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The Admissibility of Electronic Evidence in E-Commerce Contracts Disputes: Comparative Study of the Case of Cameroon, Belgium and United State

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ABSTRACT

This article is an assessment on the conclusion of e-commerce contracts and the burden of proof in electronic commerce or online payments in case of disputes. The fact that electronic contracts are paperless documents concluded online poses problem as to the information fad on the internet and posts on the websites of the suppliers or sellers of goods and services, when retrieved from the web, would only be photocopies of such information and they may be considered in most cases as hearsay evidence coupled with the disruptive nature of the internet may cast doubt on the validity of the contract. So the manner in which such information can be retrieved to be used as potential evidence in legal proceedings becomes more challenging on the evidential burden of proof in case of disputes in the e-commerce environment. Also, the value of electronic commerce transactions extends far beyond the conclusion of e-commerce contracts to the number of disputes actually resolved because the location or identity of the seller is unfamiliar or the items being sold lack a well-known brand. The primary objective of this study is to analyze the conclusion of electronic contracts and the onus of proof in case of disputes. The main research question in this study is to find out when a misrepresentation, breach, or fraudulent online transaction occurs and one of the online customer dispute the transaction, which of the online customer takes responsibility for his or her argument. According to the study, a comparative research approach is based on documentary study analysis. It is, therefore, questionable if Cameroon's legal mechanism dealing with e-commerce disputes is genuine and whether the existing inadequate online dispute resolution legislation with regard to the onus of proof in online dispute cases can address the challenges faced by online customers. This research proposes that streamlining guidelines on the burden of proof in e-commerce dispute cases in Cameroon will be paramount important due to its economic nature to avoid heavy loss and instill confidence of e-consumers. According to one writer, if consumers of the online business world are provided with an effective mechanism for redresser of their grievances

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it will go a long way to promote e-commerce. Therefore this study will fill this gap through the examination of the technological and regulatory mechanisms of online dispute resolution via a comparative study in Cameroon, United State and European Union.

Keyword: *Admissibility, Electronic, Evidence, E-Commerce, Contract, Disputes.*

I. INTRODUCTION

The conclusion of e-commerce contracts electronically has grown exponentially and this has given rise to a multiple of questions as to the increasing number of e-commerce dispute cases. The nature of the disputes makes it difficult for parties to resolve their disagreement on the basis of the burden of proof. Therefore, the availability of online dispute resolution (ODR) is an asset that users will consider as they access risks of participating in a new marketplace or other electronic environment. Acknowledgement by a marketplace that disputes may occur, and the establishment of easy procedures for the onus of proof in case of disputes will establish trust matrix in the online business transactions. So particular attention should be given to the issue of dispute resolution especially when it comes to the onus of proof in case of a dispute.

E-commerce is a field that has portrayed a need for new dispute resolution approaches which are possible. Just like offline business transaction, online system has developed a number of dispute resolution options that take into account a special quality of cross-border transactions in which much of the exchange is electronic in nature. At the beginning online dispute resolution was not in the minds of early economic entrepreneurs, but as times goes on the inevitability of disputes and need for online dispute settlement has become relevant.

The internet today which has become disruptive and facilitative, with all its numerous ways of interacting online in doing businesses allows disputes to occur, thereby giving rise for the need for dispute resolution mechanisms that can help disputants who may be at great distance from one another. In this respect, with the improvement in technology, making people involve in increasingly complex informational activities online, online disputes resolution procedures have also become more sophisticated as well. So, the numbers of disputes cases that occur within the internet are more visible than the solutions made possible via the internet. E-commerce disputes occur inevitably and often quite quickly as new kinds of transactions and interactions emerge online. Despite dispute resolution processes, however, the burden of proof for complex disputes online has also become more challenging in the e-commerce environment. The history of online disputes resolution date as far back in 1992 where internet was largely a center of US network and commercial activity was completely banned fro it under the country's National Science

Foundation². During this period, internet was used only for academic purpose for sending email and for exchange of files. So individuals taking part in role-playing games considered famous disputes that occurred at the time and as a result online mechanisms were used to deal with these kinds of conflicts, and no organized dispute resolution frameworks was designed to handle online dispute cases.

Disputes related to commercial activities only began in 1994 when two lawyers tried to recruit clients to take part in an immigration scam³ after the ban on commercial activity was off lifted. As from 1995 to 1999, as the rate of online activity increase, this gave great recognition to online disputes resolution mechanism. As new activities began to emerge in cyberspace, internet service providers began to provide with storage and connectivity to subscribers and it was not quite clear what would be internet service provider's legal liability for subscriber's actions. The question that arose was under what circumstances may internet service providers are able to check all the subscribers to see if any illegal activities have been committed. In response to this question, an online arbitration project was established called the Virtual Magistrate⁴. This was to give internet the focused online framework that it deserved to handle problems that were arising within e-commerce system. As a result the first online dispute case was mediated by the online Ombuds office, an online mediation project at the University of Massachusetts, and online mediator helped an individual website owner resolve a problem with a local newspaper claiming copyright infringement⁵. By 1999 up to date, as online dispute resolution industry has grown exponentially, there has been great recognition by governments and commercial interests that online mechanisms can be a solution for many problems that originate in the business world. To this effect, the development of information and communication technology has led to the development of international transactions with the greater opportunity of bringing people together without necessarily crossing the border, saving time, create new jobs and contributing to global growth of the economy⁶

II. DEFINITION OF ELECTRONIC CONTRACTS

Understanding what is an electronic contract, is essential to your business success in an increasingly digital world. The term contract is very important for economic transaction and as such contract play a key role of reconciling efficiency and contractual justice in electronic

² Kesan and Shah 2001

³ Everett-Church 1999

⁴ See <http://www.vmag.org/>

⁵ See Center for Internationals Technology and Dispute Resolution, Online Ombuds Narrative/: The website developer and the Newspaper at www.ombuds.org/narrative.I.html

⁶ Comfort FuahKwanga, 'Electronic Commerce in Cameroon: An Appraisal of Legal Issues and Challenges', *Journal of Humanites and Social Science (JOSR-JHSS)* Vol. 23, Issue 6, Ver, 3, June 2018, p.41

commerce. The Cameroonian law which is applicable to commercial activity⁷, electronic commerce⁸, electronic document⁹, electronic data exchange¹⁰, electronic signature¹¹, has not defined what is electronic contract. In chapter three of it's simply stipulates that "the signing of contracts by electronic means shall be allowed subject to the conditions laid down by the laws and regulations in force"¹². The regime of written contracts shall apply to electronic contracts in terms of consent, their legal effect, validity and implementation, except for the following contracts: contracts which create or transfer rights over immovable property, except for renting rights; contracts for which the law requires the intervention of courts, public authorities or professions exercising public authority; surety and guarantee contracts produced by persons acting for purposes not coming under their professional or commercial activity; contracts governed by family law and law of succession¹³. According to article 11, further states that "bids made electronically concerning the supply of goods and services shall be accompanied by the contractual conditions applicable thereto such that they can be stored and reproduced. Without prejudice to the conditions of validity mentioned in the said bids, the authors of the bids shall remain bound as long as remaining accessible online is their own doing¹⁴. An electronic contract is an agreement that is drafted, negotiated and executed completely online. Therefore, electronic agreements disclose the contractual relationship and obligations between a website owner and its commercial users. Electronic commerce agreements include terms for the various activities to be performed via internet commerce transaction. These agreements provide a business with protection regarding third party services and transaction, as well as limit liabilities. Additionally, they come in all forms and relating to virtually any types of internet commerce transactions. Electronic contracts can eliminate many costs associated with traditional pen-and-paper contracts and see countless other advantages. As electronic contract become more popular, your business must understand how to make them enforceable and binding. In an electronic contract which is an agreement formulated online, the parties interact with one another in a digital format, rather than in person or over the phone. Although it is digital, an e-contract is till a contract. It is an agreement between two individuals or companies to create a binding mutual obligation that must meet certain legal elements to be enforceable. First there is Offer: A specific offer from one party to the other to perform some

⁷ Article 2 (1) of Law No. 2010/021 of 21 December 2010

⁸ Article 2 (5) of Law No. 2010/021 of 21 December 20210

⁹ Article 2 (10) of Law No. 2010/021 of 21 December 2010

¹⁰ Article 2 (12)

¹¹ ARTICLE 2 (17)

¹² See Article 9

¹³ See Article 10 of the 2010 law on electronic commerce in Cameroon

¹⁴ See Article 11 (1)

service or pay for some goods. Second, a promise: A promise to do the action that has been accepted, such as payment for certain goods. Third is consideration: Something of value given by one party to the other in exchange for goods or services. For example, John pays 5000 FRS for office supplies. Fourth is capacity: Whether or not the signer's understands the terms being agreed to. Lastly is legality: The contract matter itself is legal. Ecommerce contracts are held to many of the same standards as traditional contracts. There must be the meeting of the minds for the agreement essentials terms. The contract should clearly outline each party's responsibilities and dictate the requirements necessary for full compliance.

(A) The nature of e-commerce disputes

With commercial transaction now making wave in the cyberspace, online dispute has become inevitable. This has led to the evolution of online disputes resolution. Since it emergence, online dispute resolution mechanism is capable of resolving online disputes especially with regards to electronic commerce. Disputes being inevitable in the course of the life of business, whether online or offline, the nature of the business disputes which the enterprise may encounter include the followings. We have contractual disputes as well as non contractual disputes.

a. Contractual disputes.

Contractual disputes are disputes between the enterprise and the internet service provider or web-hosting services provider including disagreements over interruptions in service, breach in data security. Here we may have business to customer (B2C) disputes between the enterprise and it customers over non performance of contractual obligations, poor performance of contract, misrepresentation, breach of the privacy policy, and breach of security of confidential information. We may also have business to business (B2B) disputes between the enterprise and its suppliers such as non-performance of contractual obligations, misrepresentations and complaints from customers regarding services provided by suppliers. There is also business to consumer (B2C) disputes between the enterprise and it customers such as non payments for goods and services, non performance of contractual obligations, poor performance of contract, misrepresentation, breach of privacy policy and breach of confidential information. It is between the enterprise and it customers that lay the greatest possible scope for disputes.

b. Non contractual disputes

These are the common kinds of non-contractual disputes that may arise in an online enterprise. In this domain, with regards to copyright, the enterprise might be liable for copyright infringement if it uses copyrighted material in excess of fair use and without permission. With regards to data protection, the enterprise maybe liable for sharing or revealing confidential data

on customers, as discussed in the segment on privacy. Also, with the right of free expression, the enterprise maybe subject to defamation suits for defamatory materials posted online. We also have competition law, domain name registration and trademark owner's disputes. It is also very important to note that the enterprise may be subject to trademark infringement suits if it infringes a registered or otherwise legally recognized trademark. If the enterprise has registered a domain name which corresponds to a registered or common law trademark, which may be subject to complaint under the Uniform Domain Name Dispute Resolution Policy. In general the more the internet was used for any activity, the more disputes arose. For example, use of the internet for distribution of pornography led not only to legislation and court cases but to disputes on college campuses about freedom of expression and access. Similarly, as the number of websites grew, disputes arose not only about domain names but about the legality of linking and about various other intellectual property issues related to the use and copyright information. The mostly widely known and widely used dispute resolution venues concerning cyberspace related disputes are the online auction site eBay and the Domain Name Disputes Resolution Process designed by the internet corporation for assigned names and numbers (ICANN).

While the domain names such as eBay.com make it easy for humans to remember web addresses, they become a matter of concern to trademark owners when the domain name is similar or identical to a trademark. A domain name can be registered by anyone, and the cost is normal. Those in charge of registering domain names could have avoided some conflict by making registrants aware that they might encounter problems if they registered a word that was trademarked. The US patent and trademark office maintains a website enabling free searches of the US trademark database¹⁵. Such searches have generally not been done at registration, however and even today, anyone who wishes to register a trademark word can do so.

III. TYPES OF ELECTRONIC CONTRACTS

Many different kinds of electronic contracts are used in business agreements. Well-executed online contracts combine the formality of a traditional contract with the ease of digital acceptance. The specific type of electronic contract your business should use will depend on the scenarios in which you will have to present agreements. The following are a few of the most common types of electronic contracts. First, we have browse wrap agreements. Browse wrap agreements are mobile app or website notices. They state that the user agrees to be bound by the terms and conditions of the agreement simply by using the app or website. This is often presented via a hyperlink on the website for users to click. Browse wrap agreements do not

¹⁵ See www.uspto.gov

necessarily require another step to assent to the agreement. Secondly is a click wrap agreements. A click wrap agreement requires a user to click 'I agree' to be bound to the electronic contract. This demonstrates that the user explicitly assents to the agreements rather than implicit agreement through a browse wrap. Thirdly, is a scroll wrap agreement. Scroll wrap agreements take click wrap agreements another step further. They require the consumer to scroll all the way through the terms and conditions before they can click the click wrap. Fourthly is a sign-in-wrap agreement. A sign-in-wrap agreement collects acceptance at the same time a user signs in to use a product or service online. Lastly electronic signatures¹⁶. This is any means of proffering a signature digitally. That often means squiggly lines, but can also be as simple as the click of a button or checking of a box. In every case, effective contract management software can help maintain records and ensure the enforceability of these electronic agreements.

IV. UNDERSTANDING OF E-COMMERCE ARBITRATION DISPUTES RESOLUTION

Arbitration is a process where a neutral third party (arbitrator) delivers a decision which is final and binding on both parties. It can be defined as a quasi-judicial procedure because the award replaces a judicial decision. In arbitration procedure parties usually can choose the arbitrator and the basis on which the arbitrator makes the decision. Another feature of arbitration is that the award is enforceable almost everywhere due to the wide adoption of the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards¹⁷. The majority legal studies on online arbitration agree that neither law nor arbitral principles prevent arbitration from taking place online¹⁸. Although online arbitration seems admissible under the New York Convention and the E-Commerce Directive, this is arguably an assumption by most scholars rather than a legal statement¹⁹ because an online process without a regulatory mechanism may give rise to a significant number of challenges from consumers and other weak parties if due process of law can not be secured. More recently, most arbitration providers allow parties to carryout online only part of the arbitration process. For instance, parties may download claim forms, the submission of documents through standard email or secure web interface that is the use of telephone hearing²⁰. It is but obvious that one of the main challenges

¹⁶ Article 2 (18) on the General provisions of Law No. 2010/021 of 21 December 2010, the Cameroonian legislator has defined electronic signature as "signature obtained by an asymmetrical encryption algorithms that helps to authenticate the sender of a message and verify the integrity thereof".

¹⁷ The New York Convention has currently more than 150 signatories: See <http://www.uncitral.org/uncitral/en/uncitral-texts/arbitration.html> of J.M Mathews, 'Consumer Arbitration: It is Working Now and it will work in the future', 79, 2005, *The Florida Bar Journal*, p.1

¹⁸ E. Katsh and J. Ritkin J., *Online Dispute Resolution Resolving Conflict in Cyberspace*, San Francisco, Jossey Bass, 2001

¹⁹ R. Morek , 'The Regulatory Framework for Online Dispute Resolution: A Critical View', 2006, 38 *Toll Law Review*, 165

²⁰ L. Ponte and T. Cavanaugh, *Cyber Justice, Online Dispute Resolution for E-Commerce* (New Jersey, Parson

for online arbitration is that if judicial enforcement is not required then it partly going to defeats the purpose of having an online arbitration process.

(A) The meaning of online dispute resolution

An online dispute resolution is a branch of dispute resolution which uses technology to facilitate the resolution of dispute between parties. It primarily involves arbitration, mediation, negotiation or a combination of all the three methods. To this effect, it is often seen as being the online equivalent of alternative disputes resolution²¹. That notwithstanding an online dispute resolution may also augment traditional means of resolving disputes by introducing new techniques and online technologies to the process. Online disputes resolution may be applied to varieties of disputes ranging from interpersonal disputes including consumer to consumer disputes (C2C) or interstate conflicts²². While the application of ODR is not limited to disputes arising out of Business to Consumer (B2C) online transactions, it is therefore logical to use this medium (the internet) when the parties are frequently located far from one another²³. Therefore, court-related online dispute resolution is a public facing digital space in which parties can convene to resolve their disputes or case²⁴. There are three essentials components that make court-related online disputes different from other forms of technology supported disputes resolution as see below.

Firstly, the process operates exclusively online. Unlike other court process that provide and online interface with which to accomplish discrete tasks such as e-filing, video hearings, ODR users do not otherwise interact with the court for traditional in-court procedures or events. Secondly, the procedure is explicitly designed to assist litigants in resolving their case rather than a technology platform to assist court staff-decision-making. It is not merely a platform for defendants to negotiate a payment schedule to satisfy debts but provide a potential means to challenge the validity of claims or to raise affirmative defenses. This means that when an arbitration dispute resolution takes place using computer mediated communication in the online environment, it is referred to as an online dispute resolution²⁵. Thirdly, the process which is supported by the judicial branch is not a form of private alternative dispute resolution, but which extends conflict resolution services offered by the judicial branch into digital space to service

Prentice Hall, 2005, p. 84

²¹ Arthur M. Monty Ahalt, *What You Should Know About Online Dispute Resolution*.

²² See National Centre for Technology and Dispute Resolution, Standards of Practice at www.odr.infos.

²³ L. Bygrave, 'Online Disputes Resolution: What it means for consumers', paper presented at a conference entitled 'Domain Name Systems and Internet Governance' Grace Hotel, Sydney, 7, May 2002, p. 2

²⁴ ODR-<https://www>

²⁵ See United Nations Conference on Trade and Development: *E-Commerce and Development Report 2003*, internet edition prepared by the UNCTAD secretariat, p. 177

citizens transparently, effectively and more efficiently.

It is important to note that the definition of online disputes resolution techniques range from methods where parties have control of the procedure, to methods where a third party is in control of both the process and the outcome²⁶. The primary methods of settling the matter may be complemented with ICT²⁷ when the process is conducted online, is referred to as online disputes resolution. This may include the initial filing, the production of evidence, the neutral appointment, oral hearing if needed, online discussion and the rendering of binding settlements. According to one writer²⁸, online dispute resolution is totally different medium to resolve disputes from the beginning to the end with regards to due principles of law.

So therefore, online dispute resolution was born from synergy between alternative dispute resolution and information and communication technology as a means for resolving disputes that were unavailable and entirely inefficient²⁹. The introduction of modern technology in online dispute resolution is rapidly growing to the point that the different between offline and online disputes resolution is blurry. It has been noticed that it is only possible to distinguish between proceedings that rely more on online technology and proceedings that appear not to be³⁰.

V. THE MANNER OF CONCLUSION OF ELECTRONIC CONTRACTS

The electronic trade is the most modern form of commerce used today. For it to come into existence, its conclusion needs to be made in electronic form. Because of the technology means used to conclude it, of the distribution and of the place where it is concluded, practice imposed a set of private rules for the conclusion of the electronic contracts, derogatory of Common Law. This rule regards both the stage that precedes the conclusion of the contract, and the conclusion itself. The present study will highlight these particular aspects. It is therefore important to note that concluding contracts and getting documents executed in a timely and correct manner often presents some practical difficulties³¹. The Cameroonian legislator through the Prime Ministerial Decree fixing the modalities for the exercise of electronic commerce have provides conditions

²⁶ C. Rule, *Online Dispute Resolution for Businesses, B2B, E-Commerce, Consumer, Employment Insurance and other Commercial Conflicts*, San Francisco, Jossey Bass, 2002, p. 37

²⁷ P. Cortes 'A European Legal Perspective on Consumer Online Dispute Resolution', 2009, 15(4), *Computer Telecommunications Law Review*, pp. 90-100

²⁸ J. A Garcia Alvaro, 'Online Dispute Resolution Uncharted Territory', 7, *The Vindobona Journal of International Commercial Law and Arbitration*, p. 180

²⁹ E. Katsh and J. Rifkin J., *Online Dispute Resolution Resolving Conflicts in Cyberspace*, San Francisco, Jossey Bass, 2001

³⁰ J. Hoinle, 'Online Dispute Resolution: The Emperor's New Clothes', 2003, 17(1) *International Review Law Computers and Technology*, 27. See also Cf. J. Hoinle, *Cross-border Internet Disputes Resolution*, Cambridge, and Cambridge University Press 2009.

³¹ The Covid 19 pandemic (corona virus) measures including postal service delays provide businesses with an extra challenge in order to get agreements and other documents executed.

with regards to the manner of concluding electronic contracts. Therefore, it becomes necessary for both parties to know their duties and obligations, the parties they are dealing with, the nature of goods and services to supply, and the legal forum to submit their grievances in case of disputes³². According to article 15 of the law on electronic commerce prior to the conclusion of a contract the seller shall be bound during electronic commercial transactions to provide the consumer with the price, the nature of the goods or services and the characteristics of the products, payment conditions, the conditions and datelines for delivery, the condition for the termination of the contract³³. The information must be provided electronically and put at the disposal of the consumer for consultation at all stages of the transaction³⁴. The law further provides that before concluding a contract, the seller shall allow the consumer to make a final statement of all its choices, confirm or modify the order as it may desire and consult the electronic certificate relating to its signing³⁵. It finally concluded that unless otherwise agreed by the parties, the contract shall be concluded at the address of the seller and on the date of acceptance of the order by the latter through an electronic document signed and addressed to the to the customer³⁶. This conditions are not applicable to contracts concluded through personal e-mails or individual communications. The seller shall have a period of ten days from the date of signature to provide the consumer with a paper or electronic document containing all the information relating to the sales operation³⁷.

The Belgian Law³⁸ offers some provisions regarding the electronic conclusion of agreements and e-signing of contracts. Some of these options may not be as advantageous as others, and the manner of conclusion one opts for might have consequences regarding the burden of proof in case of disputes. Under the Belgian law, the manner of conclusion of electronic contract is in accordance with the Code of Economic Law, considered valid for any act or contract. Whatsoever the case, courts may execute those acts or contracts that (i) involve a transfer of real estate (ii) require the intervention of a court/authority/professional charged with a public function (such as a notary), (iii) provide collateral or personal securities and (iv) relate to family

³² A Davison, *The Law of Electronic Commerce*, Cambridge University Press, 2009, p.25

³³ Law no. 2010/021 of 21 December 2010, article 15 (1)

³⁴ See article 15 (2) of Law no. 2010/021 of 21 December 2010

³⁵ See article 17 of Law no. 2010/021 of 21 December 2010

³⁶ See article 18

³⁷ See article 19

³⁸ Law on Digital Economy No. 1383 of August 2nd, 2011 published in the Monaco Journal of August 12th, 2011. Thanks to its application by Sovereign Ordinance No. 6.525 of August 16th, 2017 that was published in the Monaco Journal of August 25th, 2017 as regards in particular the reliability of an electronic signature, of an electronic stamp and of electronic time stamp used as part of the conclusion of a contract electronically, and which was recently completed by the sovereign Ordinances No. 6.700, 6.702 of December 7th, 2017 which were published in the Monaco Journal of December 15th 2017

or inheritance law. In order for the court to reject a contract in one of the aforementioned cases, the law requires practical impediments to the electronic conclusion of the contract. This will be the case in certain rather exceptional circumstances, when it is found that the legal requirements for the conclusion of a contract, such as the rectification of the signing capacity of the parties, are impeded in the electronic environment. Both the Code of Economic Law and the Civil Code recognized the possibility for agreements and other documents to be signed electronically. In principle, most Belgian agreements are considered validly concluded where there is consent between the parties on the essential elements of the contract. The expression of this consent can usually be chosen freely and is not subject to specific formalities (the Civil Law concept of consensualism). The formalities regarding electronic conclusion or signing of an agreement therefore mainly concern the validity of the evidence of the conclusion and signing of agreements.

The new dispositions of the Civil Code on evidence now explicitly accept digital evidence such as e-mails and text messages. This means that courts are not allowed to refuse documents in evidence only because they are in electronic form. While previously electronic data such as e-mails, text messages were often considered as a “beginning of evidence”, they are now considered evidence themselves that, in certain cases, can prove consent on the essential elements of the contract and thus its existence.

The Code of Economic Law imposes some additional requirements for electronic contracts offered by service providers that are active online. Note that this legislation is mainly intended to B2C contracts, and that the code of Economic Law explicitly provides for the possibility to deviate from the applicable regime in a B2B context. Before its user places an order online, every service provider needs to put at the disposal of the user the followings:

- The languages in which the contract can be concluded;
- The required technical steps to conclude the agreement;
- The technical means offered to the user to review and correct information before ordering, and;
- The terms of the archiving process and the possibilities of access, if applicable.

After the receipt of the order, the service provider must immediately acknowledge the receipt and provide a summary of the order. Another element to take into account is that in a B2C context, seller or the service provider must provide the consumer with the details of the electronic agreements on a “**durable medium**”. According to European case law, such a

durable medium is usually defined as an instrument which enables the recipient to store information addressed personally to him in a way accessible for future reference for an adequate period of time and which allows the unchanged reproduction of the stored information. Conclusively, Belgian law offers several possibilities to validly conclude and execute most contracts electronically. The preferred method of signing and possible additional requirements will depend on the value of the contract, the means at the parties' disposal, the risk of the validity being disputed, and the capacity of the other party (business/consumer).

VI. EVIDENTIARY BURDEN OF PROOF IN ELECTRONIC COMMERCE DISPUTES

The onus of proof is a legal standard that requires parties to provide evidence to demonstrate that a claim is valid. To this respect, there are three levels of the burden of proof that determine the level of evidence required for a claim to be established, namely proof beyond a reasonable doubt, a preponderance of the evidence and clear and convincing evidence³⁹. In civil lawsuits, the burden of proof rests on the plaintiff or the person filing the suit. The plaintiff should prove that the allegations are not true and that the defendant or the other party caused damages. This is usually done by the plaintiff through a preponderance of evidence⁴⁰. Generally the burden of proof describes the standard that a party seeking to prove a fact in court must satisfy to have that legally established.

Mostly in the e-commerce sales, merchants find themselves wrestling with the process which is triggered when consumers dispute a purchase transaction. Increasingly friendly fraud has also become a direct cause of numerous complaints. So one of the main focuses of e-commerce recently has been related to secured payments. Chargeback is a remedy used to reverse transactions made with credit or debit cards when a fraudulent use has occurred or when there is a violation of the contract terms. This procedure is very popular among online consumers since this is the main mechanism to transfer money online. Consumers are not required to give evidence to cancel a payment but the vendor has the burden of proving that the merchandise or service was given according to the contract terms. Once this is proved, the bank makes effective payment to the vendor. In the world today, chargeback are commonly used by banks and the main credit cards suppliers such as visa, MasterCard and American express. The average debit and credit cards varies among different countries. Commonly debit cardholders have fewer protections than credit cardholders but it also varies according to jurisdiction. It not surprising why credit cards are the major source of payments for consumers in e-commerce. They provide

³⁹ www.investopedia.com/terms/b/burden_of_proof/

⁴⁰ Bencrup.com/faqs-what-is-burden-of-proof/

a remedy that reverses all transactions when a fraudulent use has occurred, or when there is a violation of the contract terms. However, this method has limitations, it offers one single remedy, the return of the payment and not all disputes imply a breach of the contract or fraud.

Also, online payments providers like PayPal.com return temporarily the money paid by a buyer when the latter makes a complaint within 45 days after the payment was made. PayPal.com holds the money until the dispute is settled, but only in those cases where the merchandise did not arrive, or the description of the product was significantly different from the product itself⁴¹. In this circumstances PayPal.com act s akin to an online arbitrator⁴². However, in those circumstances where the sellers take away the money from account, before the buyer makes the claim, PayPal.com will not be responsible for the buyer's loss. Despite this, PayPal is in a very strong position since in most cases it is able to freeze the amount of money and resolve the dispute providing an instant and effective enforcement.

It is very important to note the function of charge-backs which is intended to balance the inequality of power between the businesses and consumers. It is an efficient tool for consumers because of its accessibility, speed and lack of charge for their clients who would just have to notify their banks or card issuers to cancel a transaction. By contrast the existing processes are considered largely inefficient and not transparent in the global business world because it put businesses in bad light since the burden of the proof rests on them. Merchants carry the burden of proof in chargeback disputes. This means that in a chargeback scenario, merchants must identify the item, date, amount and buyer. Also the merchants are required by law to respond within 30-45 days or the chargeback is automatic and lastly smaller merchants lack both the time and staff to track down transaction level details and if the merchant can not carry the burden of proof, they lose the revenue, merchandise and time spent. An appeal processing exists, akin to an appellate court, and if the merchant wins they keep the sale revenue.

(A) The case study of Cameroon

It is important to note that in an electronic contract disputes, holding any of the parties liable in case of a dispute is not an easy task given the fact that there is the problem of evidential uncertainty due to the nature of e-signatures. For instance, it may be very difficult to make a distinction between authorized electronic signatures whereas a forged handwritten signature can be distinguished from a genuine signature with the help of an expert in handwriting. Another practical difficulty that may arise as to the liabilities of the parties in electronic commerce

⁴¹ www.paypal.com.understanding.dispute.resolution, July 19, 2022 PayPal editorial staff

⁴² <https://www.paypal.com/us/smarthelp/contact-us> in a web browser

dispute cases are as to whether the parties can be held liable in contract or in negligence. With regards to contract, any action will pose some difficulties of breach of the contract because of the lack of a direct link between the relying party and the signatory who in this case is the subscriber. Also, any action based on negligence would raise the question as to whether one of the parties owes the other a duty of care especially when it comes to economic loss. There is a high degree of reliability and security on electronic signature when it comes to dealing with e-commerce transactions with regards to digital certificates maintenance. When this reliability and security are not respected, it may lead to misunderstanding. Under the 2010 law on electronic commerce there three categories of persons involved in the creation and use of electronic signatures namely the signatory who is the holder of the signature⁴³, the third party also called the certificate service provider and the parties who relies on the electronic signature. The law imposes on all the parties the responsibilities in the creation and use of electronic signatures with rights and obligations⁴⁴.

In Cameroon before the coming into force of the law of 2010/021 of 21 December 2010, the evidential validity of online contracts was of little effect and could only be valid in exceptional circumstances. According to the OHADA Uniform Act on General Commercial Law⁴⁵, prove of electronic transactions can be brought by every means including electronic writing and this rule is only applicable to commercial business concluded in the exercise of the profession. It should be noted that online businesses are paperless transactions conducted through the internet with the use of a computer. This is different from the traditional contract formation that are based on paper written form, authenticated by signatures that can be easily presented and the law can treat easily.

The Cameroonian legislators has filled this lacuna of the burden of proof of electronic contracts in an explicit manner rather than express by consecrating the authenticity of electronic contracts to the validity of legal acts. This simply implies that all forms of prove can be accepted such as digital photographs, data electronic files, emails, word processing documents etc subject to verification⁴⁶. This means that parties to an e-commerce disputes case have to return documents in the form in which documents are issued or presented electronic or otherwise. In this respect, it could be said that the Cameroonian law makers were more reactive than proactive in developing evidentiary standards with regards to the burden of proof relating to electronic commerce matters. Also, the law makers have made the burden of proof easier on the party

⁴³ Article 35 of Law No. 2010/021 of 21 December 2010 on electronic commerce in Cameroon

⁴⁴ Article 36 and 37 Ibid

⁴⁵ See article 5 of the OHADA Uniform Act

⁴⁶ See article 13 (2) and 14 of Law No. 2010/021 of December 2010

filing a law suit to submit electronic materials to the competent courts as evidence in hard copies and printout⁴⁷ of electronic records when the original documents have been destroyed or deleted through internet disruption.

a. The situation of Mobile Money Companies operating in Cameroon.

In the 21st century most developing countries in general and Cameroon in particular have discovered in mobile money services a sustainable alternative to our traditional banking systems. Mobile money is a service which permits customers to obtain access to financial services employing cellular devices⁴⁸ by dialing unstructured supplementary service data codes. Its enable users to store send and receive money without the transactions involving the use of bank account⁴⁹. In Cameroon mobile money is used to make purchases and send and receive money, savings, and loan facility are not provided. In Cameroon there are three main mobile money platforms namely, MTN Mobile Money, Orange Mobile Money, and Express Union Mobile Money. Orange money which has 2.8 million registered users⁵⁰ offers money deposit services, money withdrawal, the sending and receiving of money transfer, a visa card facilities, buying of airtimes and payment of bills, school fees, transferring of funds between banks accounts and mobile money accounts and purchasing of insurance-related products. On the other hand, MTN also has 2.6 million users with similar range of services with the exception of a visa card facility, the transferring of funds between bank accounts and mobile money accounts⁵¹. The growth of mobile money operating companies in Cameroon has equally led to innovation management in online banking services, mobile money payment of school fees both in secondary and higher institution of learning in Cameroon. Despite this great innovation in the telecommunication sector, mobile money transfer or payment does not provide a panacea for its customers in Cameroon⁵². One of the main upheavals with regards to universal adoption of mobile money services are the problem of regulation in the sectors relating to the process of recovery of money sent to an individual via electronic means. For instance, it is not easy to

⁴⁷ Printout documents are considered inferior document because they do not contain the date of transmission, receipt, the details list of recipient and linkages between messages sent and replies received

⁴⁸ Shrier D, Canale, G Pentland A; *Mobile Money & Payments: Technology Trends; Massachusetts Institutes of Technology Connection Science & Engineering ; Cambridge , MA, USA, 2016 (Google Scholar)*

⁴⁹ BEAC: Etat des systèmes de paiement par monnaie électronique dans la CEMAC: Available online at <https://docplayer.fr.66945930>. Etats-des-systemes-de-paiement-par-monnaie-electronique-dans-la-cemac.html (accessed 28 of December 2018)

⁵⁰ Orange Cameroon. Orange money: available online at <https://www.orange.cm/in> (accessed on 31 December 2018)

⁵¹ MTN Cameroon: MTN MoMo, available online at <https://www.mtn.cm/en/mtn-mobile-money/> (accessed on 31 December 2018)

⁵² Frank Sylvio Gahapa Talom & Robertson Khan Tengeh ; *The Impact of Mobile Money on the Financial Performance of the SMEs in Douala, Cameroon, Journal of Bank Management, Finance and Sustainability, 24th December 2019*

request a refund or to stop a transaction which has been validated in a mobile money transaction whereas it is possible to do so in the case of cash payment in a shop. Most mobile money operating companies agents usually recommend the victim to negotiate with the individual to take part of the money and send the balance and the worst is that at times the agent tells you they can't assist in the recovery process. Despite the evidence you have they will state it clear to you that they can't help you and that is why they insist you must confirm number with the name before sending or making such transactions. It rather unfortunate that the company doesn't do anything when a mistake is made; given the fact everyone is prone to mistake.

Rethinking mobile money service in Cameroon⁵³, let MTN and other mobile services learn from what other mobile money transfers companies are offering around the globe. If you mistakenly send money to an individual, all you need to do is to send a text message to the customer service number and the company after receiving the message will immediately reverse the transaction back.

(B) The case of United State

It is very important to note here that the vast majority of online dispute resolution providers are located in the United and Europe than in Cameroon⁵⁴. In June 2000 when the US government convened its first conference on online dispute resolution at the Federal Trade Commission⁵⁵, it was clear that it too was leaning towards industry self regulation. The first doubts regarding the self regulation approach were raised by consumer groups which had a long history of disagreement with corporate interests. Some companies were suggesting that online dispute resolution be integrated into their e-commerce systems as a mandatory step. That is disputants would have to engage in online dispute resolution before being permitted to go to court. They also wanted to require payment of filing fees before consumers undertaking such a process. Some consumer groups suggested that this was merely an attempt by corporations to make legal challenges even more costly, as to better insulate corporate interests from class action suits and other legal challenges. In the US, the American Bar Association's E-Commerce working group, the International Chamber of Commerce, the Better Business Bureau and several other prominent organizations all discussed these challenges at length and may eventually issue standards for online dispute resolution providers that they hoped would help to balance the competing interests of corporations and consumers.

⁵³ Cameroonnewsagency.com.<https://cameroonnewsagency.com>, 8th February 2022

⁵⁴ See the United Nations Trade and Development Report, 2003, p. 22, the number of items offered for sale by countries according to UNCTAD statistics Cameroon has only two items .

⁵⁵ See www.ftc.gov/bep/altdiseresolution

One suggested way to enforce these standards was the widespread adoption of Trustmark's. Trustmark were visualized as graphical logos placed on the websites of e-commerce companies or ODR providers ensuring that a certain baseline quality assurance standard had been met. In the case of e-commerce companies, Trustmark could attest to the availability of ODR should a problem arise? In the case of ODR providers, Trustmark would attest to the quality and fairness of the dispute resolution system offered. A handful of companies⁵⁶ and large non profit organizations had implemented Trustmark programs in the online arena quite successfully, eventually selling tens of thousands of the seals and generating significant revenue. Online dispute resolution was frequently packaged as a component in a suit of trust-enhancing packages including fraud protection, privacy guarantees and transaction feedback information. Some of these Trustmark initiatives did achieve impressive penetration in certain market niches⁵⁷. The principles of contract consummation are the same whether the consumers assent is by use of a handwritten signature or via an electronic action. The agreement must be properly formed under state law and the burden of proof is on the party seeking to enforce. Once a consumer denies an electronic signature, the proponent of an online agreement has to prove that the particular consumer took the action that constitutes acceptance of that agreement rather than just proving that the consumer's information was entered into a form at a website. Just as in the physical world, if a person denies signing a document, the party attempting to prove the validity of the contract must prove that the signature is valid

(C) The case of Belgium

Europe identified the promise of online dispute resolution early and several efforts encouraged self-regulation among industries. Some observed that government regulatory procedures moved much too slowly to put online dispute resolution mechanisms in place in a timely fashion and that by the time any law promoting or regulating online dispute resolution came into effect, the e-commerce environment and technology would likely have changed so much that the law would be irrelevant at best or an obstacle to progress at most. Most recently, activity in the self-regulation area has been focused in Europe.

CEPAN/CEPINA is the organization that specially deals with ADR/ODR options in Belgium. The Belgian Act on the out-of-court resolution of consumer disputes⁵⁸, implementing the ADR Directive⁵⁹, focuses on the internal complaints procedures of companies. The most important

⁵⁶ For examples Square Trade and BBB online

⁵⁷ For instance the Square Trade in the eBay community

⁵⁸ Law of 4th April 2014 on the insertion of Book XVI "Extrajudicial Settlement of Consumer Disputes" in the Code of Economic Law

⁵⁹ (2013/11/EU)

development is the creation of a consumer mediation service. Therefore, consumers in Belgium can choose between Arbitration⁶⁰, Mediation⁶¹ and Conciliation⁶². It is important to note that various professional associations have collaborated with consumers organizations to set up bodies for ADR purposes. Concerning the ODR, regulation⁶³, the European Commission established a web-based platform specifically designed to assist consumers who have problems with their online purchases. This European ODR platform leads to a more streamlined process for online traders and customers to resolve issues without having to go to court. The online dispute resolution can take place in all European languages. All European online traders are required to provide a link from their website to the ODR platform. This link must be visible and easily accessible on the website. In Belgium, the contact point that provides support with the resolution of disputes relating to complaints submitted through the ODR platform is the European Consumer Centre. Belgian platform, Belmed, deals with disputes arising between European consumers and companies registered with the crossroads-bank for enterprises or with B2B disputes. If the seller is not registered with the Belgian CBE, Belmed cannot be relied on. Consequently, liability for products or services supplied online is the same as for offline sales. However, the Digital content and Digital Services Directive⁶⁴ seeks to introduce explicit liability of suppliers towards the consumers. Under the provisions of Directive, the liability of the supplier would cover three situations: failure to supply the digital content or service: any non-conformity existing at the time of supply of the digital content or service; in situations where the digital content and /or service is provided on a continuous basis, the liability of the supplier is extended for the duration of the supply. The Directive further provides that a reversal of the burden of proof that is on the supplier applies throughout the liability periods referred to the above⁶⁵. So Belgian law governing the conduct of business online is mainly set out in the Belgian Code of Economic Law (BCEL). Some provisions are specific to online businesses whereas others apply to all business activities. The main applicable Books of the Belgian Code of Economic Law are: Book XII of the BCEL relating to E-commerce regarding the provisions of mandatory online information, the obligations and liability of content and hosting provider and the abusive registration of domain names⁶⁶; we also have Book VI of the BCEL relating to

⁶⁰ Article 1676 to 1723, Belgian Judicial Code (Judicial Code)

⁶¹ Articles 1724 to 1737, Judicial Code

⁶² Article 731 to 734, Judicial Code

⁶³ (EU) 524/2013

⁶⁴ (EU) 2019/770

⁶⁵ Benoit Van Asbroeck, Anne Federle, Charlotte Haine & Camille Vanpeteghem, ‘*Digital Business in Belgium: Overview*, 1st May 2021

⁶⁶ Implementing the E-commerce Directive 2000/31/EU)

fair trade practices and consumer protection⁶⁷ which sets out the main rules for conducting e-commerce with consumers, contain provisions in relation to Unfair and aggressive commercial practices, unfair clauses, and mandatory information to consumers and advertising and marketing rules. There is also Book VII of the BCEL relating to payment and credit services. Others laws governing the conduct of online business are as follows: we have Belgian Civil Code in relation to the formation of electronic contracts, electronic signatures, general torts and contractual liability; Law of 30 July 2018 on the protection of individuals with regards to the processing of personal data⁶⁸; Law of 20 October 2000 on the use of telecommunications means and electronic signatures in judicial and extrajudicial proceedings; Law of 13 June 2005 on electronic communications; and the Belgian Associations of Companies active in distance selling over the internet, has created a code of conduct which sets out basic principles that must be respected to give the necessary guarantees to the consumer.

The unlawful or lawful of conduct is assessed under the general principles of tort liability. These are set out under the Belgian law in Article 1382 and 1383 of the Code Civil. Under this general provision, anyone can introduce a tort claim where the existence of a fault, of damage and of a causal link between the fault and damage can be demonstrated. Under this law, a person must compensate for the damage caused by their fault⁶⁹ or by his negligence⁷⁰. This fault or negligence can be due to the infringement of any statutory rule; not complying with a duty of care. This duty of care is examined on a case-by case basis.

Therefore, when online content is examined under these provisions, its lawfulness will largely depend on the context and previous standards set out in case law. The question who is liable for website content breaches in principle, the internet user who writes or places illegal content online is responsible. The civil and criminal liability of a service provider⁷¹ for unlawful or infringing content of others stored by this service provider will often exonerated⁷². Hence, the service provider is not responsible or liable for the information of others that it stores as long as the service provider has no knowledge of the unlawful activity or of the unlawful information and in a claim regarding the payment of damages, could not have reasonably been aware of the activity or information. And also where the service provider promptly deletes the information

⁶⁷ Implementing the Consumer Rights Directive (2011/83/EU & Unfair Commercial Practices Directive (2005/29/EC)

⁶⁸ Belgian Privacy Acts

⁶⁹ Article 1382 of the Civil Code

⁷⁰ Article 1383 of the Civil Code

⁷¹ Such as websites hosting user-generated content

⁷² See Article 14 of the Economic Directive which has been transposed to Belgian Law in article XII. 19 of the BCEL

or makes gaining access to it impossibility as soon as it becomes or should reasonably have become, aware of the information. The service provider is therefore, not liable for storing unlawful content of theirs, as long as it has no knowledge of the unlawful nature of the content, or deletes or make inaccessible the content immediately after becoming aware of it.

However, the burden of proof will shift depending on the method used for signing the electronic contracts. For instance, qualified e-signatures are presumed to be valid until proven otherwise. Their legal value is equal to that of an original handwritten signature. For other method of signing for instance advanced and standard e-signatures, the person or entity that wishes to prove the validity of such signatures in case of a dispute, will have to prove that the signature can be attributed to the signatory and that the integrity of the contents of the signed document is ensured.

VII. PROSPECTS FOR THE FUTURE WITH REGARDS TO THE ONUS OF PROOF IN E-COMMERCE CONTRACTS DISPUTES

Most e-commerce disputes are fairly simple in that they usually concern two parties and a limited set of issues. The same types of problems crop up again and again, usually involving money, transaction terms or delivery problems. When is happened, the following suggestions may be of important in resolving the disputes thereby discharging the burden of proof. This is because online dispute resolution has much to offer in multi-party context.

- Technology can help with information flow, making it easier to disseminate announcements, revise proposals and track versions of documents, or transactions carried online,
- Tools like threaded discussion applications and online presentation in platforms can streamline many activities, making online transactions more satisfying for both parties and more efficient.
- The seller should keep evidence to show that the buyer downloaded his/her products or services, in case of sale of digital goods.
- The seller or service provider must provide the consumer with the details of the electronic agreements on a durable medium⁷³.

⁷³ According to European case law, such a durable medium is usually defined as an instrument which enables the recipient to store Information addressed personally to him in a way accessible for future reference for an adequate period of time and which allows the unchanged reproduction of the stored information.

- Issue of a third-party shipping receipt, a tracking number or a signature confirmation to prove that the goods or services were delivered.
- A copy of the signed contract or other proof should be kept by both parties to show that services were provided.

VIII. CONCLUSION

Given the importance of repeat customers and referrals in business, especially in e-commerce, it is often in the best interest of firms and individual consumers to settle their disputes cases in a timely and cost efficient manners. So any government functions as rule making in disputes resolution between citizens and government and between citizens and other citizens may involve trying to achieve consensus among interested parties, which is a very familiar dispute resolution goal. Government's initial activity concerning online disputes resolution arose out of concern for consumers who encountered problems not only in online business but as well as cross-border e-commerce transactions. More recently, various governments and their agencies have been exploring how online disputes resolution can be carried out in a streamline manner making the process more satisfying for parties and more efficient.
