

A Critical Appraisal of Contractual Liability for Defective Products within the Perspective of Electronic Commerce in Cameroon

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Abstract

Consumer protection in electronic commerce transactions is an essential component of any economic system. It is all about making sure that the consumers' rights are protected by providing mechanisms for reparation of damages in case of infringement, be it in the provision of services or products. For example, consumers who fall victim of defective products or to identity theft can be harmed by having their privacy invaded, suffering the psychological stress of having their reputation ruined, incurring financial liabilities, and undergoing tremendous transaction costs to restore their names. In this vain, this paper aimed at making an appraisal of jurisprudential and legal instruments governing e-commerce transactions in Cameroon with particular emphasis on matters of online contracts for sales of goods and services. The paper also provide modest solutions for the hurdles facing Cameroonian consumers in establishing contractual liability both at the regional (through the Organization pour l'Harmonization en Afrique du Droit des Affaires (OHADA, the Organization for the Harmonization of Business Law in Africa OHBLA) and national level. The paper therefore, concludes with some salient recommendations to bridge the gap between theory and practice in electronic commerce transactions in Cameroon.

Keywords: Contract, Liability, Defective Products, Electronic, Commerce, Cameroon.

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INTRODUCTION

Advancements in the field of Information Technology have a deep impact on the economy of a country and also on the quality of human life. One of the chief areas wherein the information technology has made a tremendous impact is 'business and commerce' [1]. Information technology has created novel ways in which businesses can relate to their customers, suppliers, partners and investors [2]. Contract law, which forms the fundamental premise for any commercial or business enterprise, could not keep itself aloof from these developments. With the advent of information technology, Business organizations, institutions, governments and individuals use computer networks to share information and sell products across

borders [3]. Consequently, there has been a shift from 'paper-based transactions' to 'electronic transactions'.

E commerce is « the sale or purchase of goods or services conducted over computer networks by methods specifically designed for the purpose of receiving or placing of orders » (WTO, 2013). Also, as per section 2 of the 2010 framework law on electronic ecommerce, electronic commerce is a commercial activity whereby a person uses electronic means to supply or ensure the supply of goods or services. These trade activities need a specific platform. For that, we realized that «E-commerce is the future of trade because of technology» The technology concern is computers, network connection, and technician. These actions refer to virtual transactions. This means that e-commerce implies electronic transactions including buying, selling, transferring or exchanging products, services and/or information, which can take place between

¹ Subhalaxmi P, 2020, "E-Commerce Contract: Challenges from Business Perspective", Business Studies Journal, Vol: 12 Issue: 2, available at <https://www.abacademies.org/articles/ecommerce-contract-challenges-from-business-perspective-9415.html>, accessed on the 22/07/2021

²Ibid.

³G. Friedman & R. Gellman, (1996), "An Information Superhighway "on Ramp" for Alternative dispute Resolution", N.Y. St. Bar J., Vol. 68, pp. 38-41, P. 38 .

different types of actors namely individuals, enterprises, governments and civil society organizations [⁴].

The transactions can be done through the use of desktop, mobile devices, tablets and smart phones. Throughout the literature, the definition of e-commerce considers five features namely: information sharing, the use of technology, buy-sell transaction, monetary transaction and competition [⁵]. With globalization and the development of Internet, e-commerce is more and more present in our daily life.

The different types of e-commerce include the Business to Business (B2B) transactions, Business to Consumers (B2C) transactions, Business to Government (B2G) transactions, Consumers to Business (C2B) and Consumers to Consumers (C2C) transactions [⁶].

The development of e-commerce can be explained by its advantages to the different stakeholders namely the reduced prices of products explain /services; an unlimited access to the global marketplace; a large potential market share; the low-cost of advertisement and low barriers to entries [⁷].

In fact, in 2013, B2C e-commerce sales amounted to more than 1.2 trillion US dollars in the world. Furthermore, many Internet users do online shopping worldwide that is about 40% of them with about 70% of adults Internet users in the US in 2011 [⁸]. If e-commerce facilitates the access to goods and services, the payment has to be facilitated therefore there is the digital payments development. It is not only the business landscape that e-commerce has changed. It came in with also a new vocabulary like online

platform, estores, global competition, global consumer segment and virtual value chain [⁹].

As a new activity in our country, the number of the persons who use that platform to solve their problems (communication, buy and sell things, money transfer, etc.), and the number of transaction in the domain grows every day.

Long time ago before the advent of e-commerce, the buying and selling of goods and services warranted the physical presence of the parties (inter praesentes) to the commercial transaction in order to conclude the contract or the trade process. This phenomenon made commercial disputes scares, due to the fact that the buyers could assess the merchantable quality of a product or its fitness for whatever purpose they were intended.

However, where disputes were inevitable or did arise within the commercial transaction, the resolution process was easier to deal with. With the advent of the growing nature of trade beyond national borders, the situation became complex due to the involvement of third party transactions and the fact that most at times, the parties to a commercial transaction could purchase goods and services without seeing or knowing themselves but simply through the use of intermediaries or third party providers. This multiple party intervention made difficult the process of attributing liability/responsibility wherein the product received by the customer did not match his command nor met his expectation. The situation even became worst, with the proliferation of modern technology in commercial transactions, wherein media outlets and internet platforms are now used to advertised products and internet websites to serve the purpose of concluding contracts by way of e-signatures or concluding sales transaction by way of electronic payments. The advent of e-commerce has brought to the scene of commercial transaction, multiple actors thereby making complex, the attribution of liabilities or responsibilities in the case of a defective product being supplied to the customer or consumer.

It would be fair to say that for a long time, e-commerce platforms have been working with impunity as they could shift the blame of a faulty product or its service on the sellers and sharing no parts of the culpability. The e-commerce platform did not undertake responsibility for the product sold by the third party sellers and due to this, often, products displayed did not correspond with the actual product received by the customer.

⁴ Alyoubi, A.A., (2015): "E-commerce in Developing Countries and How to Develop Them During the Introduction of Modern Systems" International Conference on Communication, Management and Information Technology (ICCMIT), *Procedia Computer Science*, p.479 – 483.

⁵ Goyal, S., Sergi, B.S. and Esposito, M. (2020): 'Literature review of emerging trends and future directions of e commerce in global business landscape', *World Review of Entrepreneurship, Management and Sust. Development*, Vol. X, No. Y, pp.000–000.

⁶ Ehode, E. R., et Makoudem, T. M., (2020), *The Development of E-Commerce in Cameroon, International Journal of Scientific and Research Publications*, Volume 10, Issue 5, ISSN 2250-3153.

⁷ El Gawady, Z. M. (n.a.): "The Impact of E-commerce on Developed and Developing Countries Case Study: Egypt and United States".

⁸ Source: <https://www.statista.com/markets/413/e-commerce/> last consulted on the 22/09/2021.

⁹ Goyal, S., Sergi, B.S. and Esposito, M. (2020): 'Literature review of emerging trends and future directions of e commerce in global business landscape', *World Review of Entrepreneurship, Management and Sust. Development*, Vol. X, No. Y, pp.000–000.

A product or service purchased through the internet may have some hidden defects, that may have been judged by the customer as unsatisfactory and not meeting the requirements of fitness for purpose or may not be of merchantable quality. These difficulties faced by customers have been addressed by both National and International actors through legal and institutional frameworks such as the 2011 legal framework on consumers protection in Cameroon [¹⁰] and the Uncitral Model Law on e-commerce [¹¹] and the National Consumer Council, coupled with the courts of Law to name a few.

Regardless of how well a product is designed, manufactured or distributed, the threat of litigation is always present. Manufacturers and distributors often find themselves faced with allegations that a product was defectively designed or manufactured, or that warnings with regard to usage were inadequate, and sometimes a combination of these [¹²].

The right to compensation of a victim (a consumer) who has suffered damage through using or consuming a defective product, or through exposure to a defective product, is essential in a single market open to everyone [¹³]. A plaintiff may rely on one or more of several theories upon which to base his or her argument for recovery in a product liability case. The primary theories for recovery include the following: tortious, Contractual and statutory [¹⁴]. This paper sets out to provide specific guidance as to how a manufacturer or distributor or a seller may be held contractually liable for a defective product emanating from e-commerce in Cameroon.

The objective of this study therefore, sets to examine how the African regional inter-governmental Organisation, the Organisation pour l'Harmonisation en Afrique du Droit des Affaires (OHADA, the Organisation for the Harmonisation of Business Law in Africa), has engaged with e-commerce matters to date particularly, in establishing liability in contract for defective products. Specifically, we try to consider the formation of a contract in electronic commerce and how

Cameroon as a member of OHADA, has engaged at the national level to equally establish how a manufacturer or a seller will be held liable in contract for defective products emanating from e-commerce. To know exactly what the current situation in our country is, one key question was raised. What is the legal standard that governs e commerce in Cameroon? To attain our objective, we adopt a doctrinal research methodology which is made up of primary and secondary sources of data.

THE LEGAL STANDARD REGULATING CONTRACTUAL TRANSACTIONS IN ELECTRONIC COMMERCE IN CAMEROON

E-commerce, being trade, is governed by trade laws and regulations in Cameroon. Due to the channel it uses, there are some laws and regulations, which are specific to it. It is the law n°2010/021 of 21 December 2010 that governs e-commerce in Cameroon and its implementing provisions are laid down in the decree n° 2011/1521/PM of 11 June 2011.

The e-commerce legal framework covers many points namely the setting up of a contract between a consumer and a seller in the context of e-commerce business, the consumers' protection, security and dispute settlement mechanism. The article 2 of the decree n° 2011/1521/PM of 11 June 2011 defines the e-commerce as "economical activity by which a person provides by electronic means, goods or services". It includes in the field of e commerce providing free or paid online information, commercial communications, research, access, and data recovery tools, access to a communication or hosting information network. From the above definition, we can see that e-commerce is not a specific form of trade, but normal trading activities made on with the contribution of technology.

In Cameroon, an e-commerce provider has to introduce in his offer at least 16 information, which are considered to be useful for the potential buyer. They include the contact address of the provider; product or service characteristics and price, all taxes included; the duration of validity of the offer; payment conditions and delivery process; the date and the time at which the contract will be executed and the conditions of the online contract execution and cancellation among others. In addition, there should be information on how to modify any electronic order, archiving and procedure to get access to stored contract if any [¹⁵].

All the above information is crucial in the setting up of a contract. In the case of their absence, the contract can be considered as null. For any electronic contract of a total amount greater than or equals to

¹⁰Law No. 2011/012 of 6th May 2011 on the Legal Frame Work of Consumer Protection in Cameroon.

¹¹ United Nations Commission on International Trade Law (UNCITRAL), adopted on December 16, 1996.

¹² See Borden Ladner Gervais, *Product Liability Handbook*, 2019, available at www.blg.com/-/media/insights/documents/national-product-liability-handbook-2019.pdf?la=fr&ha, accessed on the 20/05/2021.

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http://aei.pitt.edu/1217/1/defective_products_gp_COM_99_396.pdf, accessed on the 20/05/2021

¹⁴ <https://www.findlaw.com/injury/product-liability/legal-basis-for-liability-in-product-cases.html>, accessed on the 20/05/2021

¹⁵ Ehode, E. R., et Makoudem, T. M., (2020),The Development of E-Commerce in Cameroon, *International Journal of Scientific and Research Publications*, Volume 10, Issue 5, ISSN 2250-3153.

20,000 fCFA, the e-commerce provider is entitled to keep the hard version of the contract for ten years. The other part can have access to it at any time if needed (see article 8 of the decree n° 2011/1521/PM of 11 June 2011 laying down the implementing provision of the law n°2010/021 of 21 December 2010 governing e-commerce in Cameroon.

Concerning the consumer protection in general in Cameroon, it is the framework law n° 2011/012 of 6 May 2011 that provides the necessary provisions. Its application field includes e-commerce. Its article 7 provides that a consumer has up to 14 days from the signature of a contract to cancel it. It should be noted that this framework law forbids uncompetitive practices from providers (art 8 (2)). It mentions also the right to information of the consumer and the provision of customer service for durable goods.

In the case that their rights are not respected, consumers can create an association to protect and defend them. The conditions for the creation and the functioning of such organizations are presented in chapter V of the framework law. Through them, consumers can be educated on their rights and how to protect themselves from any abuse and finally how to be compensated where required. The use of Internet comes along with data protection challenges. That is the reason why Cameroon has taken it into consideration by passing on law n° 2010/012 of 21 December 2010 on cyber security and cybercrime. This is important both for e-commerce consumers and providers because in the course of their activities, their data are accessible and hackers can steal them either to take some money from consumer's bank accounts or to weaken a company.

For illustration, the Ministry of Post and Telecommunication has mentioned during a recent conference that Cameroonians have lost 3.7 billion CFA francs since 2013 due to card fraud [16]. These actions are seeing more and more in the world and constitute a major concern for Internet users. For a better implementation of the law on cybercrime and cybersecurity, Cameroon has decided to allow computer scientists to become magistrates [17]. This is a very important decision because that type of magistrates

knows very well the breaches both technically and from the legal perspective, therefore are able to hand down fair decisions.

As far dispute settlement is concerned, it is still the Decision n° 000098 /ART/DG/DAJCI of 31 July 2008 on dispute settlement mechanism in the telecommunication sector in Cameroon. Any e-commerce provider in Cameroon is governed by Cameroon law as far as his website contents are concerned. This is also applicable on the property rights that come from it. There is still a room for improvements as the ICT sector is a fast changing one.

CONTRACT FORMATION IN ELECTRONIC COMMERCE

Contract is a necessary aspect in commerce because of the risk involved so parties need to make their transactions secure. As such it becomes necessary for each party to understand his rights and obligations, to know the parties they are dealing with, the goods and services to be supplied and the legal forum in the case of a dispute [18]. There is as such a need for certainty and stability in electronic commercial transactions. Cameroonian electronic commerce Law [19] provides for functional equivalence to the traditional form and has to be treated equally by the law.

In the area of formation and validity of contracts, the context has been adapted to the traditional rules relating to the formation of a contract. The principle is also the same where the traditional forms of offer [20], acceptance, consideration, and illegality have all been considered in electronic commerce. Article 15 of the law on electronic commerce translates the principle of the validity of an electronic offer by stating that an electronic offer must make mention of the price, the characteristics of the product and the nature of the goods or services [21].

Assuming therefore that a contract is valid given that it contains all the elements that make up a valid contract as seen above, how a manufacturer or seller will be held liable in contract for defective products in electronic commerce in Cameroon.

¹⁶ Jack Ma (2017) : « E-commerce is the future of trade because of technology », CEO of Alibaba, pronounced these words on The 25th April 2017 in a high panel discussion analysing the inclusiveness of e-commerce during the e-commerce week organised by the United Nations Conference on Trade and Development (UNCTAD) in Geneva.

¹⁷ Tchabo, S. H. M. (2014): « La règlementation du commerce électronique dans la CEMAC, contribution à l'émergence d'un marché commun numérique », Thèse pour le Doctorat/Ph. D. en Droit Présentée et soutenue publiquement le 17 avril 2014, Faculté des Sciences Juridiques et Politiques, Université de Dschang.

¹⁸ Alain Davidson, 2009, *The Law of Electronic Commerce*, 1st edition, Cambridge University Press, U.S.A p 25.

¹⁹ See Article 22 (1), Decree no.2011/1521 fixing the modalities for the application of law no.2010/021 of 21 December 2010 and article 7 of the UNCITRAL Model Law on Electronic Commerce.

²⁰ Article 2 (2) of the Avant project of the Uniform Act on Contract law provides that a "proposal to conclude a contract constitutes an offer if it is sufficiently precise and if indicates the will of the author to be linked to the contract in case of acceptance.

²¹ Law no.2010/021 of 21 December 2010

A manufacturer or seller can be held liable in contract for damages arising from the breach of a condition or warranty contained in the contract [22].

THE DYCOTOMY BETWVEN A CONDITION AND WARRANTY

This section of the paper provides for the differences between a condition and warrantee in contractual relationship under electronic commerce in Cameroon.

A CONDITION

A condition in a sales contract may be defined as a fundamental obligation imposed on either of the parties, the performance of which is vital to the contract. In contrast with a warranty, a condition is a stipulation in the contract which, if breached, may give rise to a right to treat the contract as repudiated or lead to the potential awarding of damages [23].

A WARRANTY

A warranty is a promise or statement of fact about goods that is collateral to the main purpose of the contract of sale. A warranty may be express or implied. The scope and meaning of an express warranty will be determined by the actual words used by the seller in making his or her promise. The scope and meaning of an implied warranty will be determined by the circumstances of the case, including the conduct of the seller [24].

DETERMINING WHETHER A TERM IS A CONDITION OR A WARRANTY

Warranties must be distinguished from conditions in order to determine the potential remedies for a breach of contract. A condition is key to the primary purpose of the agreement and, if breached, will permit a purchaser or a consumer, in certain circumstances, to cancel or rescind the contract [25]. A breach of warranty, on the other hand, gives rise to a claim for damages, but does not give the injured party (the consumer or customer) the right to reject the goods and treat the contract as repudiated [26].

IMPLIED CONDITION AS TO MERCHANTABILITY QUALITY

The type of obligations created under the sale of goods law depends on whether or not the issue for determination relates to the core of the contract. If the issue relates to the core of the contract, then the obligation created is said to be a fundamental term of the contract, the breach of which, like that of condition, entitles the innocent party to repudiate the contract [27] and so making the other party liable. Thus, one of the major results of the industrial revolution of the 19th century was the considerable expansion in the number and complexity of goods thrust upon the consuming public. Hitherto the predominant philosophy in commerce generally had been that of laissez-faire and in the area of sales "caveat emptor" (buyer beware) which requires the buyer to ensure that the goods obtained were of reasonable quality by properly examining them. The idea that the state by law should seek to lay down minimum standards of quality and suitability was both unacceptable and foreign to bargains supposedly freely negotiated and agreed. However, industrialization soon demanded a move away from "caveat emptor" particularly or where the buyer places reliance on the seller to select the goods for him.

Consequent to this, contracting parties in keeping with the common law doctrine of freedom of contract became substantially free to make express provisions in their contract. In this light, the OHADA Uniform Act Relating to General Commercial Law [28] and the 2011 Cameroonian Consumer Protection Law [29], which are the main pieces of legislations under consideration in this Article have also granted contracting parties the right to make express provisions to the extent to which the law provides.

The provisions of the above laws are in the main confined to statements of what promises are to be implied on the part of the seller or producer and the buyer (consumer), in respect of matters upon which the contract is silent, how they are to be performed and to statements of the consequences of performance or nonperformance of those promises. It is therefore of the utmost importance that the parties should direct their minds to such implied terms, one of which is the implied condition as to merchantable quality and decide for themselves whether or not they should adopt, vary or negate them. Failure to do so mean that those terms

²² Borden Ladner Gervais, *Op. Cit.*

²³ HAMIMUL HASNAT AZMI, (1985), "Conditions and Warranties", *Cochin University Law Review* Vol. IX, pp. 460-474, p. 460

²⁴ *Ibid.*

²⁵ See the case of, *Schuler AG v Wickman Machine Tool Sales Ltd.* (1974) AC 235, in which the House of Lords stated that a breach of a condition allows for termination of the contract.

²⁶ See the case of, *Wills v Amber* [1954] 1 Lloyd's Rep 253, in which an innocent statement by the seller was held to be a warranty.

²⁷ See Article 254 of the OHADA Uniform Act. See also *Suisse Atlantique Société D'armement Maritime Sa v. Rotterdamsch Kolen Centrale* (1967) 1 AC 361 and *Narumal & Sons (Nig.) Ltd. v. NBTC* (1989) 1 CLRQ 28 SC.

²⁸ See Articles 219-244

²⁹ See s.10

(e.g. implied condition as to merchantability) should be applied unless there are other reasons to the contrary.

The question then is what is an implied condition in a contract of sale? It should be noted that contracts of sale of goods distinguish two categories of implied warranties or terms, viz, conditions and warranties. Article 1625 of the French Civil Code provides for what is known as “the obligation to guarantee” by the seller (who could also be the producer that produces and sells directly to consumers) [³⁰]. Thus, the obligation to guarantee will be interpreted here to mean a condition or warranty that the goods sold shall be of merchantable quality. The word “implied condition” could be understood in two senses; it could be used loosely to mean a term or a stipulation in a contract which is absolutely essential to its existence, the breach of which entitles the injured party to repudiate the contract and then treat it as discharged [³¹]. It follows that the seller or producer who is guilty of a breach of the implied condition is liable and cannot enforce the contract unless the consumer has affirmed it or has otherwise lost his right to repudiate it.

A condition is most often breached where the goods contain latent defects not brought to the knowledge of the consumer at the time of formation of the contract of sale. Article 1641 of the Civil Code which specifically deals with latent defects provides as follows:

The seller is held to guarantee against latent defects in the thing sold which renders it unsuitable to the use for which it is intended or which impair such use that the buyer would not have purchased it, or would only have paid a lower price, if he had knowledge of them [³²].

On the other hand, the word ‘warrant’ denotes a binding promise; but when it is used in a narrower and technical sense it means a subsidiary term in a contract, a breach of which gives no right to repudiate the contract, but only a right to an action for damages for the loss sustained. It is described in the English Sale of Goods Act, 1893, as “an agreement with reference to goods which ... is collateral to the main purpose of such contract, the breach of which gives rise to a claim for

damages but not a right to reject the goods and treat the contract as repudiated” [³³].

The main difference therefore between a condition and a warranty is that a breach of the former (condition) entitles the other party to treat the whole contract as discharged, while a breach of the latter (warranty) merely entitles the other party to claim damages, but does not absolve him from performing his duties under the contract. But a party who is entitled to rescind a contract for breach of condition may, if he so wishes, treat the breach of condition as a breach of warranty [³⁴] and so sue instead for damages, provided that the condition so waived is for that party’s sole interest.

However, the terms ‘condition’ and ‘warranty’ when used in a contract, must be distinguished from a mere representation which forms no part of the contract itself but only induces one of the parties to enter into it. Such a representation, if innocent, will entitle the representee neither to rescind the contract nor to claim damages [³⁵].

Haven noted the meaning of implied conditions and warranties in a contract of sale, the next question to be answered is what is meant by merchantability or merchantable quality? It is unfortunate that the OHADA Uniform Act Relating to General Commercial Law which purports to codify a branch of law uses a technical term the meaning of which is not self evident and without defining it. The word which can be given a variety of meanings is thus derived from old English common law usages. It must be noted that according to Article 224 of the Uniform Act, the term is cumulatively represented by certain implied conditions built in the word merchantability and these are quantity, quality, specification and packaging [³⁶].

The obligation imposed by the merchantability concept is strict [³⁷], so that any deviation from it entitles the buyer to reject the goods and treat the

³⁰ Examples are the NOSUCAM firms in Cameroon that produce sugar and market them to consumers within the country.

³¹ See *Bhan v. Burness* (1863) 3 B & S 751.

³² Article 1641 provides; “Le vendeur est tenu de la garantie à raison des défauts cachés de la chose vendue qui la rendent impropre à l’usage auquel on la destine, ou qui diminuent tellement cet usage, que l’acheteur ne l’aurait pas acquise, ou n’en aurait donné qu’un moindre prix, s’il les avait connus”.

³³ See s.62.

³⁴ See Article 255 of OHADA Uniform Act on General Commercial Law.

³⁵ See the case of, *Oscar Chess v. Williams* (1876) 1 Q.B D. 410.

³⁶ See Article 224, according to which merchantability will mean, “...the seller shall deliver the goods according to the quantity, quality, specification and packaging provided for in the contract...”

³⁷ See s.10 (1) of the 2011 Consumer Protection Law which provides that “the vendor, supplier or provider of a technology should provide or deliver to the consumer a product, technology, good or service that meets the minimum requirements of sustainability, utilization and reliability and guarantees his legitimate satisfaction”.

contract as repudiated [³⁸]. As a result of this, the manufacturer or seller of the product is therefore held liable provided the goods are defective and not meeting the implied condition of merchantability.

IMPLIED CONDITION AS TO FITNESS FOR PURPOSE

The English Sale of Goods Act, 1893 (as amended) and s. 14 (2) quoted in the case of, *Cammel Laird Co. Ltd. v. Manganese Bronze & Brass Co. Ltd* [³⁹] By Lord Wright [⁴⁰] is synonymous to Article 224 of the OHADA Uniform Act that guarantees the implied condition of merchantability.

In the understanding of Lord Wright, suitability or fitness for purpose will mean that the goods must be free from imperfections that will render them unfit for the purpose and thus unacceptable by the consumer and the law. It appears that, there are no implied warranties or conditions in a contract of sale as to quality or fitness of goods for any particular purpose, unless two principal conditions are satisfied. The first is that the sale must have been a sale by description [⁴¹]. This therefore means that, the seller or producer is not in a position to supply goods that are suitable for the purpose unless the goods are adequately described [⁴²].

³⁸ This right appears to be guaranteed by s.16 (3) of the 2011 Consumer Protection Law. It provides that “any technology or product that constitutes a potential hazard should, upon ascertaining that state, be immediately withdrawn from the market and returned for testing at the supplier’s or vendor’s expense, without prejudice to other penalties provided for by the laws and regulations in force”. The cumulative effect of this sub-section of the law is that the buyer can also reject the goods where they constitute a potential hazard and the contract will be treated as repudiated.

³⁹ (1934) A.C. 402 at p. 430.

⁴⁰ Where he said; *What s.14 (2) now means by merchantable quality is that the goods in the form in which they were tended were of no use for anti-purpose for which such goods would normally be used and hence not sealable under that description.*

⁴¹ This condition was upheld by the English Court of Appeal in the case of, *Ashington Piggeries Ltd. v. Christopher Hill Ltd.* (1972) A.C. 441.

⁴² A good example in Cameroon is the sale of pharmaceutical products where the consumer must produce a “prescription order”, otherwise known in French as “Ordinance” before he can be served by the pharmacist. The “prescription order” or “ordinance” is an implied description of the drugs required. Until this requirement is satisfied, the pharmacist may not be held liable for the supply of wrong quality drugs, which may be detrimental to the consumer’s health. If merchantability will mean suitability for the purpose, then the right pharmaceutical products will only be supplied where they are adequately described.

Secondly, when the goods are those normally supplied in the seller’s course of business. The word description was interpreted by the court In the English case of *Ashington Piggeries Ltd. v. Christopher Hill Ltd* [⁴³] to mean the actual description by which the goods which are the subject matter of the contract were bought.

Sale by a person who deals in goods of that description in the eyes of the law will invariably exclude private sale or sale for private use, consumption, occasional sales or a sale that takes place only once. One justification of the insistence that the sale must be by a person who deals in goods of that description is probably to allow specialists and professionals to display the expertise knowledge and skills in the selection of the goods since they can better appreciate the risk involved in not complying with the implied conditions of fitness for the purpose and sale by description and in some occasions, could even advise the consumer on the availability, sustainability and viability of alternative goods or substitutes [⁴⁴].

However, in Cameroon, the courts may face difficulties in applying the above conditions. For example, should a seller who sells a defective product or goods not suitable for the purpose or not of merchantable quality, for private use or only once go unpunished simply because the sale was private or took place only once? Limiting liability simply because the sale was a private one or took place only once will invariably place the consumer in a very difficult position where he suffers damage to his person or to his property as a result of the non-suitability of the goods for their intended purpose.

Thus, our suggestion with respect to the law is that, the test of fitness for the purpose should cover private sales, consumption and occasional sales. For, in Cameroon where market conditions are not quite stable and thus fluctuate, most sellers are not stable and constant in the sale of particular goods but rather try their hands on a variety of goods at different periods and seasons. Such sellers in Cameroon are generally referred to as “*buyam sellam*” and we equally have hawkers that can in a particular week sell more than five varieties of goods and should therefore not go scot free simply because their sales were occasional or meant for private use. We advocate a strict liability regime in this paper and it demands that, whoever produces sells or provides goods for consumption, should be liable for any deficiencies and defects exhibited in the quality of such goods.

⁴³ (1972) A.C 441.

⁴⁴ For instance, we have witnessed instances where pharmacists have prescribed alternative drugs, where the ones prescribed in the « ordinance » are scarce and thus not available.

The restriction of the seller to sell only in the course of business or that the sale must not be a private one and must not be done once is apt but may promote the sale of sub-standard goods even if they are not sold in the course of business. The primary intent of the law is to establish liability probably on the part of the seller or producer and by so doing, guaranteeing the safety of the consumer and this must be so, irrespective of whether the sale is a private one or done only once. In this light, Article 224 of the Uniform Act should be amended. This position can be supported by sections 17 and 18(2) of the 2011 Cameroonian Consumer Protection Law. According to s. 17:

Standards for food, pharmaceutical products and drugs shall be compulsory and comply with those laid down by relevant international organizations... [⁴⁵]

In the light of the foregoing section, all sales whether private or public carried out either once or severally must comply with the set out standards and the seller or producer irrespective of the capacity in which he sells must be held liable for any injury caused to a consumer by the product. In the case of pharmaceutical products for example, the standards are those laid down by World Health Organization (WHO). On the other hand, s.18 (2) provides that:

The producer or supplier of a technology, good or service supplied or sold to a consumer shall be liable for damage caused by such technology, good or service... [⁴⁶]

CONCLUSION AND RECOMMENDATIONS

Communication is a prerequisite. With the interconnection of markets, Internet plays a key-role in business transactions in the world. However, the usage of this technique by Cameroonians to make their operations of contractual sales/purchases is still a myriad. The main causes identified are the questionable quality of products, the data protection, the long delivery time and the lack of confidence. Behind this lack of confidence, we could identify other limiting factors, which are both psychological and technical.

Against this backdrop, one possible solution to the establishment of contractual liability for defective products in e-commerce is for Cameroon to take steps at its sovereign national level to strengthen the protection of consumers in online business transactions. Such steps could be taken through a detailed law specific to online transaction or through upgrades to the existing e-commerce and consumer protection laws to fill the gap of uncertainty with regards to the establishment of liability.

To crown it all, another possible solution to the uncertainties with regards establishing contractual liability for defective products in e-commerce is for OHADA Member States to collaborate in development of an OHADA regional instrument on consumer protection. Such an instrument could alleviate the current uncertainties in the legal provisions of Cameroon (and other OHADA Member States) in respect of online contracts in a bid to establish liability. Moreover, such an instrument could, in addition to legislating on e-commerce matters, legislate on other important consumer matters such as: consumer participation in financial markets, consumer over-indebtedness, unfair competition, and access to redress. This OHADA instrument could either take the form of a Uniform Act binding on all OHADA Member States, or a Model Law serving as a standard for Member States.

It is hope that if these observations and recommendations are effectively implemented and enforce, the uncertainties regarding establishing contractual liability for defective products in electronic commerce will be minimize why not eradicated in Cameroon *ab initiu*.

⁴⁵ See section 17 of the 2011 Cameroon Consumer Protection Law.

⁴⁶ See section 18 (2), *Ibid*.