law, clearly defines its purpose and scope of application in matters of granting credit:

- Conditions for the conclusion of a loan transaction;
- Obligations of the parties concerned;
- Liability regime in the event of payment default[viii] and this law thereby applies to Credit and microfinance institutions operating within the territory of the Republic of Cameroon;
- Borrowers and customers/members of credit institutions and microfinance institutions operating within the territory of the Republic of Cameroon;
- Loan transactions concluded between one or more customers/members and credit providers operating within the territory of the Republic of Cameroon.[ix]

The peculiarity about this law is that, it criminalises non-reimbursement of loans from credit institutions which before this time, was treated as a civil or commercial matter. This revolves around three key aspects: the obligations of the parties engaging in a loan contract, the establishment of the culpability of defaulters and the prescription and discontinuance of proceedings in the case of non-reimbursement.

OBLIGATIONS OF PARTIES ENGAGING IN A LOAN CONTRACT IN CAMEROON

In a loan contract, both the credit providers/lenders and borrowers do have obligations to fulfil, failing which either party can bring an action. This law thus clearly defines the obligations of both parties. Just like the penal legislator, the raison d'etre is to warn before striking.

Lender's obligations

It is expected of every credit provider to offer their customers products and services tailored to their needs, taking into account their repayment capacity in order to avoid any risk of loan default or debt distress.[x]

Equally, credit providers shall also be bound to communicate to customers, on a regular basis, complete information on the cost and quality of the products and services offered them.[xi]

In addition, credit providers shall be required to provide information to borrowers to help the latter determine whether the proposed loan is tailored to their needs and financial position.[xii]

Prior to the borrower's commitment, credit providers must disclose to the borrower the draft credit agreement, the overall effective rate (TEG), the attrition rate and the amortization schedule of the proposed credit transaction. Once the credit agreement is signed, the credit provider shall be required to provide to the borrower a copy of the said agreement, the overall effective rate (TEG), the attrition rate and the amortization schedule of the credit transaction.[xiii]

In each credit agreement, and in any advertisement of loans, credit providers must clearly specify the substance of the loan commitment for the borrower and the resulting repayment obligations.[xiv]

The Borrowers Responsibility under a loan contract

Bad or false information can lead to bad financing and most often to default in repayment and this in turn will result to bankruptcy of the lender. To minimise credit risk as such, it is required of any person be they natural or legal, applying for a loan to ensure the accuracy of the documents and information they provide to the credit provider.[xv] The judgement on whether to grant loans or not, by the credit provider/lender to a greater extend is based on information and documents tendered by the borrower. Reliance on such information by the credit provider/lender, the loan becomes binding on the borrower and co-obligors. The loan shall be repaid according to the terms and conditions set out in the loan agreement.[xvi] Lenders are able to recover loans on schedule only when the repayment capacity of the borrower equals or

exceeds debt service, which consist of principal and interest due for payment, while borrowers are able to repay their loans on time without suffering hardship only when their repayment capacity equals or exceed the debt service due according to the loan contract.[xvii]

Generally, in a loan contract, it is required of the borrower to make payments when they fall due. However, in accordance with the contractual terms early repayment can be made provided the origins of the funds are genuine. [xviii]

However, where there is non-compliance with a repayment term, the credit provider shall send a reminder letter to the borrower, requesting regularization of his/her situation within 30 (thirty) days of receipt of the reminder[xix]. If the borrower fails to regularize the situation after the 30-day period, the credit provider shall serve the borrower a formal notice through a bailiff or by registered mail with acknowledgment of receipt, requesting the borrower to honour his/her commitment within a second period of 8 (eight) days from the date of receipt[xx]. Where the borrower still fails to honour his/her commitment, the credit provider shall proceed with the legal closure of accounts and institute legal action for enforced collection of the debt due. From these provisions of the law, it is very glaring that importance is attached to the character of a borrower to permit the credit provider to determine the possibilities of repayment. This is however more likely where the information provided by the borrower are accurate[xxi]. There is nevertheless a mitigation under section 11(4) and (5) which provides that: *"(4) The lending credit provider shall be exempted from the prerequisites under Sections (1), (2) and (3) above in the event of payment default of a restructured or rescheduled loan. (5) Where such default concerns a collateralized loan, the lending credit provider may redeem the collateral under the terms of the Revised OHADA Uniform Act on the Organization of Collateral".*

With the exception of restructured and/or rescheduled loans, loan default shall, upon expiry of the unheeded formation notice give rise to a ban on credit being issued by a lending credit provider, subject to regularization under the conditions provided for by this law. By virtue of this provision, the law gives preliminary powers of sanctions to the credit provider, thus evidence of a quasi-jurisdiction. A ban on credit shall entail a ban on conclusion of a credit transaction with any other credit institution. The credit provider shall be bound to serve the

borrower, the letter of ban within 72 hours of the ban on credit decision[xxii]. The law further stipulates that, where the loan default is due to any one of the obligors for the same credit transaction, the ban on credit shall apply to each one of them.[xxiii] By virtue of the provisions of this law, it is evident that, the law does not condone with any form of deliberate loan defaults. Whoever contributes to a loan default therefore, will be punished accordingly. To make a ban on credit effective, it is required of the credit provider to inform within 48hours the Secretary-General of the National Credit Council or any other credit institution.[xxiv] The regularization of default does result to the upliftment of the sanction of ban on credit on a borrower. Aside the powers given to the credit provider to sanction cases of loan default, when there is evidence of bad faith, use of false or fake documents, and attempts to destroy evidence, the liability of the borrower will be engaged and penalties given.

THE CULPABILITY OF PERSONS UNDER A CONTRACTUAL LOAN AGREEMENT

Banks and credit institutions most often grant loans to needy individuals based on trust and other components of social capital rather than physical collateral.[xxv] A breach occurs when one party regardless of his or her motivation does not perform under the contract as agreed. When banks cannot recover their loans from borrowers, this is likely to result to liquidity problems for the financial institution.[xxvi] A breach in contract generally entitles a person to bring an action for any monetary damages resulting from the non-performance of the contract. Before the coming into existence of this law, contractual breaches could only receive civil sanctions such as damages and specific performance, given that intent was not really considered. The intentional nature of a contractual breach can be likened to the same moral condemnation as a crime, and as such suggest the possibility of receiving criminal sanctions. The worth of the existence of banks and microfinance institutions in Cameroon, and the difficulty of recovery of credits as aforementioned, justifies the criminalization of non-reimbursement of loans by borrowers. A crime typically requires a wrongful deed or act, as such in criminal law we talk of an actus reus and the mens rea, that is the guilty state of mind. Just like the penal legislator,

the debtor/borrower does not necessarily need to complete the prohibited act before his act is sanction, just the production of fake documents for example to obtain loans from a bank or microfinance, is enough to attract penalties. If a person intent to cause harm, the resulting act merits condemnation and criminal sanctions. Though there are several reasons for loan default, we are concerned with default as a result of bad faith, the use of false or fake documents to obtain loan, and the act of destruction of evidence by a borrower.

Default as a result of Bad faith

Bad faith according to this law is any behaviour of borrowers that intentionally fake their own insolvency. In establishing criminal responsibility, the penal legislator states that criminal responsibility shall lie when there is evidence of intention to achieve results.[xxvii] With inspiration from the criminal code, where evidence shows that default in a loan contract by the borrower is a result of bad faith, it is considered an intentional offence and thereby sanctions can be pronounced by a competent court of law. Whoever, in bad faith, defaults on a loan granted by a credit provider shall be punished with imprisonment for from 6 (six) months to 5 (five) years or with fine of from 100,000 (one hundred thousand) CFA francs to 100,000000 (one hundred million) CF A francs, or with both such imprisonment and fine.[xxviii] However, this fine shall be based on the loan amount due as follows, in CFA francs:

- 100000 (one hundred thousand) to 1 000000 (one million), for an unpaid loan less than or equal to 5000000 (five million)

- 1 000000 (one million) to 2000000 (two million), for amounts greater than 5000000 (five million) and less than or equal to 10000000 (ten million);

- 2 000000 (two million) to 5000000 (five million) for amounts greater than 10000000 (ten million) and less than or equal to 50000000 (fifty million);

- 5000000 (five million) to 10000000 (ten million) for amounts greater than 50000000 (fifty million) and less than or equal to 100000000 (one hundred million);

- 10000000 (ten million) to 25 000 000 (twenty-five million), for amounts greater than 100000000 (one hundred million) and less than or equal to 500000000 (five hundred million);

- 25 000 000 (twenty-five million) to 50000000 (fifty million), for amounts greater than 500000000 (five hundred million) and less than or equal to 1000000000 (one billion);

- 50000000 (fifty million) to 100000000 (one hundred million) for amounts greater than 1000000000 (one billion).[xxix]

It is now possible for a person to go to prison for the non-reimbursement of a loan in Cameroon. However, the definition of bad faith according to this law is to an extent vague giving room for arbitrariness. In a loan contract however, where it is evident that default is as a result of circumstances beyond the control of the borrower, an agreement of extension of payment date known as a moratorium can be reached between the borrower and the credit provider. However, the above penalties for default become applicable in case of failure to comply with a moratorium.[xxx]

The use of false documents to obtain loan from a financial institution

According to this penal innovation by the 2019 law which lays down some rules governing credit activities in the banking and micro-finance sectors in Cameroon, whoever, with intent to infringe the rights of the credit provider, uses or attempts to use false documents to conclude a credit transaction shall be punished with imprisonment for from 6 (six) months to 3 (three) years or with fine of from 100000 (one hundred thousand) CF A francs to 5000000 (five million) CFA francs, or with both such imprisonment and fine.[xxxi] A false document here will comprise any incomplete or falsified document tendered by a person to a financial institution, and relied upon by the institution in making a credit decision.

Destruction of evidence

Destruction of evidence is a dangerous act which warrants sanctions given that it obstructs the due course of justice. The success of a case depends greatly on the quantum and type of proof available before the courts. Destruction of evidence can be defined as any act in which a person

alters, conceals, falsifies, or destroy evidence with intent to interfere with an investigation by a law enforcement, government, or regulatory authority.[xxxii] Destruction of evidence is generally a criminal offence in Cameroon, and this has been supported by 2019 law which states that, Whoever fraudulently causes the deletion or modification of credit data or causes alteration of the functioning of the data processing system, shall be punished with imprisonment for from 6 (six) months to 3 (three) years or with fine of from 100000 (one hundred thousand) CFA francs to 5 000 000 (five million) CF A francs, or with both such imprisonment and fine.[xxxiii] Any modification or alteration in the data processing system may leave the credit provider in a difficult situation to establish the existence of a contractual loan agreement and the eventual breach by the borrower. The intentional act of destruction is very important for a credit provider or interested persons to establish a case for destruction of evidence.

PUNISHMENT OF CO-OFFENDERS AND ACCESSORIES

In criminalising the non-reimbursement of loans, the law does not leave out those who attempt or assist in the default of loan repayments. This 2019 law on banks and microfinance institutions thus authorises the application of penal provisions particularly relating to attempts, conspiracy, co-offenders and accessories when it comes to loan default. In this light, the law allows the application of certain provisions which set out to deter people from aiding in the commission of offences. Attempts by employees' of the credit provider to aid or abet a defaulting borrower for the above mentioned offences are sanction.[xxxiv] An attempt by the wordings of the penal code is considered as performance of any act towards its commission unambiguously indicating an irrevocable intention to commit it, and shall be treated, where execution has been arrested or has failed solely by reason of circumstances independent of the offender's will, as the commission of the felony or misdemeanour attempted.[xxxv] An attempt shall be punishable notwithstanding that complete execution was impossible by reason of a circumstance of fact unknown to the offender.[xxxvi]

Another criminal charge that is likely in a contractual breach relating to non-reimbursement of loans is that of conspiracy. With the exception between husband and wife, a failed conspiracy is sanctioned normally where the reasons or failure is independent of the conspirator's joint will as the commission of the felony or misdemeanour is resolved.[xxxvii] However, while voluntary withdrawal will diminish responsibility, prevention of execution before any attempt shall attract no criminal sanction.[xxxviii]

Again, the penal code provides equal punishment for co-offenders and accessories.[xxxix] This implies that just like the defaulting borrower, any employee who participates in the commission of the act provoking the default or facilitates the use of inadequate or false documents to obtain loan from a credit provider, will be punished in like manner. Understanding the full consequences of bankruptcy on a credit institution, added to an imprisonment or fine, a ban can be pronounced on a person convicted for any of the offences aforementioned. In addition, execution of penalties does not in any way exempt the debtor from their obligations to the credit provider.[xl]

LIABILITY OF LEGAL PERSONS

In law, a legal person is any person or thing that can do the things a human person is usually able to do in law such as enter into contracts, sue and be sued, own property.[xli] In Cameroon, duly registered companies are accorded legal personality, with rights and duties like a natural person. By virtue of this 2019 law, legal persons shall be criminally liable for offences committed by their managers or employees.[xlii] However, the criminal liability of legal persons shall not preclude that of natural persons who are perpetrators or accomplices of the same offences.[xliii] Generally, once criminal liability is established on a legal person, the penalty shall be a fine.[xliv] However, there law permits the application of one of the ancillary penalties provided for by the penal code on an accused legal person.[xlv] Ancillary penalties available for legal persons under the penal code thus include:

- Ban, for a specified period of time, on the direct or indirect exercise of any or all of its activities;
- Placement under judicial supervision for a specified period of time;
- Closure, for a specified period of time, of establishments or branches having served in the commission of offences;
- Publication or media broadcast of the judgment;
- Any other accessory penalties provided for by special instruments.[xlvi]

PRESCRIPTION AND DISCONTINUANCE OF CRIMINAL PROSECUTION RELATING TO NON-REIMBURSEMENT OF LOANS

Generally, as a justification for prescription of prosecution, it is often said that everything that happens, can be corrected with time. Any grounds for prescription must be an expression of the law.[xlvii] In criminalising the non-reimbursement of loans by borrowers from banks and microfinance institutions, provision is made for prescription that is a time after which the credit provider will not be allowed to bring a criminal action against a borrower for bad faith. When all attempts to regularise the breach fails, the credit provider or any other person concerned shall have no more than 60 (sixty) days to institute criminal proceedings against the borrower of bad faith, failing which it shall be precluded from doing so.[xlviii]

Furthermore, the law gives a possibility for a borrower/debtor to repay their loans before the commencement of the hearing of the parties, and even before judgement is delivered on merits. When this is done, the criminal case will be discontinued as per section 64 of the Criminal Procedure Code.[xlix] Going by the wordings of section 64, where criminal procedures could seriously imperil social interest or public order, by the authority of the Minister of justice, a Procurer General of the Court of Appeal can enter a nolle prosequi which in effect discontinues the criminal proceedings. However, the discontinuance of proceedings referred to above shall not preclude the possibility for the court so seized to pronounce a ban on credit against the delinquent borrower concerned for a period of no less than 1 (one) year and no more than 5

(five) years.[l] This goes with the saying that discontinuance by way of a nolle prosequi as per section 64 of the Criminal Procedure Code does not amount to an acquittal, and also the civil claim survives against an accused for breach under a contractual loan agreement. The essence of criminalising the non-reimbursement of loans arising from a contract is to avoid bankruptcy of banks and other microfinance institutions, so discontinuance of criminal proceedings following repayment by a debtor is well placed.

CONCLUSION

After a careful perusal of the law, we come to the conclusion that in a contractual loan agreement between a borrower and a credit provider in Cameroon, more risk is given to borrowers who are expected to repay loans once they fall due, failing which criminal sanctions becomes the option. The fear of legal repercussions of imprisonment and fines to a greater extend is necessary to discourage loan defaults in Cameroon. Nevertheless, while attention is against defaulting acts of borrowers to strengthen the credibility of financing institutions in Cameroon, our eyes should equally be open to the fraudulent behaviour of some financial institutions against their clients.

ENDNOTES

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