# UNIVERSITY OF RWANDA

## COLLEGE OF ARTS AND SOCIAL SCIENCES

## SCHOOL OF LAW

## LLM IN BUSINESS LAW

# Legal and institutional framework of consumer protection in credit contracts in Rwanda

**A Thesis submitted to the school of Law in**
**Partial fulfilment of the academic requirements**
**For the award of a Master's Degree**
**In Business Law (LLM)**

**By MAZIMPAKA Jean Paul**

**Supervisor** : **Dr NTEZILYAYO Faustin**

Kigali, January 2019

## DECLARATION

I MAZIMPAKA Jean Paul, hereby declare that this dissertation entitled « Legal and institutional framework of consumer protection in credit contracts in Rwanda» is original and is my own work. It was never submitted anywhere at University of Rwanda or elsewhere for the award of any degree. In case other individual's work was used, references were provided and quotations were made. Therefore, I declare that this work is presented as one of my own efforts and contributing to the fulfilment of a Master's degree in Law (LLM).

Signed by MAZIMPAKA Jean Paul

In January 2019

## CERTIFICATION

This is to certify that the study entitled “ Legal and institutional framework of consumer protection in credit contracts in Rwanda»  is a study conducted by **MAZIMPAKA Jean Paul** under my supervision and guidance.

**Name of the supervisor:** Dr Ntezilyayo Faustin

**Signature:** sé

# DEDICATION

To the almighty God for his blessing,

To my parent with her endless moral support,

To my Wife, my children, my sisters, brothers, my friends and beloved

All relatives.

## AKNOWLEDGEMENTS

I would like first to acknowledge and thank Almighty God for his endless blessings up to now.

I thank particularly Dr. Faustin Ntezilyayo who devoted part of his time to the supervision of this work. His guidance contributed to the successful completion of this dissertation.

I always recognize the contribution of my parent who cared for me before and during all the time I prepared this dissertation. My sincere acknowledgement to the management of the School of Law at University of Rwanda for their time for the achievement of my studies in the Master's program of Business Law.

May God bless each and every one in whatever he/she does!

**Names :** MAZIMPAKA Jean Paul

**Signature :** sé

**ABBREVIATIONS**

ADECOR : *Association pour la Defence des Droits des Consommateurs au Rwanda* (Rwanda Consumer's rights protection organization)
Art. : Article
BK : Bank of Kigali
BNR : *Banque Nationale du Rwanda*
BPR : *Banque Populaire du Rwanda*
CCL III : Civil Code Book III
CRF : *Cellule de Renseignments Financiers*
ECOA : Equal Credit Opportunity Act
Ed. : Edition
Et ali : *et alii* (and others)
Etc : *et caetera* (and so on)
EURO : European Currency Unit
FIU : Financial investigation unit
Ibid : *Ibidem* (in the same book, same author, and same page)
Id : *Idem* (in the same book, same author, different pages)
LII : Legal information Institute
Ltd : Limited
MB : *Moniteur belge*
MINICOM : *Ministère du Commerce* (Ministry of Trade and Industry)
N° : Number
OG : Official Gazette
Op. cit. : *Opera citato* (in the book previously cited)
P.U.F : *Presses Universitaires de France*
P : Page
RBA : Rwandan Bankers Association
RBS : (risk-based supervision)
RCom : *Requête Commerciale*
RDB : Rwanda Development Board
Rwf : Rwandan Franc
SACCO : Savings and Credit Cooperatives

SALJ : South African Law Journal

TC : *Tribunal de Commerce* (Commercial Court)

TC/Nyge : *Tribunal de Commerce*/Nyarugenge (Commercial Court)

TILA : Truth-In-Lending-Act

UK : United Kingdom

ULK : *Université Libre de Kigali*

UNR : *Université Nationale du Rwanda*

USA : United States of America

Vol : Volume

WWW : World Wide Web

**ABSTRACT :**

The present scientific work entitled "The legal and institutional framework of consumer protection in credit contracts in Rwanda" aims at analysing the Rwandan legislations and institutions in the context of credit contracts to ensure the protection of consumers in order to prevent different imbalances faced in the consumer-credit transactions. Though, the work focused on domestic legislations specifically in the banking and financial sector, it has also referred to the foreign legislations like that of Belgium, UK and Kenya among others. In the Rwandan context, this protection is not much legally guaranteed, it has created various abuses mostly resulting from financial institutions behaviors and practices. Hence, adequate analysis for the stronger legislation is necessary.

All along this study, the analysis focused on three chapters among which the first chapter analysed the existing Rwandan laws whereby gaps and inadequacy of provisions regarding the consumer credit and bank credits were mentionned. The second part of the study, analyzed issues faced by the borrowers due to inadequacy of clear legislations in the domain of credit contracts. Thus, foreign legislations were referred to in order to learn from their experience in the protection of consumers of credit. In addition, decided cases in Courts in this context played a major role in the analysis of the study.

The last part, that is chapter three, proposed the establishment of legal and institutional mechanisms to strengthen borrowers' rights in credit contracts. This part looked at various mechanisms aiming at the protection of consumers in credit contracts. The enactment of specific law governing credit and credit standard agreement in the banking system were proposed. Institutionally, also necessary role of strong institutions both public and private institutions such as the National Bank of Rwanda, Office of the Ombudsman, the Rwanda Bankers'associations and consumers'associations were assessed and proposed to improve management of credit issues by setting up strong measures to solve credit issues. To sum up, the researcher recommended that : a proper law on financial services consumer protection should be enacted and through that law, a model credit agreement should be provided. Both public and private institutions dealing with credit contracts should strengthen their capacity for better protection of borrowers'rights including sensitizing all financial services consumers on their rights and the best way to ensure their implementation by establishing more consumers 'associations, among other mechanisms.

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## I. GENERAL INTRODUCTION

A Consumer credit is a short-term loan made to enable people to purchase goods or services primarily for personal, family or household purposes. Consumer credit transactions can be classified into several different classes. Installment credit involves credit that is repaid by the borrower in several periodic payments,[1] a mortgage, for example, is a type of installment loan.[2]

Loans repaid in one lump sum are classified as non-installment credit that is actually the simplest form of credit which can be secured or unsecured. It is usually for a very short term, such as thirty days. It enables borrowers to take possession of property today and pay for it within a set amount of time.[3]

The consumer credit is assumed to be lent to a borrower, as opposed to a commercial enterprise. Though, it is not the purpose of this study to discuss the substantive provisions which consumer-credit legislation should include, it is necessary recognizing the enactment of such legislation with the aim to ensure that they are legally regulated and institutionally provided so that at least consumers may be protected.

Therefore, the basic assumption is made that there is a need to regulate credit transactions involving the consumer, so that credit providers notably banks and other financial institutions will responsibly perform their necessary function recognizing both their interests and those of borrowers.

The need for such regulation either legal or institutional undoubtedly results from the inappropriateness of normal rules of contract and different imbalances faced in the consumer-credit transactions. Different foreign legislations provide controls to protect the borrowers since

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[1] X, installment loan, available at https://en.wikipedia.org/wiki/Installment_loan, accessed on 08 November 2018.
[2] *Ibid*.
[3] X, non installment credit, available at https://definitions.uslegal.com/n/n-installment-credit, accessed on 08 November 2018.

they are assumed to be in the weaker bargaining position from usury or any other unfair practices of the professionals.

In this regard, the Belgian Law relating to consumer credit has provided preventive measures to protect a consumer. Thus, according Belgian law, it is provided that the lender gives all necessary and exact information to the borrower[4].

Actually, when a person enters into a contract with the counterpart, he/she should be having equal bargaining power in order to conduct equitable transactions. In other words, parties could know each other's reputation for fair dealing. This basically means that if the parties had equal bargaining power, it is probably fair to assume that they were capable of protecting themselves and negotiating an agreement which is fair at the time.

According to D. Aniol, inequality of barganing power occurs when the terms and provisions of a contract are unfair, unjust and unreasonable.[5] This is the case when a ter mis excessively one-sided or provides for a provision that is adverse to the borrower. The case is the same where one party is afforded greater protection while the other is defenseless.[6]

In the Rwandan context, this protection is not much enough guaranteed either legally or institutionally and it has created various abuses mostly resulting from financial institutions' misbehaviors and malpractices notably the non-disclosure of enough information to borrowers, unilateral rights to increase interest rate, refusal of credit requested, penalty for advance payment[7] determination of interest rates and fees which actually should be freely agreed between the bank and the borrower, unilateral decision to increase interest rate all along the payment period of the

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[4] Art. 11 of law of 12/06/1991 relating to consumer credit as modified and complemented to date. See, the modification through the law of 13/06/2010 published "au Moniteur Belge" MB of 21. 06. 2010.

[5] D. Aniol, *The inequality of bargaining power in consumer contracts*, thesis submitted for a degree of a Master's in Law, University of Pretoria, p. 1, Pretoria, 2015,
online, https://repository.up.ac.za/bitstream/handle/2263/53151/Aniol_Inequality_2016.pdf?sequence=1, accessed on 09/November/2018.

[6] *Ibid*.

[7] In Kenyan law, the charges for advance payment is forbidden according to the consumer protection Act, in its paragraph 61 which provides that "(1) A borrower is entitled to pay the full outstanding balance under a credit agreement at anytime without any prepayment charge or penalty, (2) A borrower is entitled to prepay a portion of the outstanding balance under a credit agreement for fixed credit on any scheduled date of the borrower's required payments under the agreement or once in any month without any prepayment charge or penalty, online, www.kenyalaw.org, revised Edition 2016 [2014], Consumer Protection Act of Kenya, nº 46 of 2012, para 62, accessed on 07 July 2018.

approved credit.[8] When we refer to the cases decided in Rwandan commercial courts in regard with the determination of interest rates, we actually find that banks have unilaterally determined the interest rates as they want and at the level of rates which cannot be really understandable considering their extent.

That is illustrated in the case decided in the Commercial Court of Nyarugenge, nº RCom 0285/011/TC/NYGE on 03/11/2011 between *Banque Populaire du Rwanda vs* G. E. On 31/12/2007 the bank offered the loan of 10.420.000 Rwf as overdraft payable in one installment after one month upon interest rate of 60% per year and penalty of late payment of 4% per year.[9] In another case in the Commercial Court of Nyarugenge, nº RCOM 001215/2016/TC/NYGE between Banque Populaire du Rwanda (BPR) *vs* R. L., the bank offered a loan of 3, 700, 000 Rwf to R. L. on 11/01/2012 at the interest rate of 17% per year and penalty for late payment of 4% per year.[10]

When we analyse the two loans in the same bank, BPR, where G.E was offered with an overdraft payable in one month with interest calculated at 60% per year and a loan offered to R. L. with interest calculated at 17% per year, it is clear that both interest rates calculated for the two loans were totally different, one at 60% per year and another at 17% per year, and that was in the same bank. This really indicates that borrower'rights are not taken into consideration, financial institutions have determined interests rate as they want without considering consumers'rights.

However, the situation is different in various foreign legislations like Belgian[11] and UK[12]. In these countries, specific laws on consumer credit were enacted to protect borrowers. For the UK, the Act that came into force on 31 July 1974 introduces the regulation for bodies trading in consumer

[8] See the credit facility agreement signed on October 5th, 2018 between JP. MAZIMPAKA, the borrower and I & M Bank on its page 2, a)"The Bank in its absolute and sole discretion may determine interest rate from time to time", c)"The Bank may by notice change the rate of interest so payable, and any such change will not prejudice in anyway the Bank's right to recover interest charged subsequent to such change.

[9] Commercial Court of Nyarugenge, nº RCom 0285/011/TC/Nyge between *Banque Populaire du Rwanda vs* GATERA Evariste, Kigali, 03/11/2011.

[10] Commercial Court of Nyarugenge, nº RCOM 001215/2016/TC/NYGE between Banque Populaire du Rwanda (BPR) *vs* RURANGWA Léonce, Kigali, 20/06/2017.

[11] Law of 12/06/1991 related to consumer credit as modified by the law of 13/06/2010 published in "Moniteur Belge (MB) of 21.06.2010.

[12] The Consumer Credit Act 1974 (as amended by the Consumer Credit Act 2006), Act of the Parliament of the United Kingdom that significantly reformed the law relating to consumer credit within the United Kingdom.

credit and related industries such as the Office of Fair Trading[13] which may take decisions in the event of irregularities.[14] The Act also regulates the limitations through which credit organizations can advertise[15] and give the county court the ability to intercede in the case of unfair or unjust credit agreements.

## II. STATEMENT OF THE PROBLEM

The Rwandan Legislator has enacted some laws among which the Law n°16/2010 of 07/05/2010 governing credit information system in Rwanda was published[16]. Currently, the law was amended by the law governing credit reporting system published in 2018 now in force.[17] Though, the law was put in place, it is silent in as far as the credit is concerned. In its article one, it only precises that the law governs the credit information system in Rwanda in the first Law and credit reporting system in the second Law.

The law does not go beyond to solve the issue of borrowers who still face different abuses such as lack of enough information to borrowers, unilateral decision from the lender to increase interest rate or refuse the credit requested without compensation of expenses incurred and so many others as indicated above. Therefore, there is a need to think of various questions resulting from that inadequacy of domestic legal and institutional framework to solve borrowers' issues so as to protect not only borrowers but also credit providers.

In this respect, in order to solve issues above mentioned, the following questions need to be addressed:

a) Does existing Rwandan legislation regulate consumer credit ?
b) What are challenges resulting from inadequacy of legal and institutional framework of consumer protection in credit contracts in Rwanda?
c) What are the legal and institutional mechanisms to strengthen the rights of borrowers in consumer credit transactions in Rwanda?

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[13] Consumer credit Act, United Kingdom, 1974, as modified and complemented to date, p.1.
[14] *Ibid*.
[15] Consumer credit Act in UK, § 43, p. 24.
[16] Law n°16/2010 of 07/05/2010 governing credit information system in Rwanda, in *O.G.* n° special of 14/05/2010.
[17] Law nº 73/2018 of 31/08/2018 governing credit reporting system, in *OG* nº 37 of 10/09/2018.

## III. HYPOTHESES

Referring to the above questions, the following hypotheses are made :

a) Existing Rwandan legislations might be regulating consumer protection in credit contracts for a better protection of borrowers due to imbalances resulting from malpractices of lenders.
b) Resolving challenges resulting from inadequacy of legal and institutional framework of consumer protection in credit contracts taking into account best practices from mature legislations can strengthen borrowers'rights.
c) Establishing legal and institutional mechanisms ensures consumer protection in credit contracts.

## IV. OBJECTIVES OF THE STUDY

Generally, the analysis of legal & institutional framework of consumer protection in credit contracts in Rwanda was done due to unfairness that is frequently highlighted and imbalances faced by borrowers in the financial sector.

The researcher was inspired by foreign legislations such as Consumer Protection Act of The Republic of Kenya, consumer credit Act of the United Kingdom as modified and complemented to date, Directive 2008/48/EC of the European Parliament and of the council of 23 April 2008, on credit agreement for consumers and repealing council Directive 87/102/EEC and the Banking (Amendment) Act in Kenya whereby specific credit laws were enacted, institutions established and issues faced in the credit sector were limited and even avoided thanks to those laws. Therefore, specific laws should be enacted to improve domestic legal framework together with proposing efficient institutional measures.

## V. SCOPE OF THE STUDY

The research is limited to the domestic legislations especially commercial laws in as far as banking and financial sector are concerned. However, where necessary and for the best effective analysis of the study, some foreign legislations such as Belgium, United Kingdom and Kenyan Laws were used since this area of credit is already regulated.

## VI. RESEARCH METHODOLOGY

In the course of this research, the researcher used techniques which served in the collection of data and the research methods for data analysis.

### VI.1. Research techniques

Various techniques were used in the present work for rich and consistent work. Thus, the documentary technique served in the collection of data from different written sources such as text books, internet website, reports, etc. The interview technique was used to collect data through conversations and discussions with different practitioners such as lawyers, Financiers, credit consumers in order to obtain good quality of information.

### VI. 2. Research methods

Concerning methods, these are the ways that are used to analyze data in order to find out information of quality that are useful in the research. In the present research, various methods were used such as comparative method which helped to compare the conditions of protection of borrowers by referring to both domestic and foreign legislations in developed countries.

The analytical method facilitated to analyze all collected data to find out those which are relevant in the regulation of credit sector for the protection of consumers. Synthetic method was used to collect all data so that the researcher may explore those that may be meaningful to provide adequate solution and fruitful result.

## VII. DIVISION OF THE STUDY

The present work was divided into three chapters:

The first chapter entitled «general considerations and analysis of existing laws on consumer protection in credit contracts» focused on analysis of the existing Rwandan laws in relation to consumer credit. In this chapter, the analysis of these laws aimed at highlighting gaps and or inadequacy of provisions regarding the consumer credit and bank credits in general in

consideration of the consumer protection, in order to find out the best way forward to sufficiently regulate consumer credit. Therefore, the analysis focused on existing laws and regulations in force. Chapter two entitled «consumer protection and salient issues in credit contracts » analyzed issues faced by the borrowers due to inadequacy of clear legislations. In this chapter, existing foreign legislations were referred to in order to learn from their experience and covered issues that were highlighted in this research.

Moreover, in this chapter, the above indicated issues were analyzed referring to some decided cases in Courts where borrowers may have been victims and entered into conflicts[18] with lenders during or after the execution of credit contracts. Finally, chapter three was entitled "establishment of legal and institutional mechanisms to strengthen borrowers' rights in credit contracts". This chapter dealt with various mechanisms aiming at the protection of consumers in credit contracts in Rwanda.

The chapter has proposed solutions to the issues which were raised by proposing enactment of specific law governing credit and credit standard agreement[19] in the banking system as it is the case for example in Belgium where the Law provides for a model credit contract.

Institutionally, necessary institutions were proposed to improve management of credit issues together with setting up measures to definitively solve them. The work ends with a conclusion and recommendations.

[18] Issue related to: Lack of specific law governing consumer credit; the nature of the credit contract where the weaker part negotiate with the stronger part; lack of model credit contract provided for by the law; lack of the role of regulatory board in the determination of interest rates and fees whereby parties freely agree on the interest rate and other fees.

[19] Art. 14 of the Belgian Law of 12 June 1991 relating to consumer credit as modified and complemented to date.

## CHAPTER ONE : GENERAL CONSIDERATIONS AND ANALYSIS OF EXISTING LAWS ON CONSUMER PROTECTION IN CREDIT CONTRACTS

This chapter comprises two sections. The first section consists of different notions and characteristics of credit in general. The second section analyzed the existing laws on consumer protection in credit contracts so as to assess how borrowers are protected.

### SECTION ONE : GENERAL NOTIONS ON CREDIT CONTRACT

Generally, a credit is operationalized between lenders and borrowers through a contract which is achieved through adhesion means. In other words, consumer adheres to the will of a lender who is normally professional with stronger bargaining power. That is why, in most cases, a credit contract is prepared by a lender and borrowers with weaker bargaining power adhere.[20]

Therefore, a borrower finds himself/herself in an inferior position towards the lender either at the negotiation level of the contract or at the execution of the credit contract. This situation puts him/her in a position to adhere to the conditions previously elaborated by the lender, with no possibility to influence their contents[21].

The peculiarity of this contract is that it is one of the most powerful engines of economic life in general and consumption in particular. It involves persons of different level of awareness.[22]

#### §1. Formation of a credit contract

During the formation of the contract, each party to the contract of credit is required to inform his partner. Indeed, it is admitted that before the formation of the contract of credit, the borrower needs protection against serious hazards that may arise from his/her decision.

Credit is not to be entitled as result of a thoughtless act, but rather must be the result of a calculated confidence.

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[20] Online, https://www.law.cornell.edu/wex/adhesion_contract_%28contract_of_adhesion%29, Cornell Law School, Legal information Institute (LII), adhesion contract, 1992, accessed on 07 November 2018.
[21] D. UDRESCU, "*Theoretical and Practical Aspects of Unfair Terms in Consumer Credit Contracts*", available on http://www.rce.feaa.ugal.ro/sites/default/files/UdrescuCocor.pdf, accessed on 02/8/2013.
[22] A. M. NGAGI, La protection des intérêts économique des consommateurs dans le cadre du libéralisme économique en droit Rwandais, Butare, les editions de l'UNR, 2005, p. 294.

**A. Definition and forms of credit agreement**

Domestically, there is no law governing the contract of credit. Therefore, reference is made to some foreign legal systems in order to define the concept of credit agreement and its different forms.

According to the Directive 2008/48/EC of the European Parliament, credit agreement refers to an agreement whereby a credit grants or promises to grant to a consumer, credit in the form of payment with interest, loan or other similar financial accommodation, except for agreement for the provision on a continuing basis of services or the supply of goods of the same kind, where the consumer pays for such services or goods for the duration of their provision by means of installments.[23]

According to the Kenyan consumer protection Act, a credit agreement means a consumer agreement under which a lender extends credit or lends money to a borrower and includes a supplier credit agreement and a prospective consumer agreement under which an extension of credit, loan of money or supplier credit agreement may occur in the future, but does not include an agreement under which a lender extends credit or lends money on the security of a mortgage of real property or consumer agreements of a prescribed type.[24]

A consumer is a natural person acting for purposes which are outside his/her trade, business or profession. In other words, a credit consists of either buying something and being given time to pay for it or borrowing money and paying it later with a certain rate of interest[25].

Dictionnary definitions of the word"consumer" are either so broad that they cover anyone who consumes goods or services, including even those who are acting in commercial capacity or so narrow that they cover only purchasers, rather than all users or just goods rather than both goods and services.

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[23] Art. 3(c) of the Directive 2008/48/EC of the European Parliament and of the council of 23/4/2008, on credit agreement for consumers and repealing council Directive 87/102/EEC. Online: https://publications.europa.eu/en/publication-detail/-/publication/e4945793-f1f9-4527-8a2e9060378fc302/languageen, accessed on 02 July 2018.

[24] Consumer Protection Act of The Republic of Kenya, n° 46 of 2012, revised edition 2016, available on www.kenyalaw.org, para 2, p. C36A – 8, accessed on 07th July 2018.

[25] M.KEENAN, S.RICHES & V.ALLEN, *Keenan and Riches' Business Law,* 10th ed, London, Longman, 2011, p. 375.

A consumer is also defined as "the buyer of a good or service or a user that is not using the product but reselling it."[26]

In addition, a credit agreement is actually a contract between a borrower and a lender which regulates the mutual promises made by each party. Loan agreements are documented via a compilation of the various mutual promises made by the involved parties. Prior to entering into a loan agreement, the "borrower" first makes representations about his affairs surrounding his character, creditworthiness, cash flow and any collateral that he may have available to pledge as security for a loan.

These representations are taken into consideration and the lender then determines under some conditions, if any, they are prepared to advance money.[27]

Credit agreements, like any contract, reflect an offer, acceptance of the offer, consideration and can only involves situations which are legal. Thus, a loan agreement involving heroin drug sales is not legally accepted.[28]

Credit agreements are usually in written form, but there is no legal reason that a loan agreement cannot be a purely oral contarct although oral agreements are more difficult to enforce.

M. Furmston and J. Chuah precise "that for a credit agreement to be properly executed, it must be a document in the prescribed form, containing all the prescribed terms, the document must embody all the terms of the agreement other than the implied terms, the document when presented to the debtor for signature, it must be in a such a way that all the terms are readable.[29]

They are adhesion contracts whereby the credit contract is a standard form contract (sometimes referred to as a contract of adhesion, a leonine contract, a take-it-or-leave-it contarct, or a boilerplate contract is a contract between two parties, where the terms and conditions of the contracts are set by one of the parties and the other party has little or no ability to negotiate more favorable terms and is thus placed in a "take it or leave it" position.[30]

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[26] Online, https://thelawdictionary.org/consumer/Black's Law Dictionary free online legal dictionary 2nd edition, accessed on 05 November 2018.
[27] X, available at https://en.wikipedia.org/wiki/Loan_agreement, visited on 14/07/2018.
[28] *Ibid.*
[29] M. FURMSTON & J. CHUAH, *commercial and consumer law*, Longman, an imprint of Pearson, UK, 2010, p. 508.
[30] Available at https: //en.wikipedia.org/wiki/Standard_form_contract, visited on 14/07/2018.

The draft law on financial consumer protection in Rwanda currently under legislative process does not define "borrower" but largely defines a financial services consumer as **"**an individual, a small or medium enterprise that enters, or may enter, into a business relationship or a contract with a financial services provider for the purpose of acquiring or receiving a financial product or service".[31]

However, according to Kenyan law on consumer protection, a borrower means a consumer who is or may become a party to a credit agreement and who receives or may receive credit or a loan of money from the other party, but does not include a guarantor.[32]

Concerning the form of the credit, the credit provider may offer form of a loan of money, in this case, the borrower will be ready to repay the amount and adjust the interests thereon to the date agreed. According to C. Galvada & J. Stoufflet, the beneficiary complies with a commitment to pay the credit in accordance with its commitment to the agreed terms.[33]

Normally, a credit is real or personal. It is real credit when it lies in its support of real property constituted as a pledge or mortgage in favor of the bank under the principle that all properties of the debtor are the common pledge to all his creditors.

This prerogative that is given to all creditors of the same debtor places them in equal position, and consequently a competition between creditors.[34] A real credit relates to the specified property of the real interest of the debtor as all forms of credit to accommodate a form of guarantee.[35] It is this allocation that makes for the bearer an exception to the general principle of equality of creditors and which creates a right in his favor or legal causes of preference.

A personal credit however, is granted in consideration of the personality of the debtor in relation to the personal security.[36] The personal security consists of a third party who engages himself/herself towards the creditor to guarantee the execution of the debt contracted by another person, in committing himself to pay in case the debtor fails to do it.

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[31] Art. One para 4 of the draft law on financial consumer protection in Rwanda,
[32] Consumer Protection Act of The Republic of Kenya, nº 46 of 2012, revised edition 2016, available on www.kenyalaw.org, part I, 2, p. C36A – 7, accessed on 07th July 2018.
[33] C. GALVADA & J. STOUFFLET, *Droit de la banque*, Paris, P.U.F, 1974, p. 597.
[34] N. NSENGIYUMVA, *Law of securities*, course notes, INILAK, Faculty of Law, 2013, p. 1, unpublished.
[35] J. HAMEL, *Banques et opérations de banques*, Paris, librairie Arthur Rousseau, 1993, p.102.
[36] *Ibid*.

In both real and personal credit, there is a credit provider which is normally a bank providing credit facilities on the one hand and a borrower who may be either a natural or legal person with finance needs on the other hand.

Nowadays and in some cases, there are credit intermediates like credit brokers, who may be either natural or legal persons playing the role of liaison between borrowers of credit and financial institutions. In other words, they act as communicators and facilitators between the parties.

**B. Obligations of the Parties in the formation of the credit contract**

In the present part, the analysis of the parties'obligations in the formation of the contract in the pre-contractual phase and contractual phase is made. In addition, we looked at the equal opportunity of the parties when negotiating a contract and we also analyzed the reflection period where a consumer can withdraw from a commitment and effectively cancel the contract with the lender.

**1. Reciprocal information from parties in the pre-contractual phase**

The duty of disclosure is reciprocal. Each party to the credit agreement has an obligation to inform the other party[37] and this is to ensure that the borrower is able to pay the credit granted or to allow him to deliberate before taking it. The parties are therefore obliged to give all necessary information regarding the credit formation.[38] According to F. Jeffrey Beatty and S.S. Samuelson, "the disclosure must be clear and in a sensible order".[39] In such cirmustances, a finance company violated TILA[40] when it lent money to Dorothy Allen. The company made all the required

[37] Article 10 & 11 of the Belgian Law of 12 June 1991 on consumer credit available on http://www.economie.eov.be, accessed on 2/6/2013.
[38] S. R. MUNYAMAHORO, *Problematique de l'application du principe de la convention-loi dans le contrôle de credit à la consommation,* master's degree, UNR 2009, p. 20, unpublished.
[39] J. F. BEATTY and S. S. SAMUELSON, *Introduction to Business law*, ed. 3, South-Western, Boston University, 2010, p. 397
[40] The Truth in Lending Act (TILA) was a federal law enacted in 1968 to protect consumers in their dealings with lenders and creditors. The TILA was implemented by the Federal Reserve Board through a series of regulations. The most important aspects of the act concern the pieces of information that must be disclosed to a borrower prior to extending credit: annual percentage rate (APR), term of the loan and total costs to the borrower. This information must be conspicuous on documents presented to the consumer before signing and also possibly on periodic billing statements, X,Truth In Lending Act (TILA) at https://www.investopedia.com/terms/t/tila.asp#ixzz5XCD5CoPq, accessed on 18 November 2018.

disclosures but scattered them throughout the loan document and intermixed them with confusing terms that were not required by Truth-In-Lending-Act (TILA).[41]

This can be done during the pre-contractual phase whereby before the conclusion of the credit agreement, many steps are made by the borrower as a party that wishes to obtain credit.

Thus, it needs to be enlightened in order that the borrower may be informed in a clear, simple way and to allow him have sufficient time to analyze the risk due to its untimely decision.[42]

Particularly, on the one hand, during the pre-contractual phase, the lender must supply clear information on the main features of the credit offered in due course notably, the duration of the credit agreement; the total amount of credit; the interest rate; payment modalities; sanctions of late payments, defaults and sureties.

In addition, lenders must evaluate the solvency of their clients before concluding an agreement and where appropriate, the lender has an obligation to supply enough information on the essential characteristics of the products proposed.

It should be explained to the borrower in a personalized manner so that it can understand the effects which it may have on its economic situation,[43] the borrower has also the duty to disclose necessary information regarding its request.

**2. Reflection period**

A reflection period is a process by which the consumer can withdraw from a commitment, indiscriminate and reverse a decision taken in circumstances where the seller's seduction outweighs the free and informed consent of the consumer. This period of reflection or retraction has the effect of cancelling the contract with the lender.[44]

In Belgium and France; the period of reflection is 7 working days after signing the contract and no indemnity is paid by the consumer in that regard.[45] The Belgian law provides it as follows:

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[41] Allen v. Beneficial Fin. Co.of Gary, 531 F.2d 797, 1976 U.S. App. LEXIS 12935 (7th Cir. 1976). quoted by J. F. BEATTY and S.S. SAMUELSON, *Introduction to Business law*, ed. 3, Boston University, 2010, p. 397.

[42] I. BUGINGO, De *I'aide juridique aux consommateurs des credit en droit rwandais*, memoire, Fac.de Droit.UNR, 1997, p. 21, *inedit*.

[43] H. BEALE, *Pre-conditional Obligation*, 3rd ed, Cavendish Publishing Ltd, p. 23.

[44] A. M. NGAGI, *La protection des intérêts économiques des consommateurs dans le cadre du libéralisme économique en droit Rwandais*, Butare, les Editions de L'UNR., 2005, p. 53.

[45] Art. 18 of the Belgian law relating to consumer credit of 12 June 1991, updated on 31-08-2005.

"The consumer has the right to cancel the credit agreement for a period of seven working days from the first business day following the signature of the contract. This right does not apply to sales by installment, leasing and loans by installment, provided that the credit amount of these contracts is less than EUR 1,250."[46]

The King can increase this loan amount. In case the Consumer renounces to the credit agreement, he/she notifies his/her decision through postal recommended letter to the borrower.
The consumer who uses what is provided for in paragraph one & 2, is required to give back simultaneously the money or the assets received and to pay interests due for the period of credit payment, calculated according to annual rate agreed upon.

No other indemnity can be claimed due to the cancellation of the agreement by the consumer and the installment payed in the framework of sale by installment is reimbursed to Him/Her in thirty days (30) following the cancellation. The cancellation of the credit agreement entails the automatic cancellation of the ancillary contracts. This article does not apply to the distance credit agreement ».[47]

In Rwanda, there is no legislation providing for such a period of reflection or retraction for the consumer. It is actually rare that a consumer, who wants at all costs to take this opportunity to receive a credit, may request such a delay.

On the contrary, practically, the Rwandan banks often retract after concluding a contract without even informing the borrower and no damages is given in that situation.

**3. Contractual phase**

During the contractual relationship, the borrower should further be informed of changes occurred or to occur in relation with his/her credit such as variable borrowing rate, monthly statements of the bank account etc. The lender has the right to issue notices of sums in arrears and notice of default once the borrower is in default.

On the other hand, the borrower should inform the lender in case of change on grounds of hardships. Therefore, borrowers can request their lenders for temporary relief or relaxation in the

[46] *Ibid.*
[47] Art. 18, §. 1, 3, 4 of the Belgian law relating to consumer credit of 12 June 1991, updated on 31-08-2005.

terms of their contract if they suffer unexpected hardships and are to be up-to-date with their repayments. They may request for the reduction of the amount of each payment or extension of the period of the contract.[48]

However, according to F. Ntezilyayo, a contract should be negotiated and accepted by the customer knowingly, which will undoubtedly facilitate its execution, because the parties may execute better than what was discussed.[49]

The following paragraph describes the equal opportunity of the parties in the credit, whereby any discrimination to the parties is prohibited communication required to the parties for any change in the contract.

**4. Obligation of equal credit opportunity**

In USA, the Equal Credit Opportunity Act (ECOA) prohibits any creditor from discriminating against a borrower because of race, color, religion, national origin, sex, marital status, age, etc.

In the same spirit, a lender must respond to a credit application within provided timeframe, in case the application is rejected, it must either tell the applicant why or notify him/her that he/she has the right to a written explanation of the reasons for this adverse action.[50]

In the case between Treadway v. Gateway, Tonja Treadway applied for a loan to buy a used car, Gateway Chevrolet Oldsmobile Inc. analysed the credit report of Treadway and found that Treadway fell into bankruptcy and her application could not be approved. However, Treadway was not notified of this adverse action. So, she filed a suit against Gateway, alleging that it had violated the ECOA by not notifying her that it had taken an adverse action against her.

During this process, Gateway lost the case, because under ECOA, it was required to the lender which had rejected the loan application to tell the applicant the reason or notify her that she had the right to a written explanation.[51]

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[48] J. GOLDRING, *Consumer Protection law*, 5th ed, Federation Press, Leichardt, Australia, 1998, p. 45.
[49] F. NTEZILYAYO, *Le cadre juridique de l'activité bancaire au Rwanda et I'accessibilité au système de* crédit, Kigali, Pallotti- Presse, 1998, p. 414.
[50] J. F. Beatty and S.S. Samuelson, Introduction to Business law, *ed*. 3, Boston University, 2010, p. 400.
[51] Treadway v. Gateway Chevrolet Oldsmobile Inc., 362 F.3D 971, 2004 U.S. App. LEXIS 6325, United States Court of Appeals for the Seventh Circuit, 2004, in F. Beatty and S.S. Samuelson, Introduction to Business law, *ed*. 3, Boston University, 2010, p. 400.

## §2. Characteristics of a credit contract

A credit contract can take the form of an adhesion, bilateral or solemn contract.

### A. Contract of adhesion

A contract of adhesion is a contract which is not really and freely bargained. In other words, it is a standard form contract drafted by one party usually a businessperson with stronger bargaining power and signed by the so called weaker party usually a consumer in need of services, who must adhere to the contract and therefore does not have the power to negotiate or easily modify the terms of the contract.[52]

Even if a consumer is aware of what is in the standard form, it is likely a take-it-or-leave-it attitude.

In ordinary way, the consumer has no much time to read the standard terms, though he/she does read them, he/she would probably not understand them enough. And if he/she does understand it, he/she would generally be told to take it or leave it. And if he/she goes to another creditor the result would be the same. There is no room for bargaining.[53]

### B. Bilateral contract

A contract of credit is a two-party agreement known as a debtor-creditor agreement. It is a contract where both parties exchange promises; the credit provider promises to grant credit to another party who promises to pay back the debt, and generally, the effect is that a bilateral contract becomes binding and enforceable when the promises are exchanged.[54]

This usually means that the contract is binding when an offer is accepted. If one party fails to perform the contract, the other party may sue another part for breach of contract. According to the law governing contracts, one party shall not require the other party to perform his/her

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[52] S.D. STERKIN**,** *Challenging Adhesion Contracts in California:* consumer's guide, 2010, p. 285, available at http://digitalcommons.law.ggu**.***edU*/ggulrev/vol34/iss2/3, accessed on 09/06/2018.
[53] J.BEATSON & D.FRIENDMANN, *Good faith and fault in contract law*, 1st ed., Clarendon Press, UK, 1997, p. 233.
[54] Article 2 § 3 of the Law no 45/2011 of 25/11/2011 governing contracts, in *OG* nº 04 *bis* of 23/01/2012.

obligations unless that party has performed his/her main obligations in case of mutual obligations.[55] This is the same in the execution of credit contracts.

**C. Solemn contract**

The contract of credit does not only require the exchange of consent but also it must comply with necessary formalities. It should be characterized in a written form and signed by the parties. A contract is designed in written form and signed by the parties to make sure that the parties have a written evidence of the agreement and have the opportunity to see all its terms.

Before the credit approval, the borrower is required to submit a letter of request (including names, account number, addresses, ID copy, expertise of the security proposed, plot document, copy of plot document notified, clearance form for a new client, insurance cover and other information about business.[56]

The security is considered to be valid when recorded in the mortgage register in the office of the Registrar General.[57] The insurance cover is requested in a sense that the insurer insures a creditor against losses incurred due to his debtor's insolvency. The risk covered is the non-payment of the debt to insolvency of the debtor that the insurance policy clearly defines.[58]

The following part analyzes the domestic laws in force focusing on the protection of consumer in credit contracts. It aims at highlighting gaps which must be addressed for the protection of borrowers in general.

[55] Law n°45/2011 of 25/11/2011 governing contracts, in *OG* nº 04 *bis* of 23/01/2012.
[56] X, required documents for personnal loan, available at https://financebuddha.com/personal-loan-documents, accessed on 07th January 2018.
[57] Art. 4 of the law nº 10/2009 of 14/05/2009 on mortgages, *OG* nº 14/05/2010.
[58] N. NSENGIYUMVA, *Law of securities*, course notes, INILAK, Faculty of Law, 2013, unpublished.

## SECTION 2: ANALYSIS OF EXISTING LAWS ON CONSUMER PROTECTION IN CREDIT CONTRACTS

The present section aims at analyzing the existing laws to be sure whether domestic legislations have provided for borrowers or whether there are any gaps that must be filled in order to ensure a balanced relationship between the parties to a consumer credit transaction. Thus, the analysis focused on the following laws and regulations:[59]

### § 1. Law relating to competition and consumer protection & law nº 45/2011 of 25/11/2011 governing contracts

This paragraph focuses on the analysis of the law relating to competition and consumer protection and the law governing contracts. The study orients the analysis to the protection of borrowers throughout these laws.

### A. Law relating to competition and consumer protection

This law aims at encouraging competition in the economy by prohibiting practices that undermine the normal and fair course of competition practices in commercial matters. It also aims at ensuring consumer's interests, promotion and protection[60], it obliges the seller to provide the consumer with correct and necessary information on the products and services and the conditions of contract considering the need for information expressed by the consumer and given the reported use by the consumer or reasonably foreseeable use.

The law further provides situations that seem to be prejudicial to the consumer, such as the way the seller reserves the right to unilaterally change the terms of the contract, the seller reserves the sole right to determine if the item delivered or service provided is or not consistent with the contract or denies the discretionary right to interpret any term of the contract, etc.[61]

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[59] Law nº 36/2012 of 21/09/2012 relating to competition and consumer protection, law n° 45/2011 of 25/11/2011 governing contracts, Law nº 73/2018 of 31/08/2018 governing credit reporting system, law n° 10/2009 of 14/05/2009 on mortgage, regulation nº14/2011 on the publication of tariff of interest rates and fees applied by banks.

[60] Art. 1 of the Law nº 36/2012 of 21/09/2012 relating to competition and consumer protection, *OG* nº 46 of 12/11/2012.

[61] *Idem*, art. 34.

The aforementioned law focuses on the consumer in general and does not specifically say anything about the protection of the borrowers. In other words, it considers a borrower like any other consumers in general and hence does not protect the borrower in particular. When one looks at the purpose of the law, it is provided that it aims at encouraging competition in the economy by prohibiting practices that undermine the normal and fair course of competition practices in commercial matters. It also aims at ensuring consumers interests promotion and protection.[62] That is why a specific law governing the protection of consumers of credit could be of more importance.

**B. Law n° 45/2011 of 25/11/2011 governing contracts**

The above law contributes to the protection of consumers whereby it requires any party in the formation of a contract including credit providers such as banks and any other financial institutions, to consider the general requirements for the formation of a contract in order to be valid. According to Article 4 of the said law, the parties are bound to the general requirements for the formation of a contract, that are mutual assent; capacity to contract; object matter of the contract and licit cause.[63]

It further concerns the course of negotiation between parties on the terms of the contract. This really protects consumers against unfair clauses contained in some contracts whereby professionals have the unilateral right to revoke or change any term of the contract without the consent of the other party as it is sometimes the case in the contract of credit.

**§. 2. Law nº 73/2018 of 31/08/2018 governing credit reporting system and law no 10/2009 of 14/05/2009 on mortgages**

This part analyzed the law governing credit reporting system, the law on mortgages and the Regulation on the publication of tariff of interest rates and fees applied by banks in order to highlight their role in the protection of borrowers.

[62] Art. 1 of the law on competition and consumer protection, note supra nº 59.
[63] Article 4 of the law n°45/2011 of 25/11/2011 governing contracts, published in *OG* nº 04 *bis* of 23/01/2012.

**A. Law nº 73/2018 of 31/08/2018 governing credit reporting system**

In Article 43 of the Law, it is provided that the Central Bank has the authority to issue the license to engage in operating credit bureau.[64] It also has powers to review and approve operating procedures of credit reporting service providers on data accuracy and integrity and fee structures, as it considers appropriate.[65]

Otherwise, credit bureaus would fix their own prices for services that might be unfair to the consumers in the absence of the Central Bank's supervision. Normally the role of credit bureau is not to fix the prices on their services, rather the law governing credit reporting system in Rwanda provides for permissible activities of credit bureau which is that an operator of a credit bureau collects, processes and disseminates data for the purpose of evaluating the creditworthiness or re-payment behavior of individuals and legal entities. An operator of a credit bureau ensures that the service is secure, reliable, efficient, and that the credit reporting solution is capable of delivering credit reports and any other related products and services in compliance with the provisions of the Law.[66]

In case of credit denial based in whole or in part on the information contained in the credit bureau report, the applicant should be notified by issuing an adverse notice. Applicants of credit are entitled to be informed and advised about their right to obtain and review copies of the credit bureau report.

Article 35 provides that "the data subject is informed of any adverse action taken against him or her related to change in the loan, credit or service conditions or if he/she has been refused a loan, credit or service depending on the data which are in the credit report."[67] In case of dispute on the information, a data subject is entitled to request for correction of any incorrect, inaccurate or incomplete credit information included in the credit reporting system at any time.[68] Credit reporting service providers, data providers and users must respect and apply the rights of the data subject regarding his/her data as provided for by the law.[69] Hence, while applying the rights of the data subjects, the following requirements must be met:

[64] Article 8 of the law nº 73/2018 of 31/08/2018 governing credit reporting system, in *O.G*. nº 37 of 10/09/2018.
[65] *Ibid*., art. 43.
[66] *Ibid*., art. 11.
[67] *Ibid*., article 35, § 2.
[68] Article 37, note supra 63.
[69] Article 39, note supra 63.

1° a dedicated unit of the operator of credit attends to claims and requests from data subject and provides to the data subject a copy of his or her credit report if the latter has provided proof of identification;[70]

2° the Central Bank publishes on its website relevant information regarding the credit reporting system in Rwanda.[71]

**B. Law nº 13/2010 of 07/05/2010 modifying and complementing Law nº 10/2009 of 14/05/2009 on mortgages**

In this law, it is worth analyzing how it ensures the protection of borrowers'rights. In this regard, article 2 on the mortgagee's remedies in case of default of payment, provides that «the mortgage contract shall contain clauses that grant the mortgage the power to manage, lease, sell or take over the mortgage in case of the mortgagor's default ».

The mortgage agreement shall also specify the time, place and terms of sale and the procedure to be followed in case of default. If the mortgagor is in default, the mortgagee shall notify the mortgagor in writing of his/her choice to use one of the remedies specified in the preceding paragraph and transmit a copy thereof to the Registrar General."

This provision actually protects the mortgagee in case of default by the mortgagor but regarding the execution of the auctioning of the property under the mortgage agreement, the provisions of the law on civil, commercial, labor and administrative procedure state that "the public auction is conducted by a court bailiff".[72] It is no longer done by a receiver as it was provided in the mortgage law.

[70] Article 40, note supra 63.
[71] *Ibid*.
[72] Art. 251 Law nº 22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure, *OG*. nº Special of 29/04/2018.

**C. Regulation nº 14/2011 on the publication of tariff of interest rates and fees applied by banks**

This regulation aims at ensuring full transparency in pricing and provision of banking services and allow customers to make a rational choice of prices for services that are offered by banks.[73]

Therefore, it is worth analyzing this regulation so as to ensure whether borrowers 'interests are protected with respect to tariff of interest rates and fees applied by banks.

Article 3 of the regulation provides for the publication of tariff of rates and fees applied by banks as follows:

"Banks are required, firstly, to publish the minimum and maximum rates and fees applicable to their operations, according to the model annexed to the regulation in a local newspaper with wide distribution, on their websites and through a brochure made available to the public and, secondly, to always display outstandingly at the entrance of their premises and any other place of business."[74]

A quick reading of this provision may lead one to think that interest rates and fees applied by banks are regulated and fixed in collaboration with the regulator, but it is not the case as the regulation, particularly in its Article 3, only provides for some modalities of the publication of the interests rates and fees but does not fix it.

The model annexed to the regulation only indicates the types of rates and interests provided for in the said regulation such as lending interest rate (short term financing, medium and long term financing, overdrafts, others), deposit rate (demand deposit, term deposit, others); and fees on bank operations.

[73] Art. 1 of regulation nº 14/2011 on the publication of tariff of interest rates and fees applied by banks, *OG* n° 30 *bis* of 25/07/2011.
[74] Art. 3 of the regulation nº 14/2011 of 2011.

A quick review of various decided cases in regard with the termination of loan contracts, refusal of loan previously approved and refusal to pay the loan by the borrower indicates that in most cases, banks have been fixing interest rate at their will and they have not really applied the same interest rates to the borrowers. This practice justifiies the gaps in Rwandan laws in regard with the regulation of interest rates to be applied by all the banks to their borrowers of the same conditions.

In the case nº RCom 0885/14/TC/Nyge between Equity Bank Rwanda Ltd *vs* M. G. in Commercial Court of Nyarugenge, the bank requested to reimburse a loan of 2.276.381 Rwf with interest calculated at 16% per year and the penalty for late payment of 6% per year.[75] However, in the case nº RCOMA 00149/2017/CHC/HCC between COGEBANQUE Ltd *vs* R. J. C., in Commercial High Court, the bank requested the recovery of the loan offered to R. J. C. on 20/07/2012 equivalent of 4, 400,000 Rwf plus interests calculated at 19% per year and penalty for delayed payment of 7% per year.[76]

The same COGEBANQUE offered the loan to NTAKIRUTIMANA Jonas on 24/03/2013 equivalent of 4, 400, 000 Rwf at the interest rate of 20, 2% per year and penalty for late payment of 22% per year as mentioned in the case nº RCOM 01291/2016/TC/NYGE in Commercial court of Nyarugenge between COGEBANQUE *vs* N. J. where the bank requested the recovery of the loan plus its ordinary interests and interests for late payment.[77]

Actually, in all of these cases, interests rates are very different even in the same bank of COGEBANQUE, for the loan offered to R. J. C., in 2012, the interest rate was 19% per year, in 2013 in less than a year the interest rate was 20, 2% per year for the same loan offered to Mr NTAKIRUTIMANA Jonas.[78]

But besides, penalty for late payment was 7% per year in 2012 in the loan offered to RUBANGO Jean Claude whereas it increased in extraordinary way up to 22% per year in less than a year in the loan offered to NTAKIRUTIMANA Jonas.[79]

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[75] Commercial Court of Nyarugenge, case nº RCom 0885/14/TC/Nyge between Equity Bank Rwanda Ltd *vs* MUGABOWISHEMA Gratien, Kigali, 31/10/2014.
[76] Commercial High Court, case nº RCOMA 00149/2017/CHC/HCC between COGEBANQUE Ltd *vs* RUBANGO Jean Claude, Kigali, 17/11/2017.
[77] Commercial Court of Nyarugenge, case nº RCOM 01291/2016/TC/NYGE between COGEBANQUE *vs* NTAKIRUTIMANA, Kigali, 19/04/2017.
[78] *Ibid*.
[79] *Ibid.*

In the case of Equity Bank Rwanda Ltd *vs* M. G. in Commercial Court of Nyarugenge, the bank calculated the interest at 16% per year and the penalty for late payment of 6% per year. By comparing the interest rates in the two banks Equity and COGEBANQUE and COGEBANQUE itself to different borrowers, the interest rate is not really harmonized. Each bank fixes it as it wants and depending on the customer. The law should at least give a limit if not fixing it as such.

However, in most jurisdictions, the States limit the maximum interest rate a lender may charge. According to Jeffrey F. Beatty and Susan S. Samuelson, the laws limiting the maximum interest rate a lender may charge are called "usury statutes", the penalty for violating usury statutes varies among the states.[80] The Kenyan law also has set limitation whereby the Banking Act provides that « A Bank or a financial institution shall set the maximum interest rate chargeable for a credit facility in Kenya at no more than four per cent (4%), the base rate set and published by the Central Bank of Kenya. »[81]

In Rwandan law, according to article 5 of the regulation n° 14/2011 on the publication of tariff of interest rates and fees applied by banks, the deposit and lending rates and various fees in connection with the activity of banking intermediation may be freely agreed between the parties concerned.[82] This provision clearly gives full independence and liberty between the borrower and credit provider in fixing the deposit, lending and other various fees in connection with the activity of banking.

Though, the provision determines that those rates may be freely agreed between the parties concerned, it is worth noting that parties are not in equal position. One needs money and the other has it, the lender decides whom to lend money and whom to refuse it.

Actually, the borrower is often in weaker position and cannot negotiate interest rate applicable to a loan or interest on deposit or any other fees for various bank operations. In essence, the regulation does not address the issue of equal rights in fixing interest rates. The Rwandan legislator should be inspired by Kenyan law in fixing the maximum of interest rate as mentionned above.

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[80] J.F. Beatty and S.S. Samuelson, Introduction to Business law, ed. 3, Boston University, 2010, p. 397.

[81] The Banking (Amendment) Act, Nairobi, 31st August, 2016, paragraph 33B (1) (a), in Kenya Gazette Supplement no 143 (Acts No. 25), 2016.

[82] Art. 5 of the regulation n° 14/2011 on the publication of tariff of interest rates and fees applied by banks, *OG* n° 30 *bis* of 25/07/2011.

**Partial conclusion**

The chapter one comprised the analysis of different notions and characteristics of credit in general. It has also analyzed the existing Rwandan laws in order to see whether a borrower is legally and institutionally protected. Regarding the credit, it exists between lenders and borrowers where the consumer adheres to the contract prepared by the lender who is normally professional. A credit consists of either buying something and being given time to pay for it or borrowing money and paying it later with a certain rate of interest.

For the credit agreement, domestically, there is no law governing the credit agreement in particular. According to consumer protection Act of Kenya, a credit agreement means a consumer agreement under which a lender lends money to a borrower and includes a supplier credit agreement and a prospective consumer agreement under which an extension of credit, loan of money or supplier credit agreement may occur in the future but does not include an agreement under which a lender extends credit or lends money on the security of a mortgage of real property or consumer agreements of a prescribed type. Generally, a credit agreement is actually a contract between a borrower and a lender which regulates the mutual promises made by each party. Though a credit agreement is bilateral the borrower has no bargaining power. It is like a take-it-or-leave-it.

Concerning the analysis of domestic existing laws on consumer of credit, the analysis focused on law nº 36/2012 of 21/09/2012 relating to competition and consumer protection, Law nº 73/2018 of 31/08/2018 governing credit reporting system, law n° 10/2009 of 14/05/2009 on mortgage, law n° 45/2011 of 25/11/2011 governing contracts and the regulation nº14/2011 on the publication of tariff of interest rates and fees applied by banks.

Throughout the analysis of these laws, the study found out that these laws prohibit practices that undermine the normal and fair course of competition practices in commercial matters by ensuring consumer's interests but they are not specific to the protection of borrowers as such.

The law governing credit reporting system in Rwanda provides that the Central Bank has the authority to regulate and fix fees on services and other charges assessed by a duly licensed credit bureau. The law on mortgages provides that the mortgage contract shall contain clauses that grant the mortgagee the power to manage, lease, sell or take over the mortgage in case of the mortgagor's default.

Concerning the regulation on the publication of tariff of interest rates and fees applied by banks, it ensures full transparency in pricing and allow customers to make a rational choice of prices for services that are offered by banks, however, the interest rates and fees applied by banks are not regulated and fixed in collaboration with the regulator. To sum up, the laws mentioned above focus on the consumer in general but they do not specifically say about the protection of the borrower in particular.

The chapter 2 has analyzed consumer protection and salient issues in credit contracts faced by borrowers. Those are mainly in relation with lack of information, lack of model credit agreement, issues pertaining to contractual imbalances in the credit agreement, refusal of the proposed credit and so others related to unfair terms.

# CHAPTER TWO: CONSUMER PROTECTION AND SALIENT CHALLENGES IN CREDIT CONTRACTS

Practically, borrowers are in a position of weakness, imbalance, and victims of abuses resulting from their contractual relationships with financiers due to various reasons including unbalanced financial situation. In the present chapter, different issues faced by consumers of credit were analyzed in order to examine how the said issues can be addressed. The chapter is composed by two sections. The first section focused on challenges faced by borrowers and the second section analysed abusive clauses in contracts of credit.

## SECTION ONE: CHALLENGES FACED BY BORROWERS IN CREDIT CONTRACTS

The situation of a borrower in Rwanda is characterized by imbalance between him and the credit provider. This imbalance is present in all phases of the credit agreement. Indeed, in this contract, the situation reflects unequal and disproportionate forces.

The borrower is often ignorant and needy on the one hand while a financial institution with sufficient information, specialized legal services and expertise on some credit products imposes its position of superiority on the other hand. The imbalance being a problem, it creates challenges that ought to be addressed.

### §1. Challenges relating to lack of information & model credit agreement

In this paragraph, the study has focused on the analysis of challenges in connection with lack of information of the borrower and challenges in relation with lack of model credit agreement whereby banks and financial institutions in general use their own contracts drafted according to their choices without consideration of interests of borrowers.

#### A. Challenges relating to lack of information

One of the major problems with the provision of credit is the lack of understanding of credit conditions and the high level of financial ignorance among consumers. Actually, failure to comply with the pre-contractual disclosure renders the subsequent credit agreement “improperly

executed".[83] Indeed, practically, lack of information in consumer credit is obvious. It is basically a generalized issue to all consumers and in credit particularly, most borrowers have no capacity of analyzing the credit contract on the fact that credit contracts are often embodied in complex documents making it difficult for the borrowers to understand the information contained therein and for them to compare different lenders' offers.

Borrowers often have a low level of financial literacy and this can be detrimental to them and creates an unbalanced playing field between the parties.

It is admitted that disclosure requirements work best when consumers are literate and able to use effectively the information provided. But even literate consumers may be confused by complex choices; therefore, it is necessary to provide clear information about the terms of the contract. It has been noted that credit contracts are prepared either in English or French and this has been a challenge to those that are not capable of using the two languages.

The Belgian law for example requires banks to provide information and advice to borrowers applying for credits. It adds that in case the bank needs some information from the borrower, it shall never constitute the information related to race, ethnic origin, sexual life, health, opinions, political activity, philosophic or religious activity, etc.[84]

R. Carroll goes further to clarify the disclosure requirement. He says that "disclosure requirements must be clear, in conspicuous manner, in a meaningful sequence, in a prescribed terminology, all numerical amounts and percentages in credit advertising or in disclosure statements must be stated in figures which are printed in not less than the equivalent of 10 point type, 0.75 inch computer type, elite size typewritten numerals or must be legibly handwritten, the terms of art, such as finance charge and annual percentage rate must be designated in a conspicuous manner on the various disclosure statements.[85]

In the same case of loans, the creditor must provide the borrower with the additional information such as the amount of credit to be given to the borrower, including all charges which are part of the amount of credit extended, amounts which are deducted as prepaid finance charges and required deposit balances, using the terms "total prepaid finance charge" and "required deposit balance; and

[83] M. FURMSTON & J. CHUAH, *commercial and consumer law*, Longman, an imprint of Pearson, UK, 2010, p. 506.
[84] http://www.ejustice.just.fgov.be/eli/loi/2003/03/24/2003011117/moniteur, Belgian Law of 12 June 1991 relating to consumer credit as modified and complemented to date, art. 10.
[85] P. D. ROTHSCHILD and W. D. CARROLL, *Consumer protection: text and materials*, 2nd ed., Anderson publishing co./Cincinnati, USA, 1973, p. 306.

the total amount of the finance charge with a description of each amount included, using the term "finance charge".[86]

The issue of information in credit contract also involves the calculation of interest rates. There are some lenders who charge the borrower a certain rate (e.g. 18% as the borrowing rate) and it is agreed upon by the parties but finally, at the end of the month or after any other period of time, the borrower finds that the rate was raised without any prior notice.

Borrowers should further be entitled to understand general rules and regulations governing the opening of any credit facility in the bank. In other words, they should have enough information regarding the interest rates, commissions, duration of the contract, guaranties and other conditions. Once borrowers are informed, they are free to make their choices. Therefore, they need to be provided with accurate and detailed information.

It is very important that businessperson especially money lenders provide to the consumers with the correct and necessary information when negotiating credits and the Central Bank[87] should play an active role to handle this situation in the financial sector. At this point, the Central bank, in its regulation on tariffs on interests rate has stated that banks are obliged to inform the public and the Central Bank in fifteen days,[88] any change made to the rates and fees. Disclosure shall be done in accordance with Article 3 of this regulation.[89]

**B. Issues relating to lack of model credit agreement**

Practically, lenders prepare themselves the credit contract according to their wish and expectations. It is not easy for the borrowers to change anything in the credit contract prepared by the banks. There is no model contract that can be referred to when negotiating an agreement. Any bank prepares its own contract with its provisions more advantageous to it. From that situation indeed,

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[86] *Id*., p. 314.
[87] Art. 3 of regulation nº 14/2011 on the publication of tariff of interest rates and fees applied by banks, *OG* n° 30 *bis* of 25/07/2011.
[88] Art. 4 of regulation nº 14/2011 on the publication of tariff of interest rates and fees applied by banks, *OG* n° 30 *bis* 0f 25/07/2011.
[89] Art. 3 of the regulation provides that" Banks are required, firstly, to publish the minimum and maximum rates and fees applicable to their operations, according to the model annexed to this Regulation in a local newspaper with wide distribution, on their websites and through a brochure made available to the public and, secondly, to always display outstandingly at the entrance of their premises and any other place of business. The publication shall be done in three official languages".

results unfair terms prejudicial to borrowers. It is also undoubtable that the Rwandan law has provided no model credit contract applicable by banks while negotiating credit contracts.

Even, the draft law on financial services consumer protection under discussion does not provide such a model contract.[90] However, foreign legislations such as the Belgian law has provided for model credit agreement in its Article 14 § 2. This model credit agreement indicates most of the contents of the agreement such as names, place and date of birth, consumer domicile, identification of the lender, identification of any other person who can be part of the credit agreement, amount of the credit, interest rate, payment modalities, specifications of the financed service or property, mortgages if any, interest rate for delayed payment, reflection period and modalities, etc.[91]

It also provides for the form of the agreement in the same article 14 in paragraph 3 (§ 3).[92] Apart from the Belgian law, the Consumer Protection Act of Kenya also provides for model credit agreement which comprises the limitation of liability for unauthorized charges, consequence of non-disclosure, correcting errors, required insurance, termination of optional services, deferral of payments, default charges, prepayment, disclosure of brokerage fee, assignment of negotiable instrument, order to pay indemnity, etc.[93] So, Rwandan legislation would better have a law on consumer credit which provides for model credit contract as well.

The abovementioned draft law, on its part, prohibits the standard form contract where by it states that "any clause of a standard form contract for the provision of any product or financial services to financial services consumers becomes invalid in its entirety and is considered as if it never existed.[94]

A contract is presumed to be a standard form contract if it was prepared by a financial service provider and was not subject to full and genuine negotiation with a consumer of financial services.

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[90] Draft Law relating to Financial Services Consumer Protection, available at Rwanda Law Reform Commission, consulted on 16/07/2018.
[91] X, http://www.ejustice.just.fgov.be/eli/loi/2003/03/24/2003011117/moniteur, Belgian Law of 12 June 1991 relating to consumer credit as modified and complemented to date, art. 14, § 2, accessed on 15 October 2018.
[92]X, http://www.ejustice.just.fgov.be/eli/loi/2003/03/24/2003011117/moniteur, Belgian Law of 12 June 1991 relating to consumer credit as modified and complemented to date, art. 14, § 2, 3, accessed on 16 October 2018.
[93] X, www.kenyalaw.org, Consumer Protection Act nº 46 of 2012, revised edition 2016, para 53, accessed on 07 July 2018.
[94] Art. 25 para 1 & 2 of the Draft law relating to financial services consumer protection, available in Rwanda Law Reform Commission, consulted on 15 July 2018.

Though, the draft law prohibits a standard form contract, it does not set main clauses of the credit contract which parties can refer to while negotiating a contract as it is the case in the Belgian and Kenyan laws.

**§2. Existing imbalances in the credit agreement**

Most credit contracts contain terms that are not subject to negotiation, the borrower must either accede completely or not, at all. It often happens that the weaker party is absolutely powerless and may have to surrender to the terms set by the stronger party.

**A. Imbalance as regard to the refusal of credit promised**

At the conclusion of a credit agreement, the bank may agree to finance the project presented by the client. This commitment is reflected in practice during the execution of the agreement and the disbursement of funds necessary to the execution of the project operation. Normally, the realization of the credit accepted constitutes an obligation of the banker in a credit operation.

The refusal of promised credit is unfair for the borrower who, in light of preliminary negotiations, had come to believe that the financial facility sought would be granted and who, in the end, is denied a credit without any stated reasons.[95]

In the case of Bank of Kigali *v*s C. K. & E. S., the Parties entered into a mortgage for the amount of 15, 000, 000 RwF. The commitment was presented before the public notary with their declared signatories. Finally, the bank granted only 5, 000, 000 Rwf.

Sometime after, the bank unilaterally modified the terms of the contract such as the type of credit, modalities of granting the loan and the duration of the payment. The modification of the credit contract caused a heavy loss to the borrower since he/she had incurred a lot of expenses with expectation of the credit equivalent to the amount that was negotiated and approved by the bank before the public notary.

[95] M. RUGWIZANGOGA, *La protection des consommateurs contre les abus resultant du déséquilibre contractuel en droit Rwandais*, memoire de licence, Fac. de Droit, ULK, 2008, p. 38, *inedit*.

The borrower filed a claim in the court up to the Supreme Court which after having analyzed the case, ruled that the bank had to disburse 15, 000, 000 Rwf as a loan that was agreed by both the bank and the borrower. The Court also allowed one million (1, 000, 000) Rwf for damages suffered and 900.000 Rwf for the legal proceedings. This situation has constituted a serious departure from the principle of the binding force of the contract.

The refusal of granting the loan should be happening after the contractual period whereby the bank would allege various faults in the execution of the contract in case the disbursement of the loan is provided in installment.

Another case happened between FINA BANK *vs* A. R. The two parties entered into an agreement, the borrower requesting for a loan that was equivalent to 30, 000, 000 Rwf and the bank accepted to offer him only 17, 548, 262 RwF. After the conclusion of the contract, the bank did not grant the loan as it was agreed. Subsequently, the borrower filed a lawsuit before the Commercial High Court requesting for nullity of the mortgage contract since he had given his house as a guarantee for the payment in case of default for the negotiated loan in the agreement.

In its defense, the bank explained that it refused because the borrower had another debt that was not yet paid which was 59, 079, 935 Rwf and that it had not to extend the limits and therefore refused to grant the loan. Finally, the Court held that the loan agreement of 17, 548, 262 Rwf was nullified and that the mortgage contract should not be extinguished so as to guarantee the debt of 59, 079, 935 Rwf.

The court also decided that the bank had to pay damages for failure to comply with the other party's agreement including expenses for the legal proceedings.[96]

If we look at another case between EQUITY BANK RWANDA Ltd *vs* B. J. C. in the appellate level in the Commercial High Court in 2016, where EQUITY BANK RWANDA Ltd appealed a judgement which started in Musanze Commercial Court under n° RCOM 00012/2016/TC/Mus, Bunani J. C. had signed a contract with the bank of a loan of three millions (3, 000, 000 rwf) but at the time of disbursement of the loan, the bank did not offer it as agreed in the contract. The bank has defended that the borrower did not register the mortgage so that he may be offered with the loan.

[96] Commercial High Court, R.COM 0021/12/HCC, FINA BANK *vs* A. RUKAMIRWA, 28/08/2012, unpublished.

However, the court ruled that it was the obligation of the bank to register the mortgage as per the clause of the loan contract and that the borrower had fulfilled all conditions required to him for the registration of the mortgage. So, the bank lost the case at the first level.

It appealed in the Commercial Hight Court which after the analysis confirmed the decision of the commercial court of Musanze which had decided that the bank pays damages of 2, 500, 000 Rwf to BUNANI J. C. and 500, 000 Rwf for the Advocate and 200, 000 Rwf for the legal proceedings.[97]

Normally, when a loan application is refused, the applicant must be provided with written explanation of the refusal and when the agreement is signed, each party has to accomplish his/her obligations and follow what was agreed in the agreement.

Nobody has an automatic right to credit, but there are certain rules to follow in order to reject the application or to refuse offering the credit that was approved by the bank itself after analysis of the application.[98] In other words, the banks should reveal the information on someone's credit report which affected the decision of the bank to refuse the credit so that the borrower may know what to improve in the future time

**B. Disequilibrium between parties to a credit contract**

Practically, the banks prepare standard form contracts on their behalf and in the benefit of the bank as a lender. The interests of borrowers are not actually protected as such. That is why, they are one-sided in favor of the business and they apparently contain unfair terms.

In practice, the borrower does not even read the contract as such or he/she reads it only after he/she has become bound by its terms. The use of standard form contract is often abused to exploit borrowers due to their inclusion of unfair terms therein.

The reality of the loan market leads to a situation whereby borrowers often enter into credit contracts without reading the standard terms, or at least, without bargaining about them.[99] Borrowers have no bargaining power to negotiate the terms of credit contracts and they are forced by their circumstances to take-it-or-leave-it on the terms offered.

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[97] Commercial High Court, RCOMA 00501/2016/CHC/HCC, EQUITY BANK RWANDA Ltd *vs* BUNANI Jean Claude, Kigali, 15/11/2016.
[98] R. A. ANDERSON, *Business Law*, 11th ed., University press, 2003, p. 101.
[99] C.C.TURPIN, "*Contract and imposed terms*", 1956, vol. 73, SALJ, p. 145.

Lenders only compete on the terms better known to the detriment of borrowers such as credit amount, contract period and modalities of repayment including interest rates rather than on the punitive and oppressive terms.[100]

It is also not practical for borrowers to seek legal advice on these terms as the cost in time and legal fees would simply be heavy for them. Therefore, there are no easy alternatives for the borrower but to adhere to the contract, often without reading it. Once a standard form agreement is signed, it is enforceable and considered to have been freely and voluntarily agreed to by the borrower.[101]

Borrowers deal with credit contracts that are not consensual in the strict sense of the word, in other words, the parties do not bargain on equal footing. It often happens that the borrower is absolutely powerless and may have to surrender to the terms presented by the lender without being given the opportunity to negotiate them.

After analyzing the disequilibrium between parties to a credit contract, the following section has focused on the analysis of abusive clauses in contracts of credit. Thus, the section comprised among others, abusive clauses most of them determined by financiers.

[100] R. CRANSTON, *Consumers and Law*, 2nd ed., USA, Oxford University Press, 1984, p. 156.
[101] L. HAWTHORNE, "*Distribution of wealth, the Dependency Theory and the Law of contract*", 2006, vol.69, .S'.IZJ, p. 48.

## SECTION 2. ABUSIVE CLAUSES IN CREDIT CONTRACTS

In relationship with the lender, the borrower is usually in a position of dependence which pushes him/her for the urgent need for liquid money borrowed.

In the present section, the researcher focused on abusive clauses such as various unfair terms, like excessive penalty clauses imposed on a borrower, unilateral decision to increase interest rate, obligation to take out an insurance contract and the unilateral termination clauses in favor of the lender.

### §. 1. Generality of unfair terms

It is more accurately a situation of abuse that allows the lender to impose his conditions on the other party, abuse that can be linked to a fraud because the latter is not free to discuss fairly the terms of the contract.[102]

He/she has no control over the imposition of unfair terms which deprive him or her of reasonable rights. The only freedom left to the consumer is the alternative of accepting terms presented to him/her or not contracting at all.

#### A. Excessive penalty clauses imposed on a borrower

A penal clause is a term that penalizes or has the effect of penalizing only one party for a breach of the contract. It is a clause as in a contract that calls for a penalty to be paid or suffered by a party under specified terms as in the event of a breach and that is usually unenforceable.[103] Terms imposing penalties for breaches of a contract by consumers may be unfair. In this regard, the draft law relating to financial services consumer protection provides for the clauses that are considered as unfair in the contract, this is notably, "the clause that imposes excessively high default fees"[104]

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[102] *Ibid*.

[103] X, Https://dictionary.findlaw.com/definition/penalty-clause.html, *Find law legal dictionary*, accessed on 05 July 2018.

[104] Art. 25 para 1 of the Draft law relating to financial services consumer protection, available in Rwanda Law Reform Commission, consulted on 17 July 2018.

According to this provision, even though, excessively high default fees is unfair as per the draft law, it does not actually prohibit default fees in payment and does not clarify what ceiling to say the default fee is excessive or not. Otherwise, each and every body can interpret in a different manner according to his/her understanding in favor of the financial service provider. Suppose 2 %, 5% or 10% is the default fees, which of the three can be excessive? The response is ambiguous since the draft law is silent in that regard.

Regarding the penalty clause, moreover, the consumer protection Act of Kenya has prohibited it during the termination of the contract as follows: "(1) a borrower may terminate an optional service of a continuing nature provided by the lender or an associate of the lender on giving thirty (30) days' notice or such shorter period of notice as specified in the agreement under which the service is provided; (2) a borrower who terminates an optional service in accordance with subsection (1) is not liable for charges relating to any portion of the service that has not been provided at the time of termination and is entitled to a refund of amounts already paid for those charges."[105]

A term may also be considered unfair if it threatens sanctions over and above those that can be imposed at law. Damages for breach of the contract may be provided for in the contract but at a reasonable amount based on the actual loss or potential loss to occur in case of breach of the contract or in case of difficulty in providing evidence of the loss. A clause of the contract fixing excessive damages shall be unenforceable because of public order, it is considered as a penalty.[106]

The penalty clause is also a plan in the sense that such compensation shall be determined in advance and in a definitive way by the parties in the event of non-performance or delay in execution. It is an accessory obligation attached to the principal obligation to assure greater responsibility in case of breach. In a credit agreement, a penalty clause is stipulated by the lender. The following presents some of penalty clause determined by banks when concluding a credit agreement.

A penalty of 7% as a default interest will be charged by the bank whenever the monthly payment agreed by both parties in the contract is not respected. This is expressly stated in the contract that in case the expected payment has not been fully carried out at the maturity, the creditor reserves

[105] X, www.kenyalaw.org, *consumer protection act of Kenya*, nº 46 of 2012, revised Edition 2016 [2014], para 59, accessed on 07 July 2018.
[106] Art. 146 of the law n° 45/2011 of 25/11/2011 governing contracts, *OG*, nº 04 *bis* of 23/01/2012.

the right to charge a certain interest rate per day of delay calculated on the outstanding credit.

In the case nº RCOM 0581/15/TC/NYGE in Commercial Court of Nyarugenge between MURISA K. M. *vs* BK Ltd, on 24/11/2011 the parties signed an agreement where the bank offered a loan to MURISA with the interest for late payment calculated at 2% per year in case of default by the borrower, when the borrower has not been able to pay regularly, as penalty the bank has calculated the interest for late payment at 2% per month while it was provided in the contract that the interest for late payment was 2% per year.

This has increased the payable loan from the total of 135.111.466 Rwf to 164.000.000 Rwf. MURISA lodged the claim into Commercial Court of Nyarugenge requesting the court to invalidate the bank decision.

The court decided that the bank imposed the interest rate for late payment which was not really stipulated in the contract, it was a unilateral decision which was contrary to the contract. Mr MURISA won the case.[107]

Another situation concerns that of the banks that calculate the interest rate for late payment on the total of the loan while it is normally calculated at outstanding loan. This also happened in the case between MUKANKUBITO G., MUNYANZIZA T. *vs* Bank of Kigali, at appellate level in Commercial High Court where the Court confirmed what was provided for in the loan agreement between the Bank and the MUKANKUBITO G. that the interest rate had to be calculated on the total loan and not on outstanding balance in case of failure to pay the loan.[108]

This case demonstrates remarkable disequilibrium between the parties in the loan agreement to the extent that the borrower comes to sign the agreement that provides for payment of interests based on the total loan in case of default of payment of basic loan, it is normally baseful that the loan be calculated at the outstanding balance as it happens in most of the loans. According to the Belgian law on consumer of credit, the interest rate for late payment cannot exceed the normal interest rate

[107] Commercial Court of Nyarugenge, RCOM 0581/15/TC/NYGE between MURISA K. M. *vs* BK Ltd, Kigali, 06 /01/2016.
[108] Commercial High Court, R.COM A 00583/2016/CHC/HCC between MUKANKUBITO G. vs Bank of Kigali Ltd, § 5, Kigali, 06/01/2017.

provided for by the law,[109] however, the Rwandan banks practice has shown that bankers unilaterally fix the interest rate for late payment.

It can even exceed the normal interest rate of the credit since the law is silent about fixing such interest rate which is actually considered a default interest. According to Kenyan law on the protection of consumers of credit, a lender is not entitled to impose on a borrower under a credit agreement default charges other than:[110]

(a) reasonable charges in respect of legal costs that the lender incurs in collecting or attempting to collect a required payment by the borrower under the agreement;
(b) reasonable charges in respect of costs, including legal costs, that the lender incurs in realizing a security interest or protecting the subject matter of a security interest after default under the agreement; or
(c) reasonable charges reflecting the costs that the lender incurs because a cheque or other instrument of payment given by the borrower under the agreement has been dishonored.

In Rwandan banking system, early repayment of credit facility granted will result into payment of 5% on the outstanding commitments; however in foreign legislations, this penalty is not applicable at all. That is why, when we refer to Kenyan law, it specifies that during a prepayment of a loan, a borrower is entitled to pay the full outstanding balance under a credit agreement at any time without any prepayment charge or penalty.[111]

A penalty of 2% in addition to the interest rate indicated in the contract will be collected on all amounts exceeding the limits of the granted credit. It usually happens on cash credit line (CCL). It is a short term cash loan provided by a Bank to its client upon request.

The client who receives the credit line can continuously draw from the bank up to a specified amount. Once he goes beyond the limits then, he is charged 2% as a penalty. The cash credit depends on the amount that the client deposits every month.

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[109] Art. 23 *bis* § 3 of Belgian law on consumer credit.
[110] X, www.kenyalaw.org, revised Edition 2016 [2014], *consumer protection act of Kenya*, nº 46 of 2012, para 61, accessed on 07 July 2018.
[111] Online, www.kenyalaw.org, consumer protection act of Kenya, nº 46 of 2012, revised edition 2016 [2014], para 62, accessed on 07 July 2018.

**B. Unilateral termination clauses in favor of the lender**

If the contract provides for a condition that terminates a debtor's obligations, those obligations can be extinguished if the condition occurs, unless the occurrence of the condition is the result of a breach of contract by the debtor or the occurrence does not subject the debtor materially to increased obligations.[112] Normally, termination clauses are not abusive as such. They become abusive when they are unilateral and non-judicial, playing a termination clause is rarely certain and, if it seems too harsh or even abusive, the judge may intervene to paralyze, to reintroduce the power of appreciation.

Termination clauses are frequent in contracts of credit. For example, among the rules of opening credit in Bank of Kigali, it is provided that the bank has the right to terminate the credit transfer immediately and without notice. This is actually, unfair; however the Rwandan legislations in relations with financial services have no response to this.[113]

Even the Draft law on Financial Services Consumer protection in its article 22 does not clearly solve the issue. The provision states that "A financial service provider cannot make unilateral changes to any product or financial services contract unless the contract expressly provides the financial service provider with the power to do so and specifies the conditions under which the contract may be changed. The regulatory authority may specify through regulations, additional restrictions and requirements relating to unilateral changes.

The abovementioned provision prohibits financial service providers from changing the contract unilaterally but it adds : "unless the contract expressly provides the financial service provider with the power to do so…". This is not easy considering the nature of the credit contract which is apparently an adhesion contract, hardly negotiable by the two parties.

Indeed, the financial service provider will include such a clause in a contract and the borrower is not in a position to refuse the contract considering his/her need of the credit or any other service. If he/she refuses, he/she may not have any other bank to negotiate a contract as per his/her will since most financial service providers operate in a like system whereby no real competition on loan

[112] Art. 79 of the law nº 45/2011 of 25/11/2012 governing contracts.
[113] See article 22 of the Draft Law relating to Financial Services Consumer Protection, available in Rwanda Law Reform Commission, consulted on 16/07/2018.

conditions exists. The Law should rather totally prohibit unilateral termination of credit agreements. Furthermore, the general operating rules and regulations of I&M Bank, for example, provide that the bank can at any time, without having to justify its decision unless otherwise provided for, terminate the business relationship it has with a customer. Similarly, it is stipulated that the bank may decide without having to justify its decision, to execute only certain instructions in relation to a customer account. We believe that the bank should follow the normal legal procedures by notifying the borrower with reasons for the termination or in case of modification of the contract terms and if not, this could be considered as unfair and abusive to the borrower.

### §. 2. Clauses relating to guarantee

Certain guarantees which are imposed to borrowers are not legally based. Those notably include the bills of exchange and the obligation to take out insurance of the credit. However, in Kenyan law, this matter is regulated.[114]

#### A. Obligation to use the bills of exchange and other instruments

An illegal practice that has become common is that of the borrower to sign a check as security for repayment of the loaned funds. Apparently, this practice does not seem to bother the borrower who needs cash, goods or services. There is a risk then that the borrower may be prosecuted for the offense of issuance a bounced check. To protect the borrower, the use of bills of exchange and other similar financial instruments as collateral for payment should be prohibited by the Rwandan law as this is the case in the Belgian law on consumer credit.

In fact the Belgian law provides that "The consumer cannot sign bills of exchange or a promissory note to secure the payment of his/her commitments resulting from the credit. He/she cannot sign either any cheque to secure his/her commitments resulting from the credit contracts.[115] Certain credit contracts with such a clause do exist in Rwanda. In the settlement of credit openings of Bank of Kigali as we mentioned before, there is a part of discount operations. The giving of a negotiable instrument may ensure payment to the Bank of Kigali; this is regulated with a title referred to as particular provisions for discount operations.[116]

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[114] www.kenyalaw.org, Consumer Protection Act nº 46 of 2012, revised edition 2016 [2014], para 53, accessed on 07 July 2018.
[115] Art. 14, §.3. point 2 of Belgian law of 12 June 1991 relating to consumer credit as modified and complemented to date.
[116] Bank of Kigali, Rules of credit opening in Bank of Kigali, available at http://www.bk.rw/files/mobile-lending-terms-conditions, accessed on 04 January 2018.

**B. Obligation to take out an insurance contract**

To guarantee one's debt, banks often require the borrower to take out an insurance policy with a well-determined company most of the time recommended by the bank. In the Belgian law, the insurance is not compulsory. The Belgian consumer credit law provides that "The insurance is never mandatory".[117] In practice, the borrower, had no freedom of choice and that the lender, for reasons of caution or commercial profit, preferred to negotiate insurance right away, even if the borrower did not initially want such insurance.[118]

Clearly the insurance has been a cost to the borrower although it is an advantage (risk protection) for the lender. Another issue is that the borrower does not often have a real choice of insurer; the lender in this situation plays a bigger role in choosing the insurer that will guarantee the credit. This shortcoming as regard the choice of the insurer can have significant implications if one considers the overall cost of the credit to the borrower and can provide additional profits to the lenders.[119] The requirement of an insurance policy has been a challenge to some borrowers whereby the bank chooses for its client (who is already insured) a different insurance company.

In Kenya, the borrower has rights to choose his own insurer unless exceptionally decided otherwise by the lender. The Kenyan consumer protection law provides that: " (1) A borrower who is required under a credit agreement to purchase insurance may purchase it from any insurer who may lawfully provide that type of insurance, except that the lender may reserve the right to disapprove, on reasonable grounds, an insurer selected by the borrower. (2) A lender who offers to provide or to arrange insurance required under a credit agreement shall at the same time disclose to the borrower in writing that the borrower may purchase the insurance through an agent or an insurer of the borrower's choice".[120]

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[117] Belgian Law of 12 June 1991 relating to consumer credit as modified and complemented to date, art. 14 §. 3. Point 1. b.

[118] A general approach on the Consumer Credit Directive 87/102 at http://www.ecri.eu/new/system/files/10+Vissol.pdf, accessed on 20/07/2013.

[119] *Ibid*.

[120] X, www.kenyalaw.org, consumer protection act nº 46 of 2012, revised edition 2016 [2014], para 58, accessed on 10 July 2018.

**Partial conclusion**

Chapter two has analyzed various salient issues faced by borrowers in credit contracts. The main issues were related to lack of information, lack of model credit agreement, issues pertaining to contractual imbalances in the credit agreement, refusal of the proposed credit and those related to unfair terms such as penalty clause, unilateral decision to terminate the contract and the rights reserved to the lender to fix and increase the interest rate among others.

With regard to challenges faced by borrowers, it was found that the situation of a borrower in Rwanda is characterized by imbalance between him and the credit provider up to the level of negotiating the credit contract. The borrower is ignorant while the lender is professional and specialized in credit businesses.

Thus, the borrower does not understand well the credit conditions on the fact that credit contracts are often embodied in complex documents making it difficult to understand the information contained therein.

In addition, in this chapter two, the study found out that there is no model contract that can be referred to when negotiating an agreement. The Rwandan laws do not provide for a model contract. However, foreign legislations such as the Belgian law provides for model credit agreement in its article 14 § 2 which determines most of the main elements of the agreement. The same, the Consumer Protection Act of Kenya provides for some contents of a credit agreement.

In regard to existing imbalances in the credit agreement, most credit contracts contain terms that are not subject to negotiation whereby the borrower accedes or not. Those are notably the refusal of credit promised whereby the bank may agree to finance the project but after signing a contract the money is not disbursed without explanation to the borrower. Chapter two has also indicated abusive clauses in contract of credit whereby the lender imposes his conditions on the other party who is not free to discuss fairly the terms of the contract. That is for instance, the obligation to take out an insurance contract as a guarantee of one's debt. In Belgian law the insurance in the credit agreement is not compulsory.[121]

[121] Article 14 § 3, 1.b of the Belgian Law of 12 June 1991 relating to consumer credit as modified and complemented to date.

In addition, the Kenyan consumer protection law provides that a borrower who is required to purchase insurance may purchase it from any insurer of his/her choice but in our banking system, only the lender determines the insurer and impose signing that insurance contract and consequently the cost of insurance in these circumstances is not negotiable.

Concerning the last chapter, it has analyzed the establishment of legal and institutional mechanisms to strengthen borrowers' rights in credit contracts. In this chapter three, legal and institutional mechanisms were proposed in such a way that borrowers are really protected through both laws and institutions.

# CHAPITRE III: ESTABLISHMENT OF LEGAL AND INSTITUTIONAL MECHANISMS TO STRENGTHEN BORROWERS' RIGHTS IN CREDIT CONTRACTS

The protection of borrowers need the establishment of a regulatory and institutional framework to empower borrowers and ensure better implementation and enforcement of such regulations in order to protect them effectively from serious risks at the loan market.

The present chapter has mainly addressed the necessity of regulating borrowers' agreement, regulation of unfair terms in the credit contracts, regulation of banking sector and its supervision in Rwanda, effective institutional framework, both public and private such as the National Bank of Rwanda, the Office of Ombudsman, the Rwanda Bankers' Association and Consumers 'Association to strengthen borrowers' rights.

## SECTION ONE: MECHANISMS RELATED TO THE LEGAL FRAMEWORK

The present section comprises two paragraphs which have analyzed the regulation of credit agreement, the regulation of unfair terms in the credit agreement and the regulation of banking sector and its supervision.

### §. 1. Necessity of regulating consumer credit agreement

Due to the importance of credit contracts and considering risks faced by borrowers, credit agreements need to be regulated. The regulation of credit agreements shall be one of the solutions to avoid unfair behaviors of professionals towards borrowers. Once regulated, certain fundamental consumer rights such as the right of equality in the consumer market, the right to disclosure and information, the right to fair and reasonable marketing, the right to fair, just and reasonable contract terms and conditions, and the right to withdraw from the existing contract shall be prescribed as detailed in the following paragraphs.

**A. Regulation of the standard credit agreement in the banking sector**

Normally, the banks prepare standard form contracts most of the time targeting their benefits and ignoring the interests of borrowers. They seem to consider one-side in favor of their business.

The fact that borrowers are eager to receive loans, though they are given opportunity to read draft credit contracts, they have no time to analyze them and fully understand the language of the contracts since most of them are prepared in English or French and no translators are provided by banks to facilitate borrowers to understand the language of credit agreements.

According to W.D. Slawson, even if the borrower is availed with a draft credit contract, he/she reads it only after he/she has become bound by its terms. The use of standard form contracts is often abused to exploit borrowers due to their inclusion of unfair terms.[122]

The Rwandan law does not determine the provisions of the standard credit agreement but the draft law on financial service consumer protection simply prohibits the unfair contract clauses that may be included in credit agreement. Its Article 25 provides that "any clause of a standard form contract for the provision of any product or financial services to financial services consumers becomes invalid in its entirety and is considered as if it never existed. »[123]

Among those unfair clauses, the draft law provides for the following: a clause that imposes excessively high default fees; a clause which allows the financial services provider not to respect his or her obligations under the contract or to limit his or her performance and a clause which allows the financial services provider to unilaterally change the terms of the contract without specifying a valid reason etc.[124]

Lenders do not allow borrowers for lawyers for advice on such contracts terms. This is due to the time constraint and the borrowers cannot afford that service. However, once a standard form

[122] W. D. SLAWSON, *op. cit*., p. 530.
[123] Art. 25 of the Draft law relating to financial services consumer protection, available in Rwanda Law Reform Commission, 2018.
[124] *Ibid*.

agreement is signed, it is enforceable and considered to have been freely and voluntarily agreed upon by both parties.[125]

**B. Regulation of unfair terms in the credit contract**

There is a need for a regulation of unfair terms that are mostly available in credit contract due to its nature. This regulation would protect borrowers from terms which are frequently against their rights.

Thus, in matters of credit, unfair terms need to be regulated. Such regulations should comprise provisions defining and punishing unfair terms. It is in this regard that the Rwandan law may be inspired by the general standard prepared by other legislations from different countries such as UK, Kenya and Belgium in as far as credit is concerned.[126]

Practically, between banks and borrowers, there are abusive clauses that have effect of creating, a significant imbalance between the rights and obligations of the parties to the contract.

In this situation, obviously, for the protection of a borrower, the latter may demand the nullity of the contract or reduction of obligations where the disproportion between the respective obligations of the parties is so great as to amount to exploitation of the borrower or the borrower's obligation is excessive, harsh or unconscionable. The general rule by itself is not enough to combat the abusive clauses; furthermore, the regulation should establish lists of unfair terms in matters of credit. In case there is a regulation of unfair terms in matters of credit, it could bring a likely contractual balance.

**C. Early repayment of the loan**

Most of credit contracts provide for penalties in case of early repayment considering the contract duration of the loan. Paying off a loan early is something that some borrowers opt for with the aim to free up their finances and help avoid additional interest.

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[125] L. HAWTHORNE, "*Distribution of wealth, the Dependency Theory and the Law of contract*", 2006, vol. 69, .S'.IZJ, p. 48.

[126] Belgian law of 12/06/1991 related to consumer credit as modified by the law of 13/06/2010 published in "Moniteur Belge (MB) of 21.06.2010, Consumer Protection Act of The Republic of Kenya, nº 46 of 2012, revised edition 2016, Consumer credit Act, United Kingdom, 1974, as modified and complemented to date.

Paying off a loan early allows a borrower to spend or save the amount he/she would have been using to service the debt that he/she has just paid off, making it easier on ones' month-to-month finances.

However, banks and lenders would not really want to get their money back as soon as possible in their entirety since they have planned for interest from the amount offered as credit during a given period of time.

It is really an investment which is expected to produce a profit at a certain moment. So, paying off that credit prematurerly in its entirety indeed create penalty to cover the interest or part of the interest that would have been received during the remaining period that was provided for loan payment. Therefore, the borrower is not required to pay off earlier. It is optional, he/she can regularly pay the debt as provided in the credit agreement during all the time provided or he/she can pay off earlier and pay penalties provided in the contract. Such a penalty is normally calculated at a percentage considering the remaining amount of credit to be paid and considering the duration period remaining.

Considering the evolution of financial sector today, the creditor should accept the early payment also called prepayment without charging the borrowers of the penalties as it is done in other jurisdictions notably Kenya as clearly stated in the Consumer Protection Act of Kenya that « a borrower is entitled to pay the full outstanding balance under a credit agreement at any time without any prepayment charge or penalty. »[127] Likewise in UK Law, it is provided that « Where for any reason the indebtedness of the debtor under a regulated credit agreement is discharged before the time fixed by the agreement, he, and any relative of his, shall at the same time be discharged from any liability under a linked transaction, other than a debt which has already become payable. »[128]

[127] Consumer Protection Act of The Republic of Kenya, nº 46 of 2012, revised edition 2016, para 62.
[128] Consumer credit Act, United Kingdom, 1974, as modified and complemented to date, point. 96. p. 52.

### D. Regulation of unforeseen hardships

If a borrower falls into unforeseen hardship while he/she has an ongoing loan, he/she may ask the lender to change the contract so that he/she may pay off the loan. The hardship[129] must be caused by an unexpected event such as illness, injury, loss of employment, the end of a relationship or any other unforeseen hardship. If the borrower can reasonably expect to meet his/her obligations in case the creditor relaxes the terms of the contract, changes to the contract may include extending the term of the contract, reducing the amount of each payment or postponing certain payments without even changing the interest rate.

The following paragraph focused on the regulation of the banking sector and generally the supervision of banks and other financial institutions in relation with the protection of the rights of borrowers.

## §. 2. Regulation of banking sector and its supervision in Rwanda

This paragraph covered the assessment of regulation and supervision of banks and the regulation of corrective and remedial powers of bank supervisors. Generally in both parts, the study intended to highlight the role of National Bank of Rwanda in as far as its supervision to the banks and other financial institutions is concerned.

The law governing the National bank of Rwanda (BNR) and the law governing organization of banking were referred to in the present analysis. The study has also pointed out the enforcement powers of BNR to address cases of non-compliance with legal and regulatory requirements through the Law on organization of Banking.

### A. Assessment of regulation and supervision

The law governing the National bank of Rwanda (BNR) and the law governing organization of banking have strengthened the legal framework for banking supervision in Rwanda.

[129] The hardship is a situation in which some's life is difficult or unpleasant, often because he/she does not have enough money, online https://www.collinsdictionary.com/dictionary/english/hardship, definition of hardship, Collins COBUILD, accessed on 15 November 2018.

The law governing BNR clearly indicates the role of BNR in as far as the oversight of financial institutions is concerned. Indeed, BNR is vested with sufficient powers for effective regulatory intervention and addresses cases of non-compliance of financial institutions but laws need to strengthen BNR powers in relation with bank credit since lots of abuses are pointed out significantly.[130]

In this context, for the supervision of bank credit, anti money laundering law was enacted in 2008.[131] This law provided for the establishment of financial investigation unit (FIU), to which BNR, banks, other financial institutions and designated parties report suspicious transactions. Thus, the law provides that : « There shall be established a Financial Investigation Unit referred to as (Cellule de renseignements Financiers) CRF in French abbreviation."[132]

Likewise, the same law was amended through the Law nº 69/2018 of 31/08/2018 on prevention and punishment of money laundering and terrorism financing also provides that «Financial Intelligence is carried out by a Centre for the purpose of preventing and countering money laundering and terrorism functioning. A Prime Minister's Order determines responsibilities, organisation and functioning of Financial Intelligence Centre. It also determines the institution to which the Centre is attached. »[133]

In this context of regulation of banks, considering the responsibilities of Central Bank, such as supervising and regulating the activities of financial institutions, to follow up and promote the soundness of financial institutions and their compliance with governing laws including Law on preventing and penalizing the crime of money laundering and financing terrorism; to ensure the adoption by financial institutions of policies and procedures designed to control and manage risks effectively, to adopt policies to safeguard the rights and interests of customers, depositors and creditors of financial institutions[134], the functionning of banks and financial instutitions is generally controled and supervised and thus the rights of customers including

[130] International monetary fund (Bank of Rwanda Financial system stability assessment prepared by the monetary and capital market department approved by Jose Vinals and Antoinette Sayeh June 9, 2011).
[131] Art. 20 of Law n° 47/2008 of 09/09/2008 on prevention and penalising the crime of money laundering and financing terrorism, *OG* nº 12 *bis* of 23.03.2009.
[132] Law n° 47/2008 of 09/09/2008 on prevention and penalising the crime of money laundering and financing terrorism, art. 20. This law was repealed by the Law nº 69/2018 of 31/08/2018 on prevention and punishment of money laundering and terrorism financing in *OG*. nº 37 of 10/09/2018.
[133] Art. 4 of the Law nº 69/2018 of 31/08/2018 on prevention and punishment of money laundering and terrorism financing.
[134] Art. 6 of Law n° 48/2017 of 23/09/2017 governing the National Bank of Rwanda, in *O.G*. nº 41 of 09/10/2017.

borrowers are ensured. However, a particular law on consumer credit is needed to ensure full and reliable protection of borrowers both legally and institutionnally.

**B. Regulation of corrective and remedial powers of bank supervisors**

The Law governing organization of Banking provides that the National Bank of Rwanda has suitable range of enforcement powers to address cases of non-compliance with legal and regulatory requirements.[135] The Central Bank, through directives, determines a pecuniary fine to be imposed to a bank that violates the provisions of the Law governing organization of banking, the Central Bank's regulations, directives and decisions issued. The amount resulting from the penalties are recovered in the favour of the Central Bank through automatic debiting of the concerned bank's account opened in the Central Bank or through a garnishment upon simple summons notified by a bailiff.[136]

The regulations indicated in this paragraph also includes those related to the publication of tariff of interest rates and fees applied by banks during the offering of loans either by domestic banks or foreign banks operating in Rwanda as authorized by Central Bank to establish a representative office in Rwanda. Thus, the Central Bank sets instructions determining permissible activities of a representative office of a foreign bank in Rwanda.[137]

Therefore, the National Bank of Rwanda should ensure that it establishes effective cooperative arrangements for ongoing supervision with the home supervisors of authorized foreign-owned banks operating in Rwanda.

However, the Law does not specifically provide for sanctions for the banks and financial institutions which violate consumers of credit rights, it generally and only provide for sanctions to be imposed to the banks that violate the provisions of BNR regulations, directives and decisions issued to the banks which regulations, directives and decisions are not really directed to the protection of borrowers as such.

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[135] Article 55 of Law nº 47/2017 of 23 /09/2017 governing the organization of banking, in *O.G*. nº 42 of 16/10/2017.
[136] Art. 67 of the Law governing organisation of banking.
[137] Art. 11 of Law governing organisation of banking.

## SECTION 2: SETTING UP AN EFFECTIVE INSTITUTIONAL FRAMEWORK ON CONSUMER PROTECTION IN CREDIT CONTRACTS

The present section analyzed institutional framework in regards with the protection of borrowers. It assessed the role of public and private institutions such as the National Bank of Rwanda, Office of the Ombudsman, the Rwanda Bankers'associations and consumers'associations respectively.

The section is divided into two paragraphs. The first paragraph focused on the analysis of the role of public institutions such as National Bank of Rwanda and the Office of Ombudsman. Paragraph two focused on private institutions such as Rwanda Bankers' Association and Consumers 'Associations.

### §. 1. Public institutions

This paragraph has pointed out the role of National Bank of Rwanda and Office of Ombudsman in regard to borrowers' rights. It specifically focussed on effective supervision of banking system always linking this role with the protection of borrowers'rights.

#### A. National Bank of Rwanda and its role of supervision

##### 1. Mission of National Bank of Rwanda

The National Bank of Rwanda regulates banks in order to protect consumers' interest in various aspects of banking relationship. Among its missions, it supervises and regulates the activities of financial institutions notably banks, micro-finance institutions, insurance companies, social security institutions, collective placement companies and pension funds institutions.[138] Financial institutions under the supervision of the Central Bank are required to furnish the latter with any documents, information or necessary justifications for the analysis of their functioning. They are required to make statements of payment risks and payment incidents which are centralized at the

[138] Art. 6 of Law n°48/2017 of 23/09/2017 governing the National Bank of Rwanda.

Bank. Any failure to disclose information or giving inaccurate information is held liable to sanctions.[139]

BNR requests banks to inform the public within fifteen days, about any change made to the rates and fees.[140] This provision should be applied effectively in order to avoid some credit providers who normally insert into their contracts, clauses containing unilateral change of the contract terms including interest rates and other charges.

In addition, BNR requests banks to have liberalization of interest rates and fees where it provides that" The deposit and lending rates and various fees in connection with the activity of banking intermediation may be freely agreed between the parties concerned."[141] Borrowers are not enough free to negotiate the interest rates except for some big clients who may request for a reduction on the lending rates. But most of the time it is not easy for the borrowers to negotiate the credit in general.

We hope that BNR would better go beyond in supervising banks even in the drafting contracts, determination of interest rates on loans offered in order to ensure that credit agreements and their management are fairly based.

**2. Effective role of banking supervision in Rwanda**

This sub-section focused on the banking supervision basing on major steps taken to strengthen regulation and supervision of banks in Rwanda. However, the Rwandan banking system is still facing some weakness that need to be addressed such as the way of regulating the credit in banks whereby the Central Bank would be able to supervise the fixing of interest rates by determining at least their threshold, minimum and maximum in general.

When we look at the foreign jurisdictions like Beligium, the supervising authority plays a bigger role in dealing with issues related to the rights of borrowers including solving disputes arisen from the credit agreements as provided for by the Belgian Law as follows : "The King can, upon approval by the Cabinet of Ministers, create a monitoring committee for a term of six years

[139] Art 71, note supra 136.
[140] Art 4 of regulation n° 14/2011 on the publication of tariff of interest rates and fees applied by banks, *O.G* n° 30 *bis* of 25/07/2011.
[141] *Ibid*., art. 5.

renewable with the responsibility to deal with all issues related to the credit including solving disputes related thereof in case the bank or other rehabilitated organs have failed to handle...".[142] We believe that a suitable legal framework for banking supervision in place will provide each responsible authority with the necessary legal powers to authorize banks, conduct ongoing supervision, address appropriate compliance with laws and undertake timely corrective actions to address various credit issues related.

An effective system of banking supervision requires the supervisor to develop and maintain a forward supervising assessment of the risk profile of individual banks and banking group, proportionate to their system of importance of assessing and addressing risks emanating from offering a credit in an orderly manner without violating the rights of borrowers.

The supervisor corrects, reviews and analyses prudential reports and statistical returns from banks on a consolidated basis and independently verifies these reports through either on site examinations or use of external experts. The supervisor has at its disposal an adequate range of supervisory tools to bring about timely corrective actions. This includes the ability to revoke the banking license or to recommend the revocation as provided for by the Law governing organisation of banks as follows : «The Central Bank may revoke a license granted to a bank at any time if :

1° the bank has not commenced operations within six (6) months from the date on which the license was granted;
2° the bank has ceased operating for a period of more than one month;
3° the bank has obtained the license through incorrect statements or fraudulent means;
4° the bank no longer meets the applicable licensing criteria;
5° the parent company is undergoing liquidation;
6° the bank is engaged in money laundering and financing terrorism activities;
7° the bank performs activities compromising the soundness of the financial sector. »[143]

[142] Art. 72 of Belgian Law of 12/06/1991 relating to consumer credit as modified and complemented by the law of 13/06/2010 published "au Moniteur Belge" MB of 21. 06. 2010.
[143] Art. 64 of Law nº 47/2017 of 23/9/2017 governing the organisation of banking, in *O.G*. nº 42 of 16/10/2017.

By analysing the provision above, it is clear that the Central bank revokes the bank license for reasons other than those related to the protection of the rights of borrowers. The provision may include among the reasons of revocation, the use of malpractices and abuses to the rights of borrowers in a sense that such behaviorism fall under point 7 of the article 64 that is just mentionned above.[144]

According to KWIZERA, J.M., the effective sytem of banking supervision needs to be able to effectively develop, implement, monitor and enforce supervisory policies under normal and stressed economic and financial conditions.[145] Indeed, supervisors may be able to respond to external conditions that can negatively affect banks in their daily operations.

The following part describe the role of Office of Ombudsman in various domain in Rwanda. The analysis aims at seeing how the rights of borrowers may be protected through the mandate and competence of Office of Ombudsman as it is done in other jurisdictions such as South africa whereby the Ombudsman office also deals with issues related to the banks and other financial institutions to protect consumers of financial services including credits.

**B. The role of the Office of Ombudsman in consumer protection in credit contracts**

The Ombudsman Office was established in 2003 under article 182 of the Constitution of the Republic of Rwanda. Its organisation and functions were established by Law nº 25/2003 of 15 August 2003 establishing the organisation and functioning of the Office of the Ombudsman as modified and complemented to date. Currently, its responsibilities, powers, organisation and functioning are determined by the Law nº 76/2013 of 11/9/2013 determining the mission, powers, organisation and functioning of the Office of the Ombudsman. In its article 3, it is provided that the Office shall be independent. In the accomplishment of its day-to-day responsibilities, the Office shall not take injunctions from any other institution.[146]

[144] Art. 64, " the Central Bank may revoke a license granted to a bank at any time if: point 7: the bank performs activities compromising the soundness of the financial sector.
[145] J.M. KWIZERA, *Role of National Bank of Rwanda in the regulation of Banks and Financial Institutions*: A Legal analysis, Fac. of law, ULK, Kigali, 2013, p. 19.
[146] Law nº 76/2013 of 11/9/2013 determining the mission, powers, organization and functioning of the Office of the Ombudsman, in *O.G*., n°Special of 18/10/2013.

The Office shall have the following mission : to act as a link between the citizen, public and private institutions, prevent and fight injustice, corruption and related offences in public and private entities, receive and examine complaints from individuals and associations in connection with the acts of civil servants, State organs and private institutions, to receive annually the declaration of assets from public servants, receive annually declaration of assets of political organisations and verify their origin and their use.

Advise Cabinet and other concerned institutions as regard to strenghtening and improving their policy of preventing, fighting and punishing corruption and related offences, make a follow up on how the policy of prevention and fight against injustice, corruption and related offences is implemented by public and private institutions, make a follow up on the respect of laws relating to conduct of politicians and leaders, sensitize the population to refrain from corruption and related offences in general and train for the same purpose employees both in public and private institutions or non governmental organisations, prepare and make public the list of persons definitively convicted for the crime of corruption and related offenses and sentences received, contribute to strengthening of good governance in all institutions by drawing the attention of such institutions where their functioning and relations are weak due to their contradiction with the law, with their respective responsibilities, with the State general policy or because they have negative impact on the population.

Sensitize the population to work together with public and private institutions to build the country and dare to denounce bad practices based on injustice, corruption and related offences, advise public and private institutions on the improvement of the quality of services delivered to the population, submit annually its program and activity report to the President of the Republic and the Parliament, both Chambers to follow up the enforcement of the Law relating to access to information, to perform any other duties as may be assigned by law.[147]

In general, the Office also has powers to request for explanations on decisions and actions taken by Government and public institutions, private institutions and non governmental organisations with which the population is not satisfied. To carry out investigations on actions of Government or private institutions in which the population finds injustice.

[147] Art. 4 of Law nº 76/2013 of 11/9/2013 determining the mission, powers, organization and functioning of the Office of the Ombudsman, in *O.G.*, n°Special of 18/10/2013.

To identify laws that hamper the general interest of the population. Powers to advise and orient complaints to other institutions, requesting concerned institutions to adress complaints referred to them, powers to request sanctions, powers of judicial police and prosecution, request for judgement review, powers to execute judgements and powers of temporary suspension of a suspect of corruption and related offences.[148]

However by analysis of the provision above, it is not specific in the mission and powers of the Office of Ombudsman whether it can handle and deal with injustice based on bank credit issues faced by borrowers. On the contrary, in other jurisdictions like South Africa, the Ombudsman office has among other responsibilities to follow and deal with bank credit issues between financial service providers and consumers of those services particularly borrowers in order to protect them.

Precisely, the South African law has provided for an Ombudsman for Banking Services which office resolves complaints in relation with banking services and products. The service is free and the only requirement is that it must be a bank issue and the customer must have followed the banks complaint handling procedures before approaching the Ombudsman.[149] It also provides for Credit Ombudsman which office was established to resolve complaints from consumers and businesses that are negatively impacted by credit bureau information and disputes with credit providers.[150] Due to important services offered by Ombudsman Office in South Africa in various sectors, many other names are used to represent the ombudsman office, such as Public Protector and Médiateur.[151]

From this practice and responsibility of South African Office of Ombudsman to deal with Banking Services and credit in particular to protect rights of borrowers specifically, the Rwandan legislator may be inspired by South Africa and other jurisdictions to include among the mission and responsibilities of Rwandan Office of Ombudsman, the responsibility of dealing with financial services related issues including credit services in particular.

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[148] Arts. 6-17 of Law nº 76/2013 of 11/9/2013 determining the mission, powers, organization and functioning of the Office of the Ombudsman, in *O.G.*, n°Special of 18/10/2013.
[149] X, Ombudsman for Banking Services – http://www.obssa.co.za/index.php/publications, accessed on 08th January 2019.
[150] X, Credit Ombud –http://www.creditombud.org.za/annual-reports/accessed on 08th January 2019.
[151] X, http://toasa.org.za/web/The Ombudsman association South Africa, accessed on 08th January 2019.

## §. 2. Private institutions

This paragraph focused on the role of Rwanda Bankers'Association in strengthening the rights of borrowers. It also focused on the role of Consumers 'Associations in relation to the rights of borrowers. In this part, ADECOR the first legally accepted consumers' rights organization in Rwanda was developped to highlight its contribution to the protection of borrowers.

### A. The role of Rwanda Bankers' Association in strengthening borrowers' rights

The Rwanda Bankers' Association is a group of local bankers that acts as a forum for the banking sector. Among its objectives, the Association considers to project a good public image of banking as a service industry and develop good public relations to carry on awareness for purposes of educating the public in regard to the scope, importance and activities of the banking industry to assist its growth and development.[152]

There is a need for agreements that can be made between such professional organizations and consumer organizations in order to discuss their issues, search for better solutions to disputes that may arise between themselves and therefore promote better relationships.

The Rwandan Bankers Association (RBA) has facilitated borrowers by issuing a new set of guidelines which inform clients on how to seek access to credit facilities using secured property assets. Clients have to present all the information as required when seeking facilities secured by property.[153] However, the Bankers Association has no particularity of protecting borrowers against malpractices and other abuses faced by the borrowers, indeed, it is an association of Bankers, those malpractices and abuses are cuased by transactions between borrowers and the Banks which really are represented in the Association.

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[152] X, "The Rwanda Bankers' Association", available at http://www.rba.rw/about.php accessed on 10 November 2018.
[153] B. NAMATA,"Bankers Issue New Mortgage Rules in RwandA", New Times, available on http://in2eastafrica,net/bankers-issue-new-mortgage-rules-in-rwanda/ accessed on 10 October 2018.

## B. The role of Consumers'Associations in strengthening borrowers' rights

ADECOR is the first and only legally accepted consumers' rights organization in Rwanda. Its vision is to have a society where consumers have access to enough, safe and affordable services and goods and where they can use their synergy to influence the market behaviour and protection of their rights.[154]

### B. 1. ADECOR's background

The "Association pour la Defence des Droits des Consommateurs au Rwanda (ADECOR)" or Rwanda Consumers'rights protection Organization was legally established in Rwanda in 2008 as a non-profit organization. Its establishment was based on four fundamental rights of consumers:

(1) Right to a decent life, safe and quality goods and services;

(2) Right to free choice, accessibility to multiple and affordable choices of goods and services;

(3) Right to information about prices and descriptions and effects of products and services and finally,

(4) Right to be heard, being able to express his/her satisfaction or grievances and get appropriate remedies.[155]

### B. 2. ADECOR's objectives

Among its objectives, ADECOR uses various ways and means to fight against the high increase of prices at the market, it ensures that consumers buy products fulfilling required standards and that they are given the exact quantity bought, it mobilises consumers around their rights and obligations and it contributes to the development of the country in collaboration with other economic stakeholders in development activities and projects.[156] ADECOR has no specific objectives aimed at protecting borrowers; it rather advocates for all consumers in general for the protection of their rights and interests in general.

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[154] X, Http://adecor-rwanda.org/index.php/about-us/objectives, accessed on 15 November 2018.
[155] X, ADECOR background, available at http://adecor-rwanda.org/index.php/about-us/background, accessed on 15 November 2018.
[156] X, ADECOR objectives, available at Http://adecor-rwanda.org/index.php/about-us/objectives, accessed on 15 November 2018.

As the only legally recognized consumer association, ADECOR is facing a big challenge to be the voice of millions of consumers that need to be heard and protected. A lot is yet to be done in strategizing to secure consumers' rights in a more liberalized market that is taking place in Rwanda. Active presence and participation of non-state actors is more than ever needed in this area. In the interview held with a staff in charge of consumer protection in the Ministry of trade and industry on 16 November 2018, he confirmed that "ADECOR is the only association of consumer protection so far and it is the only one MINICOM deals with to handle consumers 'issues."[157]

ADECOR has already played a big role in engaging with the Parliament of Rwanda and MINICOM in the drafting of the law on the competition and consumers' rights protection.[158]

That law contributed to consumers 'rights including the rights of borrowers in general. In its article one, the law provides that "…It also aims at ensuring consumer's interests, promotion and protection."[159]

MINICOM, having consumer protection in its attributions, needs to play a major role in sensitizing people, and consumers in particular to establish more consumers 'associations given that ADECOR has been operating alone since 2008. The establishment of more consumer organizations, with specialization in some sectors of activities such as the financial sector is long overdue.

[157] Interview held with MINICOM representative in regards to Consumers'Association in Rwanda, Kigali on 16 November 2018.
[158] ADECOR Strategic Plan 2012-2017, p. 12.
[159]Art. One of the law nº 36/2012 of 21/09/2012 relating to competition and consumer protection, *op. cit.* nº 54.

**Partial conclusion**

In Chapter three on establishment of legal & institutional mechanisms to strengthen borrowers' rights in credit contracts, the study worked on the establishment of mechanisms to empower borrowers and ensure better implementation and enforcement of such regulations in order to protect borrowers effectively from serious malpractices at the loan market. In this regard, various mechanisms were analyzed such as the necessity of regulating credit agreement, the regulation of unfair credit contract terms, the regulation of the banking sector and its effective supervision and the need of an effective institutional framework both public and private on the protection of borrowers.

In the section one regarding the legal framework, the study has considered necessary the regulation of credit agreement to avoid risks faced by borrowers during transactions with credit providers. Such credit agreement, would prescribe certain fundamental consumer rights such as the right of equality in the consumer market, right to disclosure and information, right to fair and reasonable marketing, right to fair, right to withdraw from the existing contract without any fine etc.

Concerning the banking sector and its supervision, even though, the law governing the National bank of Rwanda and the law governing organization of banking have strengthened the legal framework for banking supervision in Rwanda, these laws have not clearly indicated the role of BNR in as far as the oversight of financial institutions is concerned. BNR is vested with sufficient powers for effective regulatory intervention and address cases of non-compliance of financial institutions but laws need to strengthen the powers of BNR in relation with bank credit since lots of abuses in financial sector are pointed out significantly in the area of credit.

Section two focused on strengthening the institutional framework such as National Bank of Rwanda and Office of Ombudsman. For the National Bank of Rwanda, it has a role of regulation of the banking sector in various aspects of banking relationship. Among its missions, it supervises and regulates the activities of financial institutions.

The NBR has the duty to ensure that financial institutions are equipped with documents, necessary justifications for the analysis of their functioning. They are required to make statements of payment risks and payment incidents which are centralized at the Bank.

Any failure to disclose information or giving inaccurate information to the financial institution is held liable to sanctions. Though, the central bank requires banks to inform the public any change made to the rates and fees, it does not play any role to fix rates and fees of the interest and any penalty for default. Such requirement should help to avoid some credit providers to insert into credit contracts clauses containing unilateral alteration of the contract terms and unilateral determination of interest rates.

For the role of Office of Ombudsman, it was realized that it has not among its mission and responsibilities the role of dealing with credit disputes between consumers of credit and credit providers whereas, it is the other way around in other jurisdictions such as South Africa where the Office of Ombudsman has among its role, also to deal with financial services including issues related to credit.

Chapter three also discussed the role of private institutions such as Rwanda Bankers' Association and consumers' associations in regards with strengthening the rights of borrowers. In this regard, the Bankers' Association which is a group of local bankers that act as a forum for the banking sector deal with among their mission to project a good public image of banking as a service industry and develop good public relations with consumers.

Not only the banks'association play a role in the promotion of banking sector, but also the Consumers 'Associations such as ADECOR which is the first and only legally accepted as consumers' rights organization in Rwanda play a bigger role advocating for millions of consumers. In this way, ADECOR has engaged with the Parliament of Rwanda and other institutions such as Ministry of Trade, Commerce and Industry in the drafting of the law on the competition and consumers' rights protection. Many more associations need to be established for the promotion of consumers in general and borrowers in particular.

## GENERAL CONCLUSION

A consumer credit is a short-term loan made to enable people to purchase goods or services primarily for personal, family or household purposes. Consumer credit transactions can be classified into several different classes. Installment credit repaid in several periodic payments; loans repaid in one lump sum are classified as non-installment credit.

This study has not discussed substantively what consumer-credit legislations should include, it has rather discussed the enactment of such legislations to ensure consumer protection in credit contracts in order to prevent different imbalances faced in the consumer-credit transactions and provide for credit agreement as per reference to foreign legislations such as Belgian, UK and Kenyan Laws among others.

In the Rwandan context, this protection is not much legally guaranteed and it has created various abuses mostly resulting from financial institutions misbehaviors and malpractices. Hence, adequate legislation is deemed necessary. The present work focused on domestic legislations specifically in the banking and financial sector. The study used different techniques such as documentary and interview techniques and research methods notably comparative, analytical and synthetic methods.

This study was divided into three chapters, whereby chapter one focused on analysis of general considerations and analysis of existing laws on consumer protection in credit contracts in order to highlight gaps regarding consumer protection in credit contracts so as to find out the best way forward to sufficiently strengthen borrowers' rights.

Thus, focus was put into analysis existing domestic laws with reference to foreign legislations. The analysis focused on the various laws such as the Law nº 36/2012 of 21/09/2012 relating to competition and consumer protection, Law nº 73/2018 of 31/08/2018 governing credit reporting system, Law n° 10/2009 of 14/05/2009 on mortgage, Law n° 45/2011 of 25/11/2011 governing contracts and the regulation nº14/2011 on the publication of tariff of interest rates and fees applied by banks.

Generally, these laws do not adequately protect borrowers as such since no credit agreement is provided; financial institutions fix the interest rates as they wish and the protection of the weaker party in the negotiation of credit is not provided while penalty clauses not expressly explained to borrowers bind in credit agreements.

In chapter two of the work, salient issues faced by the borrowers due to lack or inadequacy of clear legislations were analysed. In this chapter, reference was made to existing foreign legislations in order to learn from their experience and cover issues highlighted in this study. Some decided cases were also used where borrowers were victims and entered into conflicts with financial institutions before or during the execution of credit contracts.

In order for the study to propose ways to resolve salient problems pertaining to consumer protection in contract of credits, it was first necessary to highligh issues faced by borrowers notably those relating to lack of information, lack of model credit agreement, issues resulting from contractual imbalances in the credit agreement, refusal of the proposed credit, fixation and increase of interest rates and penalty clauses, etc. Reference thus made to some foreign legislations that strictly prohibit such malpractices, which are notably the consumer protection Act of Kenya which provides that a borrower may terminate an optional service of a continuing nature provided by the lender giving thirty days' notice or such shorter period of notice without any liability for charges.

In addition, regarding the penalty for default interest charged by the bank in case the monthly payment agreed by both parties in the contract is not respected, the creditor reserves the right to charge a certain interest rate per day of delay calculated on the outstanding credit. According to the Belgian law on consumer credit, the interest rate for late payment cannot exceed the normal interest rate provided for by the law. In this situation, financial institutions cannot unilaterally fix the interest rate for late payment beyond this provision.

To solve all the above issues, likewise, Chapter three which dealt with the establishment of legal and institutional mechanisms to strengthen borrowers' rights in credit contracts, proposed solutions to the issues raised. Therefore, the enactment of specific law governing credit and credit model agreement in the banking system were proposed. The establishment and consolidation of existing public and private institutions for the efficient protection of borrowers such as the Nationa Bank of Rwanda, Office of Ombudsman, Bankers'Association, Consumers'Associations, were also proposed for them to play a role in dealing with financial services including issues related to credit.

## RECOMMENDATIONS

In light of all the shortfalls identified in the consumer protection in credit contracts, the study has formulated the following recommendations in order to ensure an effective and efficient protection.

Firstly, a proper law on financial services consumer protection should be enacted for a better protection of borrowers in credit contracts and a model credit agreement should be provided for by the law.

Secondly, both public and private institutions intervening in matters pertaining to consumer protection in credit contracts need to strengthen their capacity. In this regard, the Office of Ombudsman could include among its responsibilities, the way of handling disputes related to credit in banks and other financial services related issues. In addition, the Ministry of Trade and Industry, which has consumer protection in its attributions needs to play a major role in sensitizing people, and financial services consumers in particular on their rights and the best way to ensure their implementation by establishing more consumers 'associations, among other mechanisms.

Thirdly, although administrative regulation of interest rate is not advisable, there should be mechanisms to ensure more transparency and fairness in the determination of interest rates on loans contracted by borrowers so as to avoid unfair terms in credit contracts.

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