

**A LEGAL ANALYSIS OF BANKS FIDUCIARY DUTIES: A CASE
STUDY OF BURUNDI**

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DECLARATION

I declare that this thesis is the work of GIRITEKA Doria alone, except where due acknowledged is made in the text. It does not include materials for which any other university degree or diploma has been awarded.

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APPROVAL

I certify that I have supervised and read this thesis and that in my opinion; it conforms to acceptable standards of scholarly presentation and is fully adequate in scope and quality as a minor thesis in partial fulfillment for the award of Degree of Master of Laws of Kampala International University.

Name of Supervisor: _____

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Date: _____

DEDICATION

This piece of work is dedicated, especially to my parents Mr. Joseph Ntabishimwa and Mrs. Languide Bigirimana, brothers and sisters, who always encourage and support me tirelessly. Thank you for understanding and encouraging me throughout my master's programme.

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ACRONYMS

BANCOBU	Banque Commercial du Burundi
BCB	Banque de Credit de Bujumbura
BIA	Burundi Investment Authority
BRB	Banque de la Republique du Burundi
BSA	Bank Secrecy Act
KCB	Kenya Commercial Bank
SAP	Structural Adjustment Program
SME	Small and Medium Enterprises
USD	United States Dollar

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ABSTRACT

This study specifically aims to critically analyze the application, practice and implementation of the law on Bank fiduciary obligation and the problems associated with it in Burundi, in order to identify possible interventions to control breach of fiduciary responsibilities in banks. Since there is a need to be critical and analytical, this study employed theoretical analysis of fiduciary duties in Burundi so as to derive conclusions and recommendations. The study findings indicated that, protection of trust, accountability and circumstances leading to breach of fiduciary were due to failure to protect a trust, misleading advice, undue influences, conflict of interest among others whereas these problems can be avoided. The study concluded that in Burundi, laws do not provide any particular protection for the weaker party especially in banking. The study recommended that laws need adjustment and a new paradigm and those banks need to respect rules and regulations to adopt good practice which should be done hand in hand with a dynamic monitoring of bank officers on procedure taken in advising on fiduciary issues.

CHAPTER ONE

GENERAL INTRODUCTION

1.1 Background to the study

In English common law, "the fiduciary" is arguably the most important concept within the portion of the legal system known as equity. The reason why fiduciary principles have not lent themselves to the emergence of a unified field is that the sources of the duties are rooted in different parts of the law. In effect, the civil law has not always recognized fiduciary relationships as general principles permeating many areas of law. Meanwhile, certain claims that are part of fiduciary law in common law jurisdictions can be grounded in the general law of obligations in continental jurisdictions.¹ There is therefore limited need or appetite for fiduciary law conceived as separate from contractual obligations. This is all the more true since in European legal systems; the general law of obligations typically contains broad notions such as "fair dealing" and "good faith" that can be called upon to deal with conflict of interest cases.²

In common law countries, the principle of fiduciary law has been developed separately by the chancery court as opposed to the common law court and plays a pivotal role in regulating flexibility situations involving conflicts of interest or discretionary powers. On the other hand, in civil law countries, there is no equivalent *principle* of fiduciary law. Instead, there are isolated specific provisions dealing with conflicts of interests such as prohibition of self-dealing and prohibition of competition with the principal.³

Although these scattered provisions may play a similar role in regulating conflicts of interest or discretionary powers, I argue that there exists a significant difference between the two regimes, and that powerful judges armed with flexible fiduciary law would do a better monitoring or guarding job by undertaking "gap-filling"

¹ Martin G., Genevieve H.,(2018),*fiduciary principles in European civil law system*, Oxford Handbook of Fiduciary Law, p.4

² Ibid.

³ Ignacio Arroyo Martinez, (1982), *Trust and the Civil Law*, volume 42 La. L. Rev. p6.

mechanism in private law which could lower overall agency costs: while the chancery court has inherent and unlimited discretion in recognizing the fiduciary status of a person in a conflicting position and in granting flexible fiduciary remedies, the civil law courts have to resort to relevant statutory provisions and are inevitably subject to the limitation resulting from the statutory interpretation of those provisions, and the available remedies are normally limited to damages only.⁴

The deficiency of the principle of fiduciary law in civil law system may be overcome in part by well-prepared statutory provisions that give same effect as fiduciary law under common law, including codified no-conflict rule, and no-profit rule. In particular, in respect of status-based fiduciaries (ie. those who are designated as fiduciary on the basis of a particular position of trust and confidence they hold, for example, a director, a lawyer or a fund manager), it is possible for civil law countries to overcome the deficiency by a similar fiduciary-finding through well-prepared statutory provisions regarding that position, and civil law courts' active role in interpreting those statutes. But, in respect of fact-based fiduciaries who are designated as a fiduciary on the basis of a particular circumstance in which relationship of trust and confidence develops, it seems nearly impossible for civil law courts to give similar effect to the relationship as a fiduciary relationship.⁵

A fiduciary is someone who has undertaken to act for and on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence.⁶

When a fiduciary duty is imposed, equity requires a stricter standard of behavior than the comparable tortious duty of care at common law. It is said the fiduciary has a duty not to be in situation where personal interests and fiduciary duty conflict, a duty not to be in a situation where his fiduciary duty conflicts with another fiduciary duty, and a duty not profit from his fiduciary position without express knowledge and consent. A fiduciary cannot have a conflict of interest it has been

⁴ Katharina Pistor, Chenggang Xu,(2002) *Fiduciary Duty in Transitional Civil Law Jurisdictions Lessons from the Incomplete Law Theory*, London School of Economics.

⁵ Ibid.

⁶ Bristol, west society v Mothew [1998] Ch 1 at 18.

said that fiduciaries must conduct themselves at a level higher than that trodden by the crowd⁷ and that the distinguishing or overriding duty of a fiduciary is the obligation of undivided loyalty.⁸

The fiduciary concept has enjoyed a remarkable renaissance in the second half of the twentieth century, perhaps unexpectedly, given its banishment to the legal darkness when modern trust law was formalized in the eighteenth and early nineteenth centuries.⁹

Banking law, which has quietly resisted some of the significant changes in private law over the past twenty years, has now been ensnared in the spreading net of the "law of fiduciaries".

First, it appeared to have been settled as long ago as 1848¹⁰ that the banker-customer relationship was purely one of debtor-creditor and excluded any element of trusteeship or fiduciary obligation. Once a customer had deposited money, the banker was as free to use it as any other debtor. His sole obligation was to return to the customer on demand the deposited sum with any interest. It may be that the denial of a fiduciary relationship by the House of Lords in the context of the deposit-taking business of banks has precluded investigation by subsequent courts of possible fiduciary obligations in relation to other aspects of banking business.¹¹ Only recently have the courts been willing to find that a banker may be a constructive trustee of a corporate customer's money in certain circumstances and even more recently the courts have decided that a fiduciary duty is owed when giving investment advice. Thus, it is premature to expect a complete or articulate doctrine of fiduciary duty in the banker-customer context.¹²

⁷ [1998]186 CLR 7.

⁸ [1998] 1711 FCA.

⁹ Kenya Grange Vehicle Industries Ltd V. Southern Credit Banking Corporation Ltd [2014] e KLR .

¹⁰ *Foley v. Hill*, 2 H.L. *Thermo King Corp. v. Provincial Bank of Canada*, D.L.R. (S.C.C. 1982); *Joachimson v. Swiss Bank Corp.*, [1921] 3 K.B.

¹¹ *Ibid.*

¹² *Barclays Bank v. Quince*, [1968] 3 All E.R. (H.L.); *Karak Rubber Co. v. Burden*, [1971] 3 All E.R. 1118 (Ch. D.); *Selangor United Rubber Estates Ltd. v. Craddock*, [1968] 3 All E.R. 1073 (Ch. D.).

Secondly, it would be inappropriate to criticize the Courts too severely for failing to articulate a precise and useful definition of the fiduciary duty in the banker-customer relationship because the general notion of fiduciary duty has not yet been fully explored. Although its use is increasing in the common law, the concept is imprecise and always will be. The modern "law of fiduciaries" generally, and not merely its application in banking law, is in its formative stage."¹³

In reference to the Burundi, the Burundian financial sector is dominated by commercial banks and includes a handful of formal non-bank financial institutions, mainly development banks and a growing microfinance network. Currently, the banking sector comprises 8 commercial banks.

The banking sector is highly concentrated with the two mature banks, the Banque de Crédit de Bujumbura (BCB) and the commercial bank of Burundi (BANCOBU) accounting for a commanding share of the market. Together with the Interbank Burundi (IBB) created in 1992, the three largest banks represented 76 percent of total assets, 74 percent of credit, and 79 percent of deposits in 2008, as well as most bank branches in the country.¹⁴

In an effort to improve the efficiency of the financial system, the government initiated its liberalization in 1987 in the context of the second phase of the Structural Adjustment Program (SAP). The period leading to the adjustment program was characterized by strict controls of interest rates and credit allocation across sectors. In addition, some financial institutions were granted monopoly in the mobilization of deposits (especially from parastatals) and the allocation of credit (especially for coffee trade financing).

Customer relationship management in banks can be referred to as the ability to understand, sometimes anticipate and manage the needs of the customer. Basically the main purpose of customer relationship management in banks or customer satisfaction is to enable banks customer retention and attract new customers to enhancing business growth. A satisfied customer is a great marketing tool for banks

¹³Jones, C, (1968), *Unjust Enrichment and the Fiduciary's Duty of Loyalty*, 84 L.Q.R. 472 .

¹⁴Hsieh and Klenow, (2009), *Capital misallocation due to political factors*, p20.

since these customers will help improve the bank business growth through referrals. Satisfied customers also give positive publicity hence leading to banks improved bottom line.

Banks should at all times strive to increase business through speed and real time responses to the existing customer needs. This is because attracting new customers involves huge costs in terms of promotional costs, advertising costs and even follow up costs. The longer the relationship a customer has with the bank, the better the returns they bring. This interaction and relationship should result in increased profitability to the banks through revenue growth and operational efficiency. The relationship also leads to customer loyalty. Organizations caring for their existing customers are almost definitely likely to be winners. There are great benefits to the banks which adopt Customer Relationship Management in banks.¹⁵

It is also not clear from the case law whether banks may engage of advice giving as a part of the general business of banking within the meaning. In some cases where negligent advice has been given, the courts have found that the banks were not liable because the advice in question was not within the scope of the particular manager's authority.¹⁶

The scholarly research on the banks' fiduciary obligations in particular reference to Burundi is scanty. In this regard, there is need to critically examine the existing legal framework in the country such that credible recommendations to reduce or curb such cases can be put in place.

It is well known that bankers counsel customers in general business matters. Indeed, banks aggressively advertise themselves as competent and willing advisors.¹⁷

¹⁵Bilal A, Asim. R, Rehmat U.,(2010), *Customer Relationship Management in Banks: Strategies and Model for Banking*.CRM Paperback. P6.

¹⁶ FATF(2010),Financial Action Task Force. Global Money Laundering and Terrorists Financing Threat Assessment report,Paris,july.

¹⁷Royal Bank of Canada v. Mack, [1932] S.C.R. 488, [1932] 1 D.L.R. 753; Mutual Mortgage Corp. v. Bank of Montreal, 53 W.W.R. 724, 55 D.L.R. (2d) 164 (B.C.C.A. 1965).

In any event, banks which hold themselves out to the public as offering business advice can hardly be heard to argue otherwise should the advice prove to be erroneous.¹⁸ Therefore, there would appear to be good reason today for the courts to eschew their historical hesitation in order to explore more fully the duties owed by bankers to their customers. Other constraints to growth in Burundi range from physical factors including unfavorable geography, poor infrastructure, and high production and transport costs, as well as policy and institutional constraints.¹⁹

However, as suggested earlier, close analysis of recent decisions reveals inaccuracy in the formulation of the content of the fiduciary obligation.

This phenomenon has greatly affected many customers and has limited their capacity to get financial assistance from commercial banks since there is mismanagement of the law governing the relationship between the bank and the customer. It is within this background that this study attempted to critically analyze the applicability of the fiduciary duties and determine whether it offers any protection to both the customer and the bank with particular reference to Burundi, which is a civil law country.

1.2 Statement of the Problem

The relationship between the banker and the customer can be said to be a contractual one. This means that there is a contract between the banker and the customer in relation to any general transaction and some specific transactions. The contract specifies the obligations imposed on the banker and the customer. Some obligations may however be agreed on at a later stage. Bankers are obliged to perform certain obligations. However some obligations are not mandatory and therefore must be agreed on in case that it is not a habit for the banker to perform them. The relationship between the banker and the customer was not held to be so specific and close so as to amount to a relationship of an agent and the customer.²⁰

¹⁸Barclays Bank v. Quillclose Inv., [1968] 3 All E.R. 651 (H.L.); Karak Rubber Co. v. Burden, [1971] 3 All E.R. 1118 (Ch. D.); Selangor United Rubber Estates Ltd.

¹⁹Central Bank of Burundi, Annual reports, 2010.

²⁰Home Personal Finance. *A Bank's Obligations to its Customers*, p 6.

There are further duties owed by the bank to the customer for example the bank has a duty to protect its customer from fraud committed by the agents, directors, partners in making payment orders etc. There are some statutory protections in relation to the bank in the absence of negligence²¹. There is also a duty of care owed by the bank to the customer when the bank is giving advice on investments or when the bank gives advice or explains security documentation. However it was held that the bank is not under a continuing duty to keep the advice under review.²²

It is also well known that bankers advise customers in general business matters. Indeed, banks aggressively advertise themselves as competent and willing advisors. Thus, there can be little doubt that investment counselling, particularly to small customers, falls squarely within banking business. In any event, banks which hold themselves out to the public as offering business advice can hardly be heard to argue otherwise should the advice prove to be erroneous.' Therefore, there would appear to be good reason today for the courts to eschew their historical hesitation in order to explore more fully the duties owed by bankers to their customers.²³

The precise nature of a banker's fiduciary duty to its customer is unclear. These fiduciary relationships seem to be done unlawfully because sometimes it is done on an unequal bargaining power and this show that the customer receives the harsh treatment according to the law²⁴. This phenomenon has been an obstacle between clients and banks because of the malpractice of the law governing their relationship²⁵.It seems that the law protects more the bank than the customer.

Although there are some writings about the bank and customer relationship in Burundi, there is little if any scholarly research on the application and practice of enforcement of the law on Banks' fiduciary obligations in Burundi. Therefore, this research tries to fill up this gap.

²¹ Lim, C and Rugwabiza, L(2009),*A Shock analysis of Burundi's economy. The financial crisis and other shocks.* African Development Bank, Regional Department East Africa A (OREA), p 6.

²²ISTEEBU-(2008).Burundian Institute of Statistics and Economics Studies, Accounts of the Nation, 2005.Bujumbura,December, p 8.

²³ Canadian Pioneer Management Ltd. v. Saskatchewan Lab. Rel. Bd., [1980] S.C.R. 433.

²⁴La porta R ,lopez de silanes F ,shleifer A ,vishny R, (1997). *Legal determinants of external Finance* p1131-1150.

²⁵ Ibid.

Additionally, there are still enormous legal and policy irregularities under which fiduciary obligations in Burundi are operated.²⁶ The inadequacy of scholarly work on legal application under which banks fiduciary obligations operate in Burundi associated with the legal and policy irregularities under which fiduciary obligations are enforced in Burundi, therefore prompted the need to critically examine the existing laws and policies. It is against this misuse of the law governing the banks fiduciary obligation in advice-giving, that the study is carried out analyzing the relevance of this law in as far the enforcement of this law is concerned and the malpractices can be curtailed.

1.3 Research Questions

This research deals with the following questions:

- (a) What is the legal nature of the fiduciary obligation owed by bankers to customers in Burundi?
- (b) What are the problems faced by banks and customers caused by the misuse of legal precedent in formulating substantive content for fiduciary obligation in Burundi?
- (c) What are the relevant elements which may ultimately comprise the basis of a substantive fiduciary obligation in the banker-customer relationship in Burundi?

1.4 Research Objective

The research is based on the following objectives:

1.4.1 General Objective

The general objective of the research is to critically analyze the application, practice and enforcement of the law on Banks' fiduciary obligation and the problems associated with it in Burundi.

1.4.2 Specific Objectives

- (a) To analyze the legal nature of the fiduciary obligation owed by bankers to customers in Burundi.

²⁶Daily monitor July 29th, 2013 <http://www.monitor.co.ug/News/National>.

- (b) To identify the problems faced by banks and customers for the misuse of legal precedent in formulating substantive content for fiduciary obligation in Burundi.
- (c) To distinguish the relevant elements which may ultimately comprise the basis of a substantive fiduciary obligation in the banker-customer relationship in Burundi.
- (d) To provide recommendations for adequate bank-customer relationship in Burundi.

1.5 Significance of the study

The findings of this research can be helpful to the following categories of persons or, groups and in a variety of ways as follows:

The bankers and customers will understand the legal framework regarding the fiduciary obligation owed by bankers to customers in Burundi and cases of malpractices arising from it. Thus, they learn to act lawfully in the application of the mortgage laws and act in compliance with those laws. The customer specifically will deeply understand the weaknesses in the practicability and applicability of the fiduciary obligation owed by bankers. Therefore, they wish to engage the government of Burundi to cultivate a favorable investment climate in the country by harmonizing the application of the laws in the country. The research will help on how customers effectively use their rights in order to redeem their security in regards to the law and how to avoid liability.

The findings in this research will be also of help to the government of Burundi as regards improving the lending climate from commercial banks in the following ways. The Government of Burundi will get to understand that customers of banks face innumerable challenges from commercial banks as regards to application and practice of the fiduciary duties. This will enable them to review the existing loopholes existing in the law such that the common man can be protected. The study will support some form of ambition of extending Burundian legal framework in commercial banks for the benefit of Burundian.

The research will also improve on the understanding of what fiduciary duties are, the content of its legal framework in Burundi, in particular.

1.6 Scope of the study

This study focused on the legal framework governing the banking law on fiduciary obligations in Burundi. However, it first analyzed the legal nature of the fiduciary obligation owed by bankers to customers in Burundi, then discussed the problems faced by banks and customers because of the misuse of legal precedent in formulating substantive content for fiduciary obligation in Burundi and lastly, distinguished the perspective on the application of fiduciary obligation in the banker-customer relationship in Burundi.

This study is focusing on Burundi in particular. This area had been considered for this study because it has many commercial banks that deal with people and businesses. Thus, it was easier to investigate how the applicability of fiduciary duties has affected them. However, examples on the subject will be drawn from other jurisdictions.

1.7 Research Methodology

Since there is a need to be critical and analytical, this study employed theoretical analysis of fiduciary duties in Burundi so as to derive conclusions and recommendations. In this regard, it was based on the in-depth study of the relevant laws.

This study employed legal desk research design meaning that the study was based on the library materials involving both primary source and secondary source. The primary sources that the researcher employed, included Codes and Laws of Burundi; Contract Act, Burundi, 1998.

Law n°1/017 2003, Law on the establishment of Banks and Financial Institutions, Burundi 2003) ;Law n°1/01 2008 Procurement Bill ;Circular n°01/08 relating to the legal minimum capital of banks and financial institutions enacted by law n°1/017 of october 23,2003 regulating banks and financial institutions ; Bank of Uganda Financial Consumer Protection Guidelines, 2011 and some cases.

The secondary sources that the researcher used are the available literature on banks fiduciary obligations most especially in the areas of laws and policies as well as its impact on socio-economic development. These had been derived from text books such as books, articles, working papers, reports and journals by visiting libraries and internet website.

1.8 Literature Review

The literature reviewed in this study focuses on challenges that are faced by financial institutions and their customers in their relations in Burundi, and how they can cope up with those challenges encountered. The literature review also examines the legal framework as the major concern of this study was to establish an in depth understanding of a legal analysis of banks fiduciary duties.

The Government of Burundi, like many other developing countries has recognized the critical role of the financial institutions, in the national poverty reduction strategy²⁷. Consequently, there are many financial institutions (MFIs) opening up in the country. To ensure that the expected results are realized, the industry is regulated following the National Central Bank instructions on financial activities²⁸.

According to some scholars, they assert the fact that the financial institutions expansion needs a strong structure of rules able to deal with efficiency in the mobilization of funds, ensure suitable risk management and customer protection as a first objective²⁹.

Plato argued that the classification of the banking contract as a fiduciary contract imposes on the bank, as a fiduciary, a special duty towards its beneficiary the customer a fiduciary duty. The bank's fiduciary duty sets a very high standard of conduct for the bank, obligating it to act with integrity, fairness, professionalism, and skill. However, at the heart of the duty stands the duty to exercise the power vested in the bank without abuse. The key words are loyalty and fidelity. The bank as "a fiduciary" is required to perform its duties solely for the purpose for which the power

²⁷ Helms, Brigit, (2006) *Access for All: Building Inclusive Financial Systems*. Washington, D.C.: CGAP, p.96.

²⁸Ibid, p.96.

²⁹Porteous, David, Daryl Collins, and Jeff Abrams(2010), *Prudential Regulation in Microfinance*.Policy Framing Note 3. Cambridge: "Financial Access Initiative", P.53.

was vested in it, without ulterior motives and while protecting³⁰ the interest of the beneficiary—the customer.³¹The bank must act for the best interest of the customer. “Moreover, the bank must prefer the interest of its customer to the interests of others, including its own self-interest.”³²

He also added “ while the duty of good faith requires a person to act fairly in the course of pursuing his or her own personal interest, the fiduciary duty requires that person to prefer the interest of the other to his or her own personal interest.” No wonder the fiduciary³³ duty was recognized as an altruistic duty, and was described by the metaphor of “an angel’s behavior.”³⁴

Ruth Plato-Shinar argued that ‘In determining the legal rule that applies to the relationship, here too the customer is dependent on the bank. As mentioned above, the banking contract is a standard agreement that is drafted in advance by the bank. Even if the bank agrees to conduct negotiations with a certain customer regarding the wording of the documents, the basis of the negotiations is the original draft that was prepared by the bank and clearly protects its interests.’³⁵

The same author added that the fiduciary approach imposes a duty on the bank to disclose any information to the customer that would be essential to the customer when making a decision about performing a banking transaction. The duty is not limited to the details included in the various statutory and regulatory provisions regarding disclosure but is much wider. The fiduciary approach imposes a positive obligation on the bank to deliver all of the essential information regarding the transaction,³⁶ in order to prevent a situation where the customer takes an obligation upon his or herself without knowing all the relevant facts.³⁷

³⁰ Plato-Shinar, *An Angel Named “The Bank,” the bank’s fiduciary duty as the basic theory in Israel banking law*, vol.36 issue,P27.

³¹ Ibid.

³² Ibid.

³³ Plato-Shinar,(2013) , *An Angel Named “The Bank,”* supra note 3, at 30 (citing Buchbinder).

57(4) PD at 332; M. Rubinstein & B. Okon.

³⁴ Ibid.

³⁵ Idem.

³⁶ Law No. °1/017 on the establishment of Banks and Financial Institutions, Burundi 2003.

³⁷ Ibid.

In the Burundian context, the banker-customer relationship is a contractual relationship based on a contract between the parties. As a contractual relationship, it is governed by contract law. However, contract law does not provide the customer with the protection he or she requires against the bank. Therefore, the Burundian courts have adopted an approach in determining that the banking contract is a special contract, then a fiduciary contract.

Ronald Hersbergen argued that perhaps the bank and its depositor may be viewed as having equal bargaining power and freedom of contract, although full recognition of modern day realities may well suggest a contrary conclusion. Nevertheless, the bank has been entrusted with an important franchise to serve the public and has, from time to time, received broad legislative protection.³⁸

In determining the legal rule that applies to the relationship, here too the customer is dependent on the bank. Where 'special disadvantage' in the nature of age, infirmity, poor education or difficulty with the french language affects the customer, the ordinary fiduciary relationship is usually not employed in Burundi

Fiduciary relationships on the Burundian legal regime doesn't look more to the position of the weaker party. The one who relies, that is not the one who exploits the reliance. Customers, rather than bankers, are not hence their dominant concern.

The weakness of the consumer in Burundi is reflected in various areas: both at the stage of the formation of the legal norm and at the stage of exercising it; on an individual level as well as on a group level; and in terms of bargaining power as well as in terms of informational gaps.

According to Janine Pascoe, he is indicated that Standard form guarantees typically used by financial institutions, even those which comply with disclosure regimes under legislation and industry codes, may contain provisions which are unjust in themselves.³⁹

³⁸ Ronald Hersbergen, (1975), *The Bank-Customer Relationship Under the Louisiana Commercial Laws*, 36 La. L. Rev., P22.

³⁹ Janine Pascoe,(2006) *,Statutory Unconscionability and Guarantees*, Monash University,volume 18,issue 2,L. Rev., P3.

Ornadeutch added that there are huge differences in the level of professional knowledge, technical methods of managing and monitoring financial activities, financial power, bargaining power, and so on.⁴⁰ The customer's inferiority is also reflected in instances of legal disputes with the bank given the existence of a great inequality in the financial ability to conduct legal proceedings and the difficulties of proof that stem from the lack of full information; this is due to the inferiority in the bargaining position in the negotiation stage and the lack of previous experience in legal conflicts.⁴¹

In the Burundi financial sector, the trend is the disparity of power between the dealer and the consumer. The starting point is the consumer's inability to deal with the sophisticated markets of the modern world due to changes in market structure, technological innovations, and the variety of products and services.

The inequality between the parties is due not only to the dealer's more substantial economic power, but also to factors such as the complexity of the transaction, the expertise of the dealer in the relevant field, and the lack of feasibility for the consumer to negotiate on the contract because of the low chances of success in such negotiations.

According to Plato-Shinar & Weber, during the last two decades, courts have broadly implemented the bank's fiduciary duty. The fiduciary duty applies to each and every customer: whether he is an individual or a corporation; whether he is a business customer or a private customer; whether he is an ordinary customer without financial experience; or a sophisticated customer who is familiar with the banking and financial world. The fiduciary duty will apply even to customers who have financial power that can be likened to the strength of the bank.⁴² Every customer, by virtue of his very status as a customer, is entitled to a fiduciary duty.

⁴⁰ Ibid.

⁴¹ Ruth Plato-Shinar, (1975) , *The Banking Contract as a Special Contract: The IsraeliTouro Law Review*: (2013) Vol. 29: No. 3, Article 13, p2.

⁴²Plato-Shinar, Ruth and Weber, (2008), *Three Models of the Bank's Fiduciary Duty*, Law and Financial Markets Review 422.P29.

Ben-Oliel also added that the bank's fiduciary duty is broad from an additional aspect: the type of activities to which it applies. The duty applies to the types of banking services, activities, and transactions that the bank performs on behalf of the customer. The duty arises from the existence of a bank-customer relationship. The relationship between the parties, by its very definition, is what imposes the fiduciary duty, and not a specific action that the bank wishes to perform.⁴³

Shankar in his work said that "the fiduciary must not allow a risk or materialisation of a conflict between the interests of the plaintiff and others, nor make an unauthorised profit from their position. It is acknowledged that there exists a debate in the literature on the issue of whether these duties should have, also, a prescriptive dimension."⁴⁴

From the foregoing, it is evident that in cases of breach of the bank's fiduciary duty, a wide variety of remedies are available to the customer. The existence of such a basket of remedies ensures effective protection of the customer and is suitable for the special contract that exists between the parties. Not only does it enable the customer to sue for the relief appropriate to his needs according to the circumstances of the case, but it also allows the court flexibility.

According to the fiduciary approach, the duty of disclosure is broad in several aspects. Firstly, logic demands that the duty of disclosure relate only to information that is external to the contract.

Friendman & Cohen added that the assumption is that the matter that should be disclosed is hidden from the customer's knowledge while the stipulations of the contract are disclosed to the customer. But, under the fiduciary approach, the duty of disclosure includes an obligation not only to disclose information that is external to the contract, but also various provisions of the contract.⁴⁵ The duty of providing information that is imposed on the bank must include providing—or "detailing"—the

⁴³ Ben-Oliel (1996), *Banking law general part*, at p5.

⁴⁴Tanya Shankar, *The place of the dishonest and fraudulent design requirement in accessory liability for assisting in breach of trust or fiduciary duty*, Monarch university law review (vol 40, n03). P796.

⁴⁵Chris Willett, (2007), *Fairness in Consumer Contracts: The Case of Unfair Terms Markets and the law*, Ashgate Publishing Ltd, P26.

contents of the contract and the bank must be meticulous about pointing out essential information, even though such information is included in the banking agreement.⁴⁶

Glover in his work, argued bankers relationships with those who use their services are recognised to have a fiduciary nature in at least some of their aspects.⁴⁷ Various banking services, such as managing a current account, managing financial deposits, and establishing a loan, are by their very nature ongoing services that will likely continue for many years. The duty of providing information will apply to the bank over the lengthy period of this relationship as well.⁴⁸

The initiative for the disclosure process must come from the bank itself. Even if the customer never approaches the bank for information, this does not exempt the bank from its duty, nor does it limit the extent of the bank's responsibility. A bank that does not provide the full information required, of its own initiative,⁴⁹ bears the responsibility for its omissions.⁵⁰

According to Orna Deutch, there is no duty on one party to a contract to explain the contents of the contract to the other party.⁵¹ Negligence of a party to a contract stemming from their lack of understanding of the contents of the transaction is that party's responsibility alone. A person is deemed to be one who knows and understands the contents of a document that he or she signs and any claims by the person that this is not so will not be accepted.⁵² However, a different rule should be established with respect to banking contracts as fiduciary contracts. A special duty is imposed on the bank to provide an explanation to the customer.

Porath, added even if it is possible to deduce from the banking document itself the nature and essence thereof, a duty should be imposed on the bank to give the customer a detailed explanation regarding the content of the contract and the

⁴⁶ Ibid.

⁴⁷ Glover, John (1995) ,*Banks and Fiduciary Relationships*, Bond Law Review: Vol. 7: Iss. 1, Article 5, p 1.

⁴⁸ Ibid.

⁴⁹ Contract Act, Burundi, 1998 .

⁵⁰ Ibid.

⁵¹ Orna Deutch , *Consumerism*, supra note 75, at 355.

⁵² Ibid.

essence of the transaction. Furthermore, there will be instances where an obligation is imposed on the bank to advise a customer and to explain the transaction to him or her, even if the customer does not request such an explanation because he or she is unaware of how essential the explanation is.⁵³

However, Plato notes that fiduciary relationship creates exception to the general rule. In such a case, the contract can be generally avoided by its signer on a showing merely that the fiduciary failed to make him aware of the legal significance of the signing of the contract. Bank, should be a broad obligation in various aspects⁵⁴.

In the Burundian context, the customer is unable to effectively supervise the bank's activities either because the customer lacks the professional knowhow and technical means required or because the customer usually receives information about what is happening in his account only retrospectively.

1.9 Organisation layout

This study will consist of five chapters. Chapter one consists of introduction, background of the study, statement of the problem, objectives of the study, research questions, scope of the study, significance of the study, methodology, literature review, and research structure. Chapter two reviews and analyses the legal nature of the fiduciary obligation owed by bankers to customers in Burundi. Chapter three discusses the problems faced by banks and customers caused by the misuse of legal precedent in formulating substantive content for fiduciary obligation in Burundi. Chapter four distinguish the relevant element which may ultimately comprise the basis of a substantive fiduciary obligation in the banker-customer relationship in Burundi. Chapter five is the last chapter of the study summarises the key research findings, draw conclusions and forward recommendations.

⁵³Porath, *The Responsibility of the Banks*, p 324.

⁵⁴ Plato-Shinar,(2010) *The Bank's Fiduciary Duty*, *Quarterly Banking Review*,p134.

CHAPTER TWO

LEGAL ANALYSIS OF THE NATURE OF THE FIDUCIARY OBLIGATIONS IN BURUNDI

2.1 Introduction

This chapter reviews and analyzes the nature of the fiduciary obligation owed by bankers vis-à-vis clients in Burundi. The banker-customer relationship is a contractual relationship based on a contract between the parties.⁵⁵ As a contractual relationship, it is governed by contract law.⁵⁶ However, contract law does not provide the client with the protection he/she needs against the bank.⁵⁷ As a result, the Burundian courts have to adopt an approach to determine that the banking contract is a special contract, then a fiduciary contract. Under a fiduciary contract, the bank, as a fiduciary, is subject to a fiduciary duty to the beneficiary, the customer.⁵⁸ The fiduciary obligation imposes on the bank a very high standard of behavior, much higher than the standard imposed on it by contract law. By adopting a fiduciary approach, the customer is granted a very wide protection against the bank.

2.2 Legislation on the financial consumer protection

The efforts of legislation to protect the financial consumer are very robust in every respect. By simple consumer protection legislation, the consumers of financial services in Burundi have benefited inadequate protection as their investments and deposits in banks are not well protected and other financial institutions do not provide much protection its requirement.

We have thus noted the nature of Burundian law "the civil law", since it was constituted since Burundi's independence from Belgium on 1 July 1962, is a right strongly influenced by Belgian law. The Belgian legislator (as well as legislators around the world) has long held that protective and corrective legislative measures

⁵⁵ Ruth Plato-Shinar(2010), *The bank's fiduciary duty: the duty of loyalty. Quarterly Banking Review* p.38

⁵⁶ Ibid.

⁵⁷ Ruth Plato-Shinar,(2007). *An Angel Named "The Bank": The Bank's Fiduciary Duty as the Basic Theory in Banking Law*, world rev.p 27.

⁵⁸ Ibid.

should be put in place to remedy the lower position of the consumer (as opposed to companies) in terms of knowledge, expertise and experience in the financial field sector. Especially in the aftermath of the 2007-2008 financial crisis, Belgian policymakers have emphasized increased consumer protection and financial literacy in order to achieve financial stability.⁵⁹ Considering the potentially can cause individual consumers and for the financial markets, improving the protection of consumers in the financial markets is also a major concern of the European Union.⁶⁰

2.2.1. The banker-customer relationship as a contractual relationship

The banker-customer relationship is a contractual relationship.⁶¹ In the realm of civil law, the bank customer relationship is governed by the law of obligations: the law of contracts, torts and unjust enrichment. The central focus of these laws is the general contract law consisting of the contracts (general part) and the contracts (remedies for breach of contract). It is created by entering into a contract and continues to exist as long as the contract is in effect and terminates upon the termination of the contract.⁶² Because the relationship is contractual, it is governed by contract law.⁶³

The banker-customer relationship is a contractual relationship. The banking contract is only concluded when two parties, the banker and the client, exchange their consent. However; the application of contract law in banking context creates a problem: contract law does not take into account situations of inequality of power between the parties.⁶⁴

Based on the paragraph of the Burundian civil code article 33 which states that: "Agreements lawfully entered into take the place of the law for those who made them. They can only be revoked by mutual consent or for the reasons permitted by law. They must be executed in good faith".

⁵⁹ Directorate-General for Internal Policies, Consumer Protection Aspects of Financial Services, European Union, 2014, 18.

⁶⁰ Ibid.

⁶¹ E. P. Ellinger, E. Lomnicka, C. Hare, (2011), *Ellinger's Modern banking law*, OUP Oxford, p115

⁶² Plato-Shinar (2007), *An Angel Named "The Bank,"* common law world review volume 36, issue 1, p 36.

⁶³ Ibid.

⁶⁴ Ibid . p35

This law which is also a fundamental law governing Burundian banking contracts, it is alleged that this is not a fair law because as mentioned above, the banking contract is a standard contract which is drafted in advance by the bank . The customer's consent consists of expressing his/her acceptance of the contents of the various forms submitted to him/her by the bank. In fact, almost all bank contracts in civil law are membership contracts. In most cases, the customer accepts, approves and signs a form whose the content he/she has not really read. Even if the bank agrees to negotiate with a certain client regarding the wording of the documents, the basis of the negotiations is the original project prepared by the bank and Cleary protects its interests.

In the context of fiduciary relationship, in Burundi, some identifiable 'undue influence' must be found in order to relieve the customer of the same facts. The application of the doctrine of undue influence doctrine is qualified in Burundi with the requirement that the plaintiff establish a 'manifest disadvantage' whenever a presumptive relationship is invoked.

Contract law determines arrangements that seek to balance the interests of the contracting parties on the basis of the presumption of equality in power. In situations of a serious power disparity between the parties, these laws do not offer any particular protection for the weaker party. As will be explained later, in Burundi, the bank's customer relationship is characterized by an enormous inequality of power, probably the most intolerable are found in the complex standard conditions, which are now so common. In the ordinary way the customer has no time to read them, and if he/she did read them, he/she would probably not understand them. And if he did understand or object to any of them, he would generally be told he could take it or leave it. And if he/she then went to another supplier the result would be the same. Freedom to contract must surely imply some choice for bargaining and therefore contract law is not an appropriate tool for regulating this contractual relationship.⁶⁵

⁶⁵ Ibid.

2.2.2. Unconscionable dealing

In Burundi, it seems that there is similar concern about the conduct of the bank and not the customer's trust. The same wrong approach also centered its focus on the strongest party is taken. Only the undue influence of the bank in Burundi is more commonly expressed as 'unconscionability' or 'unconscionable dealing' on the part of the bank. The difference is minimal.

In addition, a contractual derogation is allowed.⁶⁶ Therefore, even if one of these laws contains a clause intended to protect one of the parties to the contract, it can be assumed that in a situation of disparity of power, the stronger party would contract out of such a clause. Indeed, this is the situation in the banking context. Banks used to make stipulations regarding various statutory clauses in order to protect their interests and to minimize their liability.⁶⁷

In *commercial Bank of Australia limited v Amadios* ⁶⁸, the Amadios, whose son carried on business as a builder, guaranteed the son's indebtedness to the commercial Bank. To this end, they executed certain documents the effect of which was to provide the bank with a mortgage over a building which they owned. When the son's business failed, the bank sought to enforce the guarantee. In their defence, the Amadios asserted that the guarantee was unenforceable because it was unconscionable.

It was held (high court of Australia) (by 3-1majority) that, in all the circumstances, it was unconscionable for the bank to rely on the guarantee. The circumstances which the court took into account in reaching this conclusion included the fact that :

- a) The Amadios spoke little English;
- b) They did not seek independent advice, nor was the seeking of such advice suggested by the bank;

⁶⁶ Gabriela Shalev, (2005), *The Law of Contract - General Part, Towards Codification of the Civil* L 50 p 16.

⁶⁷ *Ibid.*

⁶⁸ (1983)151 CLR 447.

- c) At the time the mortgage was executed ,he was aware of the son's precarious financial position and knew that Amadios were not so appraised and ;
- d) The bank did not advice the Amadios that there was no limit on their liability under the guarantee-the Amadios believed the liability was limited to 50000 dollars.

Dawson J. delivered a dissenting judgment in which he said that the facts did not point to the Amadios having been disadvantaged and that, therefore, the bank was no guilty of either unconscionable conduct or misrepresentation.

In the course of this judgment, Mason J. noted that: relief on the ground of unconscionable conduct will be granted when unconscientious advantage is taken of an innocent party whose will is overborne so that it is not independent and voluntary, just as it will also be granted when such advantage is taken of an innocent party who though not deprived of an independent and voluntary will, is unable to make a worthwhile judgment as to what is in his best interests.⁶⁹

Perhaps the Burundian position implies that for a bank to give transactional advice is not an inherently fiduciary matter. Rather, the giving of bad or self- interested advice is an occasional wrong. Where the claimant is able to establish a bank's misconduct, 'unconscionability' or 'unconscionable dealing', the wrong will be repaired.

2.2.3. Weakness of the contract law

The Belgian legislator (as well as legislators worldwide) has long been of the opinion that protective and corrective legislative measures should be put in place to address a consumer's inferior position (as opposed to businesses) with regard to knowledge, expertise and experience in the financial sector. Particularly in the aftermath of the financial crisis of 2007–2008, Belgian policymakers have been focusing on stronger consumer protection, together with better financial education, in order to achieve financial stability.⁷⁰ Considering the significant potential detriment that financial

⁶⁹ Bank of America corp.v.city of Miami and Wells Fargo &co.v.city of Miami(US.Sup.Ct)

⁷⁰ Martin G.,Genevieve H.(2018),fiduciary principles in European civil law systems, ECGI working paper series p5

services can cause to individual consumers and to the financial markets, improved protection for consumers in financial markets is also a key preoccupation of the European Union.

In the Burundian context, there are some exceptions to this rule. Some clauses of the Contracts Law can provide the banking customer with adequate protection, such as the duty to act in good faith in this section 33 of the Civil Code III which states that the convention formed must be executed in good faith.⁷¹ The prohibition against misleading or the prohibition against exploitation from Section 1, Article 9 of the Civil Code III which states that there is no valid consent, if the consent was given only in error, or if it was extorted by violence or surprised by fraud.⁷² These clauses aim to establish a correct and fair standard of behavior. But as useful they are, these clauses are only isolated clauses and do not offer adequate protection to the banking customer in Burundi.

When a consumer enters into a contract with a company within the meaning of the law, he is usually confronted with standard documents that are presented to all consumers. Given the economic imbalance that characterizes this relationship, it is rarely possible for the consumer to negotiate the terms of the contract. Conscious of their position of strength, companies may be tempted to include unfair clauses in these contracts. It should be noted that contracts have the object or the effect of creating a significant imbalance between the rights and obligations of the parties to the contract to the detriment of the non-professional or the consumer. For example, the clause according to which the customer has a period of one month to contest the changes to the general terms and conditions of the deposit account agreement, the clause which suggests to the customer that it bears sole responsibility for verifying that the bank check delivered to the collection is not neither falsified nor counterfeited, the clause allowing the bank, having made a mistake in the execution of an operation, to remove or reduce the right to repair of his client. In other words, the clause is abusive when it breaks the contractual equilibrium.

⁷¹ Ibid.

⁷² Ibid.

Fiduciary relationships are then based on trust of the client and not on the bank's wrongdoing. Another contractual tool that can protect the banking customer is the contracts law. This law applies to banking contracts, which are banking contracts.⁷³ This law allows courts to "annul or change any condition of a contract which involves an unfair disadvantage to customers or an unfair advantage to the supplier, which may result in the deprivation of customer." But attempts to attack clauses of banking contracts on the ground that they are unfair usually fail.⁷⁴

2.3 Court's Passive Attitude

Burundi does not yet call a bank's transactional advice 'fiduciary', as a contractual relationship, it is governed by contract law. However, contract law does not provide the customer with the protection its needs.

The courts have adopted a very conservative attitude in the application of the law. They generally prefer not to intervene in the content of the banking contract and avoid removing privative clauses of the bank contracts.⁷⁵ The banks took advantage of the court's passive attitude and have continued to use contracts with unfair clauses.⁷⁶

In summary, the use of contract law in Burundi, in banking disputes has not created a proper balance between the banks and their customers, nor provided the client with an adequate level of protection.⁷⁷ The Relevant advice and disclosure requirements are considered insufficient.⁷⁸

2.4. Banking Service to Customer under the contract law of Burundi

The experience accumulated in the implementation of the contractual approach to the bank-customer relationship reveals that true protection for the customer requires a specific and cogent arrangement.⁷⁹ The Contract Law, the law no.10/2009 of

⁷³Diniel E.(1982), *Standard Contracts Law*, Contract Laws, Legislation 574LSI 6.

⁷⁴ Sinai Deutch(1996), *Bank-Customer Relationship: Contractual and Consumer Aspects*, in a book in honour of gad tadesky, p 163, 183 .

⁷⁵ Ibid.

⁷⁶Nevo E,[2010]CA 6916/04 Bank Leumi Le-Israel Ltd. v. Att'y Gen.

⁷⁷ ibid.

⁷⁸Code of Banking Practice(1993), *Bankers Association, Part B 'Principles of Conduct'* 7.0.

⁷⁹ Plato-shinar *the Bank 's fiduciary duty*, supra note 1, p 39.

14/05/2009 is the main law that regulates the contractual relationship between the bank and the customer in Burundi.⁸⁰ It is intended to solve the problem of power disparity between the parties and to ensure that the bank does not abuse it to the detriment of the customer.⁸¹ It is therefore, possible that a bank may be bound by fiduciary liabilities to a customer who is related to the bank's advice in a transaction. Similarly, a fiduciary relationship can arise between a bank and a reliant customer who guarantees the borrowing of another. In this case, a bank which gives a self-interested or incomplete explanation of the transaction is possibly liable according to the trustee-like standard.

2.4.1 Protective clauses for the customer

The contract law includes clauses of protection for the client, such as the prohibition against misleading; the prohibition against injury in specific circumstances; the duty to disclose details of the banking transaction; a duty to provide certain banking services⁸². Once the explanation is invoked by the client to the knowledge of the bank, the ordinary class is probably transformed into a fiduciary transaction. In addition, it may constitute a criminal offense on the part of the bank, its managers, and its senior officials. Another important statutory tool is the supervision of banks to review public inquiries regarding their transactions with the bank, and, in cases where the investigation is deemed to be justified, to order the bank to rectify the defect.⁸³

Although no fiduciary duty to disclose the details of a transaction is imposed when a bank had no reason to believe that a corporate officer was relying on it for advice. However, even the contract Law does not offer the customer full protection. The law addresses specific problems and does not provide any radical protection to the customer.

⁸⁰ Ibid.

⁸¹ Plato-Shinar, Ruth (2013), "The Banking Contract as a Special Contract: The Israeli Approach," *Touro Law Review*: Vol. 29: No. 3, Article 13. p 4

⁸² Ibid.

⁸³ Ibid.

What about the situation where the bank deals with a large commercial customer and the customer suffers a loss based on the transactional explanations or non-disclosures? A trusting relationship may not be so easily inferred in this case either.

It does not address common problems such as the provision of non objective financial advice or the complex matter of conflicts of interest in banking activities.⁸⁴ Moreover, some of the sections included in the law are drafted vaguely, resulting in their scope not being well defined; for example, section 4, which prohibits misleading.⁸⁵ It is disputed whether this section imposes an active duty of disclosure on the bank. Another problem that arises with this law is that the only remedy it provides is compensation. It does not include other basic remedies such as rescission of the contract.⁸⁶

2.4.2. Restrictions of the undue influence

When the transactional advice of a bank produces an agreement or a provision for the benefit of the bank, and certain elements of disadvantage or inequality affects the position of the client, this research has noted that the doctrines of 'undue influence tend to be used in Burundi. The idea in both doctrines seems to be that a negotiation or profit cannot be maintained if the bank has obtained it by acting oppressively or from a position of strength.

The customer of banks deserves special protection. The courts have continued in this direction and have implemented this concept. As will see in chapter 4, classifying the banking contract as a fiduciary contract can solve the aforementioned problems and provide the customer with the protection he or she needs.

2.4.3. Perspective on Consumer Protection in banking sector

In the Burundian financial sector, the trend is the disparity of power between the dealer and the consumer. The starting point is the consumer's inability to deal with the sophisticated markets of the modern world due to changing market structure, technological innovations, and the variety of products and services.

⁸⁴ Ruth Plato-Shinar, *The Bank's Fiduciary Duty Law: Is There a Need to Transform it from an Equitable Principle Into a Statutory Duty?*, 41 *Common World*.

⁸⁵ Law No. °1/017 on the establishment of Banks and Financial Institutions, Burundi 2003, section 4.

⁸⁶ *Ibid.*

The relationship between the bank and the depositor is at least quasi-fiduciary and the depositors reasonably expect that a bank will not claim non-existent legal defenses to avoid repayment when the bank negligently disburses the entrusted funds. Which is highly questionable, the inequality between the parties is due not only to the greater economic power of the bank, but also to factors such as the complexity of the transaction, the expertise of the dealer in the area concerned, and the lack of capability for the consumer to negotiate on the contract due to the low chances of success in such negotiations.⁸⁷

The fiduciary relationship with the Burundian legal system does not take into account the position of the weaker party. The one, who relies, is not the one who exploits the reliance. Customers, rather than bankers, are not their dominant concern.

The weakness of the consumer in Burundi is reflected in various areas: both at the stage of the formation of the legal norm and at the stage of exercising it; on an individual level as well as on a group level; and in terms of bargaining power as well as in terms of information gaps.⁸⁸The erroneous or incomplete explanation of a borrowing transaction that does not provide an obvious benefit to the bank may be beyond the margins of the fiduciary sanction. The possibility has been discussed and conservative views have been expressed.⁸⁹

Nevertheless, the inferiority of the consumer alone is not a sufficient reason for the intervention of the law. The law should only to be used to ensure that the inferiority of the consumer could be abused by the dealer. The contract law seeks to minimize the situations where the power of the dealer is abused by imposing limits on the dealer's conduct. The Burundian law does not contain specific rules on the liability of financial institutions. Therefore, the general rules of contractual (contract claims) and extra-contractual liability (tort claims) apply to financial institutions.

⁸⁷ Sinai deutch,(2001) ,*Consumer Protection Law*, Tel-Aviv: The Israeli Bar Association p 52-53.

⁸⁸ Ibid.

⁸⁹ Ibid.

In accordance with such rules, financial institutions may restrict or exclude their liability (contractual and extra-contractual) for their actions or omission, including for gross negligence if this is expressly specified. However, liability for the financial institution's own fraudulent or willful misconduct may never be limited or excluded.

The traditional justification for the special protection of the consumer's interest is therefore the protection against exploitation of the relative weakness⁹⁰ of the consumer. In Burundi, the freedom of contract is compromised because of the need for intervention to protect the consumer, whose inferior position can be exploited by the dealer.

A bank could have unduly influenced a customer to its advantage. The bank's conduct will be what is valued, although it depends on the relative position of the customer. This happened in *Woods v Martin's Bank Ltd*⁹¹ A bank advised an inexperienced young man to make an imprudent investment in one of the bank's problem customers. An undue influence may be alleged when a bank takes a security or guarantee from a customer to secure advances made to another. The bank may have unconscionably shifted a bad risk from itself to the customer who provided the security or guarantee.⁹²

2.5 Classification of the Banking Contract as a Fiduciary Deal

Customer can rely on a bank when a financial advice has been received in connection with taking a loan. Advice in this regard may relate to the loan transaction itself, or to the use of its proceeds. They underline the trust that the client has in the bank and the reliance on the bank's advice, the "theory of trust and reliance. "They mention the control that the bank has over the financial assets and economic interests of the customer⁹³. Alternatively, customers can count on the bank's loyalty to a particular investment objective of which they have advised the bank. A customer, for example, may be on one or other side in a corporate takeover

⁹⁰Orna Deutch, *consumer legal protection*, *supra* note 51, p 87.

⁹¹[1959] 1 Q.B.55.

⁹² D Waters, (1986) „*Banks, Fiduciary Obligations and Unconscionable Transactions*,65 *Can Bar Rev* 37, p 43.

⁹³ Ariel Porath, (1994),*The Responsibility of the Banks in Respect of Negligence: Recent Developments*, in hamishpat year book, 1992- 1993.

war. Not only then a source of funds for that party, the bank may also be in the position of being the party's confidant.⁹⁴ Customers in this position may claim a "right to rely" on the bank not to frustrate their takeover plans.⁹⁵

Banks are considered as quasi public bodies and, therefore, they impose a particularly high standard of conduct on them. However, it seems that the main reason for the court's particular approach to the banking contract is the great inequality of power between the parties to the contract.⁹⁶

2.5.1 Disparity of power

A huge disparity of power exists between the banks and most of their clients. There are huge differences in the level of professional knowledge, technical methods of managing and monitoring financial activities, financial power, bargaining power, and so on. The customer's inferiority characterizes each step of their relationship with the bank from the negotiation phase to the signing of the banking contract, the period of the execution of the contract, and until the end of the relationship.⁹⁷ A fair intervention could be justified as being necessary to protect 'reasonable expectations' of customers that their bank will act in their interests, not in the interest of someone else.⁹⁸

2.5.2 Inequality between the Bank and customer

The inferiority of the customer is also reflected in case of disputes with the bank. The existence of a great inequality about the customer ability to take legal proceedings and the difficulties of proof that stem from the lack of full information; this is due to the inferiority in the bargaining position in the negotiation phase and the lack of experience in the legal conflicts.⁹⁹

When a banker gives customers advice on their financial affairs, relationship then the banker and customer relations may imply, in addition to any contractual rights,

⁹⁴ Ibid.

⁹⁵ Ibid.

⁹⁶ Kosoi v. Y.L. [1980], Feuchtwanger Bank Ltd. 38(3) (Isr.), and HCJ 531/79 Likud Faction v. PetachTikva City Council 34(2) PD 566, 570.

⁹⁷ Nat'l Westminster Bank Plc. v. Morgan, (1983) 3 All E.R. 85 (Eng.), rev'd(1985) 1 A.C. 686 (Eng.).

⁹⁸ D Waters (1986) ,*Banks, Fiduciary Obligations and Unconscionable Transactions*' 65 *Can Bar Rev* 37, 41.

⁹⁹ Plato-Shinar, *An Angel Named "The Bank," supra* note 3, p 33, 36.

both contract law duties of care and fiduciary duties.¹⁰⁰ This research therefore, seen the great inequality that exists between the bank and the typical customer. However, inequality of power alone is not sufficient reason for the intervention of the law.

2.6 Intervention of the law

The dependency issue may need to be considered in the light of the customer's experience and resources.¹⁰¹ The intervention of the law is justified only when the inequality of power is accompanied by a real concern that the party holding the power can unfairly benefit from the weaker party.¹⁰²

A finance director applying for a loan on behalf of a large corporation can be expected to have better understanding of lending transactions than a trader who acquires a taxi permit. If in both cases the bank makes error that could be characterized as a fiduciary wrong, the fiduciary characterisation of the relationship may not be the same. It may be less reasonable for the director to claim to have trusted the bank and placed it in trust.¹⁰³ In addition, the customer is dependent on the bank in the provision of the service, the manner in which it is performed, the determination of the price, as well as in the determination of the legal arrangement that applies to it, as shown below.¹⁰⁴ Banks cannot withhold money from customers or debit their accounts if there is suspicion of fraud,

There is also a Kenyan case of *KCB V Bryceson Kuboka*¹⁰⁵, where the High Court Judge Patrick Otieno said banks cannot claim what is kept in customers' accounts, unless there is a contract between them that states they can do so.

He made the ruling in a case where a customer had filed a suit against Kenya Commercial Bank (KCB), claiming the lender had frozen his accounts without proof of wrongdoing. The judge said if banks were allowed to ransack their clients'

¹⁰⁰ Halsbury, *Halsbury's Laws of England* Butterworth (1974)4th ed, vol.3(1).

¹⁰¹ Murphy J and KW Curtis ,(1987),*the fiduciary controversy: injection of fiduciary principles into the bank - depositor and bank-borrower relationships*, 20 *Loyola L Rev* 795 838-9 .

¹⁰² Ibid.

¹⁰³ Ibid.

¹⁰⁴ Ibid.

¹⁰⁵ NO.445 OF 2002.

accounts, freeze them and debit the amount claimed to have been lost, without being questioned, it would amount to anarchy.

The power inequality becomes problematic when it creates a dependency of the inferior party on the stronger party. Indeed; the tremendous power given to the bank creates a real dependency of the customer.

The bank has the discretion to accept or refuse to perform the banking transaction requested by the customer.¹⁰⁶ Therefore, in most transactions, the customer is dependent on the bank's willingness to provide the service requested. A customer's dependence on the service provider is not exclusive to the banking sector and therefore it is insufficient in itself to justify the imposition of a fiduciary duty.

2.7 Bankers' Advice to Customers

When a banker gives customers advice on their financial affairs, then the banker and customer relations may involve, in addition to all contractual rights, both common law duties of care and fiduciary duties. Remedies in contract, tort and fairness may all be called in aid where some forms of defective advice are given.

A bank, we are reminded in *National Westminster Bank plc v Morgan*¹⁰⁷, 'is not a charitable institution'. The United States decision in *Klein v First Edina National Bank*¹⁰⁸, was concerned with an alleged fiduciary duty to disclose and expressed the matter as follows.

We believe the correct rule to be that when a bank transacts business with a depositor or other customer, it has no special duty to counsel the customer and inform him of every material fact relating to the transaction - including the bank's motive, if material, for the transaction - unless special circumstances exist, such as where the bank knows or has reason to know that the customer is placing his trust and confidence in the bank and is relying on the bank.¹⁰⁹

¹⁰⁶ Sinai Deutch, (2004), *Protection of the Bank Customer: By Statute or by Ethical Codes—Which is Preferable?* 2 Depaul bus. & COM. L.J. 419, 424 .

¹⁰⁷ [1983] 3 All ER 85, 91, Dunn LJ (CA).

¹⁰⁸ 196 NW 2d 619 (1972), 623, curiam.

¹⁰⁹ Ibid.

Even a person who does not require business finance or complicated transactions needs a mortgage, a bank guarantee, investment counseling for small savings, or the possibility of making payments by means of direct debit orders. Even those customers whose financial activities are limited to receiving a salary as an employee need bank accounts if they cannot receive the payment in cash. This essentiality of the banking services increases the customers' dependence on the bank.

In *Credit Industrial et Commercial v TeoWai Cheong*¹¹⁰, Philip Pillai JC decided that the question whether a private bank owes a duty to advise its client will ultimately depend on the contract and the conduct of the parties. CIC involved structured equity products known as accumulators and the dispute was whether or not the defendant had purchased the accumulators from the plaintiff.

In the case *Crédit Industriel et Commercial v TeoWai Cheong*¹¹¹, the Singapore High Court held that the plaintiff was under no contractual obligation to ensure that the defendant understood the full import and implications of all the terms of the accumulators. The term sheet of the disputed accumulators had set out the relevant disclaimers relating to the defendant's need to make his own risk assessments. It was up to the defendant to request information or clarification about terminating the accumulators if it was required.

The nature and terms of the contractual relationship between the parties will determine the extent of the responsibility assumed and can, in certain cases, exclude any assumption of legal responsibility to the plaintiff for whom the defendant has assumed to act.¹¹²

The court held that the terms of the main contractual documents relied upon by the bank made it clear that the parties were treating each other in a stipulated and accepted basis that, whatever advice or recommendations may have been given by the bank in the course of their trading relationship, no obligations to provide

¹¹⁰ [2010] SGHC 155 ("CIC").

¹¹¹ [2012] SGHC 94.

¹¹² *ibid.*

appropriate investment advice, or duties of care as an investment advisor, were being assumed.

Fiduciary relationships may be invoked to protect the fiduciary aspects of customers' transactions, but the boundaries of the place where the banker ceases to be the customer's 'arm's length' debtor and becomes responsible for the consequences of the customer's reliance may change. At the same time, it may be wrong to restrict the fiduciary responsibility of bankers to reliance where they have the opportunity to give advice. For bankers will then be able to protect themselves from harmful consequences by the use of well-drawn disclaimers. Trusting and reliance should perhaps be considered as integral and non exclusive parts of modern banking.

In the Burundian context, the customer is unable to effectively supervise the bank's activities either because the customer lacks the professional knowhow and technical means required or because the customer usually receives information about what is happening in his account only retrospectively. Thus, even the hiring professional inspection services, which involve the high financial cost, will not solve the problem of supervision.¹¹³ The customer has no choice but to rely on the professionalism and integrity of the bank in the exercise of its functions.¹¹⁴ Fiduciary standards of loyalty should apply in many non-deposit aspects of the relationship and appropriate remedies made available accordingly.

The prices of banking services available to the client are prescribed by the bank. For years the banks have used their influence as a pillar of the Burundian economy to increase their profits, mostly at the expense of the retail sector, which is perceived as the weakest party in terms of bargaining power in transactions with the bank.¹¹⁵ Banks use their market power to charge households and small businesses high fees and interest rates.¹¹⁶

¹¹³ Robert Cooter & Bradley J. Freedman, (1991), *The Fiduciary Relationship: Its Economic Character and Legal Consequences*, 66 N.Y.U. L. REV. p1049 .

¹¹⁴ Ibid.

¹¹⁵ <http://www.knesset.gov.il/committees/heb/docs/bank>.

¹¹⁶ The report of the parliamentary financial committee, *supra* note 85, p 9.

2.8 The legal rule that applies to the relationship.

Investment advice is about the using of money (or its equivalent) for profit. Funds of money advised may be those of the customers, or funds that the bank proposes to lend. The critical circumstance' giving rise to an advisor's fiduciary status has been said to be whether the bank knows, or reasonably ought to know, that its advice is being relied upon by the customer.¹¹⁷As a result, the Commission determined that Burundi households pay a lack-of-competition fee when purchasing bank services."¹¹⁸

Factual 'reliance' of the customer on investment advice may occur where the customer has been a customer for a long time. The customer can be inexperienced in finance or in business.¹¹⁹The trust placed in the bank, the reliability, and the bank's knowledge of this situation may justify the imposition of an express fiduciary behaviour on the bank. A fiduciary responsibility is supposed to encroach only when the bank knows it is invoked. It is also important to know whether the advice of the bank to the customer was based on all the material facts to the knowledge of the bank, although this fact is more relevant to the breach of a fiduciary duty than the qualification of a relationship as fiduciary or not.¹²⁰

In determining the legal rule that applies to the relationship, here too the customer is dependent on the bank. Where 'special disadvantage' in the nature of age, infirmity, poor education or difficulty with the french language affects the customer, the ordinary fiduciary relationship is usually not employed in Burundi. In *national Westminster Bank Plc v Morgan* ¹²¹ use of language to regulate the bank and customer relation was disciplined by House of Lords. A bank manager obtained a customer's agreement to a mortgage after offering her transactional explanation and later the customer alleged that the circumstances of the advice put pressure on her to sign-a fact, she said, should have been evident to the manager at the time .The customer was allowed to avoid the mortgage by reason of the fact that it was

¹¹⁷D. waters, (1986), *Banks, Fiduciary Obligations and Unconscionable Transactions* ,65 *Can Bar Rev* 37, p43.

¹¹⁸ Id.

¹¹⁹ Id.

¹²⁰*Kabwand Pty Ltd v National Australia Bank Ltd* (1989) 11 ATPR 50,367, *Commonwealth Bank of Australia v Smith* (1991) 102 ALR 453.

¹²¹ (1983),3 All ER 85.

obtained in breach of a banker's fiduciary duty of care. As mentioned above, the banking contract is a standard .Negotiations with a certain customer regarding the wording of the documents, the basis of the negotiations is the original draft that was prepared by the bank and clearly protects its interests. The banking contract usually includes a long list of obligations that are imposed on the customer.¹²²

The case is more one for the 'unconscionable dealing' wrong. However, if the facts include a factor that should alert the appropriately perceptive banker' to the fact that his advice was invoked and then the ordinary fiduciary relationship may have application as well.¹²³ If a reference appears to the bank, this usually concerns the rights of the bank vis-à-vis the customer.

Many of these clauses have been recognized as unfavorable.¹²⁴ Before entering those activities, the bank usually explains to the businessman what are his rights and responsibilities in the transaction. Fiduciary relationships are not the normal way that the law regulates this aspect of the banker's business.¹²⁵

In summary, given the great power inequality between the bank and the customer, as well as the customer's dependency on the bank as a provider of vital services, the courts in Burundi may impose a fiduciary duty on the bank vis-à-vis the customer. The fiduciary duty serves as a means to curb the bank's power and to prevent it from being abused to the detriment of the customer.

In a Kenyan case, *Shalimar flowers self help group-vs- KCB*¹²⁶ where a sum of 43,817.00 Euros was paid out of the plaintiff's foreign account and a total sum of Kshs. 2,216,182.00 was paid from the plaintiff's local currency account at the Kenya Commercial Bank. The payments were made by the defendant, Kenya Commercial

¹²²*Sh.A.P. Ltd.*, 57(6) PD at 788.

¹²³ Ibid.

¹²⁴Bank Leumi; *Standard Contracts 8002/02 Standard Contracts Tribunal, Supervisor of Banks* File No. CA 232/10 .

¹²⁵ <http://epublications.bond.edu.au/blr/vol7/iss1/5>.

¹²⁶Civil Cause no. 17 of 2015.

Bank, after cheques which purportedly bore the signatures of the plaintiff's authorized officials.

In part, the payments were purportedly made for purposes of the supply of water pumps and the supply of standby UPS, networking accessories, lap tops and printers to the plaintiff. It was explained that withdrawals from the plaintiff's accounts required the resolution of the members and the approval of the farm manager or fair trade officer. The plaintiff contended that the payments were not authorized and that the Defendant bank was negligent in verifying and confirming the authenticity of the signatures on the cheques. The plaintiff stated that the defendant had breached the duty it owed customers by making the illegal payments.

The defendant said that it verified the signatures on the cheques as per the mandate of the Plaintiff. According to the defendant, out of extra caution, the bank would also call the customer to confirm the cheque payment. When the plaintiff complained, the defendant advised the plaintiff to report the matter to the police. The investigations led to the identification of the former chairman and secretary of the plaintiff as the suspected culprits. Evidence produced at the trial against the Accused persons exonerated the bank from blame and indicated that the security of the cheque books was the customer's responsibility.

The correct rule is that when a bank transacts business with a customer, it has no specific obligation to advise the customer and to inform him of any material fact relating to the transaction -including the reason for the transaction, for example where the bank knows or has reason to know that the customer is placing his trust and confidence in the bank and that it depends on the bank'.¹²⁷

Bankers who advise customers on the acquisition of a business or investment are like stockbrokers who offer investment advice. Both have defined non-fiduciary roles in accepting deposits, and buying or selling shares, respectively. Bankers and investment dealer can each create a fiduciary element in the relationship with a customer by assuming advice to a person who is known to rely.

¹²⁷ Ibid.

In *Daly v Sydney Stock Exchange*¹²⁸, a stockbroker acting as an 'investment adviser' was found to be a fiduciary to the extent of his advice.

Whenever the bank, which presents itself as an expert in investment advice, is approached for advice on investments and undertakes to give it, by giving this advice the adviser has a fiduciary relationship with the person he or she is dealing with.¹²⁹ A bank is expected to act in its own interests to ensure the security of its position as lender to its customer but it may have created in the customer the expectation that it will nevertheless advise in the interest of the customer as to the wisdom of a proposed investment.¹³⁰

Transactional advice of a bank is the kind that refers to the explanations given to customers of transactions between the customers and himself. The details of the transactions entered and the relative obligations of the parties are set out. Advising on transactions is an integral to the business of banking. Retail banks enter into daily commercial relations with their customers.

2.9 Customers' Reliance

If a bank through its competent officer takes the initiative to explain the mechanics of a transaction to a customer, the bank has the duty of diligence not to distort the position. Alternatively, persons advised may be able to avoid the transaction in equity by alleging a misrepresentation. If the 'fiduciary' idea is used in this context, it is generally not consistent with the ordinary type of fiduciary relationship. The person advised may claim that the bank acted "recklessly", or that the bank or its agent has exercised 'undue influence' over the transaction.

In an Australian case, *James v Australia and New Zealand Banking Group Ltd*¹³¹ which involved a reliance-based fiduciary claim arising from 'transactional advice' given in a wider 'investment advice' context. The decision underlined the importance of demonstrating a customer's factual or justified reliance of either kind before a 'transactional advisor' will be found to be a fiduciary. Customers in that case claimed

¹²⁸ (1986) 160 CLR 371.

¹³⁰ *Ibid.*

¹³¹ (1986) 64 ALR at 353.

that they received defective transactional advice from a bank when they were about to make a substantial rural investment. Loan funds were desperately needed by the customers to meet commitments that they had already undertaken. The manager of the bank indicated that he could not lend the customers what they wanted and recommended that they apply to a particular Perth mortgage-broker instead. The customers went to the broker, who turned out to be an unlicensed incompetent and they suffered loss as a consequence. The bank manager was, in argument, alleged to be the customers' fiduciary who caused their losses by his breach of duty. The customers claimed to this end that: they had come to rely upon the bank for advice in financial matters relating to the conduct of their farming operations.

The manager's misrepresentations regarding the availability of bridge financing and loan services were also considered as a cause of loss.¹³²

2.10 Conclusion

According to the information obtained from this chapter, there seems to be a lot of misconducts in the fiduciary duties in Burundi although the level of contract enforcement in relation to financial transactions has significantly increased; on the relevance of the fiduciary obligations on the protection of the bank customer in Burundi, several statements seem to point out that the banking law does not protect the interest of the financial consumer. This could still hit investment and socio-economic transformation in the country as clients may end up fearing the entire financial system.

¹³²Ibid.

CHAPTER THREE

THE EFFECTS OF THE MISUSE OF LEGAL PRINCIPLES ON FIDUCIARY OBLIGATIONS IN BURUNDI

3.1 Introduction

This chapter gives brief information and analyses the problems faced by banks and customers of the misuse of legal precedent in formulating substantive content for fiduciary obligation in Burundi. It also establishes some of the key socio-economic as well as financial grounds being affected.

3.2 Bank-Customer Protection

Consumer protection, in the broader sense, refers to the laws and regulations that ensure fair interaction between service providers and consumers. Government intervention and regulation in the area of consumer protection are justified on the basis of inherent information asymmetries and power imbalances in markets, with producers or service providers having more information about the product or service than the consumers. A consumer protection framework generally includes the introduction of greater transparency and awareness about the goods and services, promotion of competition in the marketplace, prevention of fraud, education of customers, and elimination of unfair practices.

Consumer protection frameworks in the financial service industry are evolving as products become more complex and a greater number of people rely on financial services. An effective consumer protection framework includes three complementary aspects. First, it includes laws and regulations governing relations between service providers and users and ensuring fairness, transparency and recourse rights. Second, it requires an effective enforcement mechanism including dispute resolution. Third, it includes promotion of financial literacy and capability by helping users of financial services to acquire the necessary knowledge and skills to manage their finances.

The current ethical problems faced in the provision of financial advice to Burundian financial consumers and the factors that influence ethical honest conduct are

insufficient to fulfill the obligations: it is said that even an honest person can abrogate his fiduciary duties without being dishonest decision making within financial services organisations.¹³³

Financial services do not always help everyone who uses them, and financial providers do not always treat customers fairly. In particular, rapid growth in credit markets that are approaching saturation can lead to over-credit and other behavior not in customers' best interests. Financial consumer protection deserves special attention when applied to low-income clients who have little education, little experience with formal financial services, and few formal providers to choose from¹³⁴. The financial skills of customers themselves are an important complement to consumer protection regulation. The term "financial capacity" refers to the knowledge, understanding, skills, attitudes, and especially behaviors that people need to make sound personal financial decisions that are appropriate to their social and financial circumstances¹³⁵. The Burundian legal regime has not yet done significant work on the principles of customer protection in the banking sector.

3.3 Adequacy and transparency of information

Burundi banking services providers do not give clients clear and comprehensive information about services offered, including their terms and costs. In Burundi, this confidentiality is protected by general regulation on the use and processing of personal data.¹³⁶ Breaches of privacy can result from customer behavior, such as failing to protect a password, so consumer awareness is an important complement to regulation. Regulation can in turn reinforce consumer awareness, for example, by requiring providers to cover these essential elements in their disclosure (although many will do so without regulatory compulsion, simply as a matter of good business judgment, especially to combat fraud by employees or agents)¹³⁷.

¹³³ John Glover, (1995) *Commercial Equity: Fiduciary Relationships*, *Bond Law Review*: Vol. 7: Iss. 1, Article 5,p8.

¹³⁴ Ibid.

¹³⁵ Ibid.

¹³⁶FATF (Financial Action Task Force).2012a. "International Standards on Combatting Money Laundering and the Financing of Terrorism and Proliferation, February 2012." Paris: FATF/OECD.

¹³⁷ Ibid.

The application of such a wide range of privacy-related regulation may be difficult, given the potential diversity of regulators involved, particularly for cross-border services and data. In the absence of a specific consumer protection Act, civil penalties are not effective for the protections of privacy, but sanctions for others should be a matter of criminal law¹³⁸.

3.4 Data privacy and security

For less experienced financial consumers in particular, disclosure rules are not written with simple language and simple presentation and comparability of different products and different service providers. Where literacy are low, disclosure rules are not addressed to ensure effective communication to those who cannot read. It is unclear, whether complete and accurate information including, in particular, disclosure on loans will affect consumers' behavior as much as expected¹³⁹, there may be trade-offs between data privacy rules and the goal of better financial access for the poor. For example, in a country like Burundi without credit information systems that reach micro borrowers, informal information sharing among micro lenders may be the only way to protect against dangerous levels of cross-borrowing, even though such data sharing would violate consumer data privacy protections in many countries¹⁴⁰. Where regulatory barriers prevent information sharing among lenders serving poor clients, an argument can be made to mitigate these barriers to allow the establishment of credit information systems that mitigate over-indebtedness risk¹⁴¹.

In addition, disclosure approach designed for most affluent consumers in Burundi may not always work well; at least without modification¹⁴². And more is not always better. At some point the volume of disclosure produces diminishing returns, so the focus is not on simplicity, quality, and clarity, but quantity.

¹³⁸ Ibid.

¹³⁹European Union Payment Service Directive.2007. 2007/64/EC of 13 November.

¹⁴⁰ Ibid.

¹⁴¹Ibid.

¹⁴² Ibid.

3.5 Interest rate restraints

Interest rate restrictions can restrict access by making it impossible to serve small or remote borrowers. It may be politically difficult to set a top limit that is high enough to cover the unavoidable costs of micro lending and a sufficiently high profit margin to attract capital to low-income financial services¹⁴³. In theory, the interest rate could be set at a level that allows for sustainable microfinance operations while eliminating excessive profits. But achieving this balance can be politically difficult for the government agency to identify (and implicitly sanction) a particular rate¹⁴⁴. Most people do not understand why small loans require high interest rates, which tends to shock the public conscience when banks are allowed to charge very high rates to poor borrowers without enough information.

Even in the absence of interest rate controls, rates have been reducing in most microcredit markets. At the same time, there have been cases when banks have immediately reduced their rates in response to public criticism. The interest rates of some Banks are high in their market and produce profits that most people consider excessive, but worldwide the percentage of poor borrowers who pay such rates seems to be quite small.¹⁴⁵

A reasonable alternative to disclosure combined with measures to help consumers understand the product and prices. Together with additional efforts to publish comparative prices among lenders, some markets have successful in bring down interest rates, which has led to more effective competition between Banks and other financial service providers.¹⁴⁶

¹⁴³ Ibid.

¹⁴⁴ Ibid.

¹⁴⁵ Ibid.

¹⁴⁶European Union Payment Service Directive.2007. 2007/64/EC of 13 November.

3.6 Abusive loaning

Regulatory tools to promote equitable lending include standard loan forms and disclosure rules, recourse mechanisms for consumers, basic registration of all credit providers, required assessment of repayment capacity, and constraints on debt-to-income ratios prohibition of misleading advertising are not there .¹⁴⁷

Some banks have defined a policy on delinquency, based on a concern that uncollateralized micro lending is sustainable only if repayment rates are kept very high. But the implementation of such a policy can lead to overly aggressive collection practices that damage borrowers and their households. Possible regulatory tools include rules against intimidation and coercion, and due process for seizing and auctioning promised goods.¹⁴⁸ Public and private dispute resolution channels are not used to help resolve abusive practices. Crafting clear and enforceable definitions of prohibited behavior is difficult. Especially in the area of collection practices, what is “abusive” will often depend on local cultural norms.¹⁴⁹

3.7 Fraud and related financial crimes

Like other financial institutions, banks may be victim of fraud and related financial crimes. For examples, loan officers can invent fictitious borrowers or embezzle customers’ payments; managers may misappropriate grant funds.¹⁵⁰ A high yield investment is promised; the first investors are indeed paid the promised high returns, but out of the investments of following victims.¹⁵¹

Identity fraud in financial services involves assuming the identity of another person, or a fictitious identity, to obtain financial services or appropriate funds providers can be both victims and facilitators of identity fraud.¹⁵² For example, fraudsters may assume fictitious identities and falsify information about their cash flow to obtain loans that they do not intend to repay, or may assume the identity of a borrower

¹⁴⁷FATF (Financial Action Task Force).2012a. “International Standards on Combatting Money Laundering and the Financing of Terrorism and Proliferation, February 2012.”OECD.

¹⁴⁸ibid.

¹⁴⁹Ibid.

¹⁵⁰ EBRD (European Bank for Reconstruction and Development). 2007. “Mortgages in Transition Economies: The Legal Framework for Mortgages and Mortgage Securities.” London: EBRD.

¹⁵¹ Ibid.

¹⁵² Ibid.

with a solid credit rating for the same purpose. Identity theft is relatively easy when illiterate victims may have to sign documents they can not understand. It can also be the result of a data security breach, or because the victim is has to give up a password or a personal identification number.¹⁵³ Such activity is a crime in most countries. The focus should be on improving the application of existing criminal sanctions and other data protection and privacy measures.

3.8 Conflicts of Interest

In the investment banking sector, there is significant potential for conflicts of interest. Indeed, conflicts are considered as an inevitable characteristic of investment banking activity.¹⁵⁴ This is due to the lack of consumer protection, the multiple services offered by companies, the different capacities in which they operate, and their broad client base.

Positions of conflict with the interests of financial advisory clients can arise in a several ways.¹⁵⁵ First, personal interest of an investment bank may conflict with that of its financial advisory client. Examples of this would include competing with a client for an investment opportunity and providing financial advisory services to the target company of an unsolicited takeover offer at the same time as the firm's asset management arm independently sells some of its holding of shares in that company.¹⁵⁶

Second, a firm may be in a situation where the interests of one client conflict with those of another. For examples, a company provides financial advisory services to separate customer who are considering the same investment opportunity; and when an investment bank advice the target of an unsolicited takeover offer while also being part of a syndicate that raises funds for the bidder.¹⁵⁷

¹⁵³G-20. 2008. "Declaration: Summit on Financial Markets and the World Economy." Washington, D.C.: G-20.http://www.g20.org/Documents/g20_summit_declaration.pdf.

¹⁵⁴ Royston Goode, (1986),*Conflicts of Interest in the Changing Financial World* xv, Law Commission, United Kingdom, *Fiduciary Duties Consultation Paper*, n 47, 1, 12–18, 61–3.

¹⁵⁵ Deborah A DeMott,(1991),*Fiduciary Obligation, Agency and Partnership: Duties in Ongoing Business Relationships* 671.

¹⁵⁶ Ibid.

¹⁵⁷ Ibid.

Third, conflicts may arise between the functions or services provided by an investment bank such that there is a systemic incompatibility with the interests served. Respect to the unavoidable existence of conflicts of interest in financial services conglomerates;¹⁵⁸The response of an investment bank to conflicts of interest such as these will depend on the fiduciary principles obligation to avoid positions of conflict and possibly by regulatory provisions, which are be discussed later.¹⁵⁹

In the context of financial advisory services in Burundi, ¹⁶⁰ the downside risk for individuals is limited and, in large banks, inadequate systems and controls can mean that the management of the bank is not aware of the problem of financial control. Misconduct is rooted in conditions commonly encountered in financial services. The question is important for a number of reasons. First, in the absence of a fiduciary relationship and outside any express contractual commitment, investment banks will, generally not be required to avoid conflicts of interest in the provision of such financial advisory services.¹⁶¹

Due to the lack of the implementation of the Banks customer relationship as a fiduciary one in Burundi, banks may consider that they can afford with misconduct, believing that public authorities are unlikely to apply very sanctions. In addition, individuals and banks may misjudge the likelihood that misconduct will be noticed, and, if it is noticed. ¹⁶²

3.9 Conclusion

According to the analysis of this chapter, first, bank misconduct imposes costs on society. In particular, it may undermine confidence in the financial system, and confidence is a vital element for the proper functioning of the system. This could discourage users of financial services from using the system. Thus, it should be

¹⁵⁸ Id.

¹⁵⁹ <http://www.oag.state.ny.us/press/2002/apr/apr08b_02.html>.

¹⁶⁰ Charles Geisst(1995), *Investment Banking in the Financial System* 191; The Goldman Sachs Group Inc, *Annual Report on Form 10-K* (2003) 4;

¹⁶¹ *Mannesman AG v Goldman Sachs International* (High Court of Justice of England and Wales, Chancery Division, Lightman J, 18 November(1999) [3], [8].

¹⁶² Ibid.

prevented by all means and firmly condemned. Second, while financial and other sanctions applied in cases of misconduct are properly used as a corrective mechanism, in some cases, they may themselves create systemic risks that could impose costs on users of the financial system. Misconduct and related penalties are usually tail events. They can create uncertainty about the business model, the solvency and profitability of banks. Therefore, much of the Burundi financial sector can be affected, making it more vulnerable to other shocks. The consequences of the misconduct could be a withdrawal from the financial markets and the activities of a bank, either forced or on a voluntary basis, such that the functioning of a particular market is altered, leading to a direct loss of financial services for the end user. The next chapter will distinguish the relevant elements which may ultimately comprise the doctrinal basis of a substantive fiduciary obligation in the banker-customer relationship in Burundi.

CHAPTER FOUR

THE APPLICATION OF FIDUCIARY OBLIGATION IN THE BANKER-CUSTOMER RELATIONSHIP IN BURUNDI

4.1 Introduction

This Chapter distinguishes the relevant elements which may ultimately comprise the basis of a substantive fiduciary obligation in the banker-customer relationship in Burundi. The research findings are obtained through examined in line with the existing regional and international laws and policies as well as some relevant legal cases.

4.2 Lack of fiduciary duties and legal adverse impact

The world financial crisis of 2008 will be a permanent reference point on the need for strong structures to protect consumers' assets in the global financial services industry. The crisis had significance in the unethical use of customer deposits by some banks to buy shares that were lost due to the near collapse of the capital market, and the decline in consumer confidence which threatened the stability of the financial system. The fiduciary duty is essentially tool used by the courts to protect those relationships when one has the discretion to control or manage the asset of another to his detriment the 'basic model'.¹⁶³ The Burundi Central Bank sought to further reassure customers of the overall security of the financial system.

The Burundi Central Bank has to work for the elimination of unfair and unethical practices by financial services providers in order to restore consumer confidence.¹⁶⁴ Banks may charge their customers for certain types of banking services such as arranging overdrafts, stopping a cheque, issuing bank drafts, crediting foreign cheques, and sending money abroad.¹⁶⁵

The ultimate aim of this framework is to build consumer/investor confidence in the financial services industry and ultimately promote long-term financial stability,

¹⁶³Devdeep Ghosh, (2012) ,Fixing the fiduciary obligation: the prescription-proscription dichotomy, *Canberra Law Review* vol.11 (1),p 24.

¹⁶⁴ Ibid.

¹⁶⁵Mr Jackie WU, Ms Vicky LEE, (2001), *Protection for Banking Consumers in the United Kingdom and the United States of America: Fees and Charges* ,December.

growth and innovation. The framework which is a product of extensive engagement and consultations with critical stakeholders, sets out the minimum standards that must be followed by all stakeholders and must be developed in conformity with international best practices and standards. A strong, effective and comprehensive regulatory/supervisory consumer protection framework is needed.

4.3 Legal Structures

Laws and regulations may be needed for the effective regulation of financial operators. Even the best disclosures, alone, may not be adequate, so to avoid situations in which retail investors become involved with unsuitable products,¹⁶⁶ institutions should be “encouraged” to develop sufficient measures for client protection as part of their product development activities.¹⁶⁷ Supervisory and compliance framework, effective institutional arrangements must be established for the application of consumer protection. Consumer protection institution should have the necessary authorities to fulfill their mandate, clearly the responsibilities supported by appropriate governance structures, operational independence and high professional standards. There should be effective legal, regulatory and supervisory structures to protect consumers from banking and other financial services regulated by the Bank.¹⁶⁸

This framework is based on several principles in recognition of the particularities of the Burundian financial services industry as well as the aspirations of the BRB. The principles among others are: data and privacy, complaints handling and redress business conduct, disclosure and transparency, competition, enforcement responsible, consumer Financial education, fair treatment, protection of consumer assets, these structures evolve based on emerging market trends.¹⁶⁹

Banks are required to assess the financial capabilities of consumers of financial products/services to confirm that products/services offered will address the needs of consumers. In principle, financial operators are required to observe the highest

¹⁶⁶ Ibid.

¹⁶⁷ Stephen Lumpkin (2010) ,*Consumer protection and innovation*, OECD journal: Financial Market Trend ,p.23.

¹⁶⁸Idem.

¹⁶⁹Idem.

ethical standards and professionalism in their business transactions with consumers of financial products and services. ¹⁷⁰

Citing the case of *Lipkin Gorman V Karpnale Ltd* ¹⁷¹ the learned judge paraphrased the words of Parker LJ as follows:

Parker LJ observed that the cases dealing with the question of breach of duty of care by a paying banker to his customer when carrying out (the) customer's mandate must be approached with caution as they are no more decisions of fact i.e. of the application of the law to an endless variety of circumstances.

Githinji JA continued to state:

*"In addition, cases relating to a collecting banker being sued in conversion and those relating to a paying banker sued for breach of contact raise different considerations. In the former case, it is for the banker to establish that he collected without negligence, and in the latter the burdens is on the customer to prove negligence. The statutory protection is also different in the two types of cases ..."*¹⁷²

As noted by the learned judge of appeal, statutory provisions protecting bankers were intended to mitigate against the strict duty imposed under common law "to one's neighbor who is the owner, or entitled to possession of any goods is to refrain from doing any voluntary act in relation to his goods which is an usurpation of his proprietary or possessory rights in them"..

This protection was intended to create an environment in which the banking sector would develop to protect the rights of consumers and be a fundamental principle for banking operators in the financial services sector. In addition, it is expected that bank should provide consumers numerous opportunities to ask questions that

¹⁷⁰ Ibid.

¹⁷¹ (1992) 4 ALL ER 409

¹⁷² Ibid.

require special attention. As such, banks are expected to consider both financial and ethical considerations in making business decisions.¹⁷³

4.4 Application of the Fiduciary Concept to Banks

It should be noted that the mere depositing of funds by a customer with a bank does not create a fiduciary relationship. There will then a discussion of the exceptional circumstances in which the banker is in a fiduciary relationship with its customer.

There are four situations in which a banker may become a fiduciary in relation to its customer¹⁷⁴: where it receives or transfers funds of its customer; where it gives advice to its customer; where it is in a position of conflict of duty and interest ;where the banker is in a special relationship with its customer or has confidential information about its customer or has confidential information about his customer , and is in a position of conflict of duty and interest where a bank makes a mistaken payment to another. It will be seen that these categories are separate and distinct.

However, there are some special situations in which the banker and customer relationship may become a fiduciary one. These situations will now be discussed in accordance with the Burundian central bank.

4.5 Delivery of Financial Information

The identification of relationships as fiduciary is important because the obligations imposed as a result of fiduciary characterization require a person or persons a standard of loyalty, as expressed in conduct that is both uncompromising and rigorous.¹⁷⁵ Honest conduct alone is not enough fulfill the obligations: it is said that even an honest person may abrogate his fiduciary duties without being dishonest. What is needed is total loyalty to the service of the interests of another.¹⁷⁶ The Burundian Central Bank (BRB) should use appropriate mechanisms to monitor banks and ensure that they properly engage customers prior to the sale of financial

¹⁷³ Ibid.

¹⁷⁴ Nigel A. Clayton (1992), *Banks as fiduciaries: the UK position, department of law ,city university, London: vol 8, p2*

¹⁷⁵ P D Finn (1989) , 'The Fiduciary Principle' *Equity, Fiduciaries and Trusts* , UNSW law journal, vol.12, p26.

¹⁷⁶ John Glover (1995), *Commercial Equity: Fiduciary Relationships Bond Law Review: Vol. 7: Iss. 1, Article 5, p47–p48*.

products or services. Specific legal provisions should create an effective regime for the protection of a consumer of any banking product or service.¹⁷⁷ Banks must act in the best interests of consumers in the terms of advice and execution of transactions. For consumers to make informed decisions in choosing financial products and services, they must be familiar with the features.¹⁷⁸

The case *Williams v. Walker-Thomas Furniture*¹⁷⁹ involved Walker-Thomas (Washington, D.C. at 7th St. & L St. NW) extending credit from 1957 to 1962 to Williams for a series of furniture purchases. The contract was written in such a way that no furniture could be paid off until all of it was. When Williams defaulted on the contract in 1962, Walker-Thomas tried to repossess all the furniture sold since 1957. The district of Columbia court of appeals ruled that the lower court could rule the contract unconscionable and refuse to enforce it, and returned the case to the lower court to decide whether or not the contract was in fact unconscionable, J. Skelly Wright held that the case needed to be sent back to trial to determine further facts, but in doing so held that a contract may be set aside if it was procured through unconscionable means.

Thus, before consumers sign up for any financial products, banks have also to assess the consumers' ability to fulfill the terms and conditions associated with the financial products and services; assess whether the products or services of interest suit the consumers' needs. Where a product requested does not meet the needs of the customer, the bank is obliged to advise or caution the customer in writing before granting such and give clear information on the features of the services and products; First, the good practices apply only to a country's regulated financial system and not to informal financial services.¹⁸⁰ Banks are obliged to provide appropriate financial advice to consumers before the sale of any financial product or service.¹⁸¹

¹⁷⁷ International Bank for Reconstruction and Development / The World Bank, 2012.

¹⁷⁸ Ibid.

¹⁷⁹ Co 350 F.2d 445 (D.C. Cir. 1965).

¹⁸⁰ Ibid.

¹⁸¹ Ibid.

For contracts or categories of financial products or services that the BRB deems to be potentially risky to the consumer, banks have to be required to document records of pre-contractual deliberations with consumers. The records should reflect the Banks efforts before reaching an agreement with the consumer on the product or service. In addition, records of meetings must be recognized by the consumer.¹⁸²

4.6 Fiduciary duty of Disclosure and Transparency

Banks have to provide accurate information about financial products and services to consumers at all times to enable them make informed decisions. Such information must be timely, detailed, clear and unambiguous. A clear obligation to take account of the interests of consumers who might be vulnerable because of for example their over indebtedness.¹⁸³ The primary coverage to be treaded under this principle should be advertising. Advertisements and marketing materials should seek to provide as much information possible on the products and services being advertised. Secondly, the terms of contract, bankers shall also inform consumers of the possibility of variations in terms and conditions of contracts due to changes in economic conditions before these contracts are executed. ¹⁸⁴ The contractual terms and conditions must contain adequate information that will improve the decision-making process of consumers prior to the execution of the contract. Notice of changes: banks have to give prior notice to consumers within the time specified in contracts, before implementing variations in terms and conditions of contracts.

The judgment in *Simba commodities Ltd vs citibank N.A*¹⁸⁵ wherein the case of *Karak brothers company Ltd vs Burden*¹⁸⁶ was quoted. The cited passage demonstrates the scope of the duty of a paying banker to its customer and is worth reproducing in extenso:

¹⁸² Ibid.

¹⁸³ F Philpott (2009), *The Law of Consumer Credit and Hire*, Oxford University Press, 1 edition (June 15, 2008) p63.

¹⁸⁴ Ibid.

¹⁸⁵ N.A. Civil Case No. 236.(2003)

¹⁸⁶ (1972) ALLER

... as to the nature and extent of the contractual duty of care owed by a paying bank to its customer when called on to honour a cheque drawn by the customer; and in particular, in the case of a corporate customer which has given the usual mandate to its bank, to what extent the bank is entitled to place exclusive reliance on the fact that the cheque is signed by the corporation's duly authorized signatories the conclusion reached by Ungood-Thomas J was as follows:

... A bank has a duty under its contract with its customer to exercise "reasonable care and skill" in carrying out its part with regard to operations within its contract with its customer. The standard of that reasonable care and skill is an objective standard applicable to bankers. Whether or not it has been attained in any particular case has to be decided in the light of all the relevant facts, which can vary almost infinitely. The relevant considerations include the prima facie assumption that men are honest, the practice of bankers, the very limited time in which banks have to decide what course to take with regard to a cheque presented for payment without risking liability for delay, and the extent to which an operation is unusual or out of the ordinary course of business.

So the duty of skill and care applied to interpreting, ascertaining, and acting in accordance with the instructions of a customer; and that must mean his really intended instructions as contrasted with the instructions to act on signatures misused to defeat the customer's real intentions. Of course, omniapraesumuntur rite esse acta, and a bank should normally act in accordance with the mandate – but not if reasonable skill and care indicate a different course.”¹⁸⁷

4.6.1 Self-Regulation

Banks have to be encouraged to develop structures for self-regulation individually or collectively, in accordance with the principles of the consumer protection. Banks are also expected to develop codes of conduct/practices that set minimum standards of

¹⁸⁷Ibid.

service for consumer protection matters. ¹⁸⁸Compliance officers have to ensure that their operations comply with the codes of conduct that include the following: a) transparency and disclosure requirements; b) fair contract terms; c) sales promotion; d) capability and suitability assessment; and e) complaints handling. To prevent practices that may hamper the effectiveness of its operations such as conflicts of interest and weak sanctions the Central bank of Burundi shall provide certain degree of supervision over the self-regulatory environment including by ensuring objectivity in the remediation process; and interpreting relevant laws that relate to financial protection.

The use of automated systems and mass distribution systems can provide greater visibility and analysis of product and customer data, ensuring that the target market(s) of the product are adhered according with product specifications¹⁸⁹ The bank have to adopt proactive supervisory approach in assessing the consumer protection practices of financial operators. To examine bankers, the bank has also adopt a risk-based approach which shall identify activities and practices that pose greater risk to consumers. This approach will discourage operators from engaging in practices that may put consumer assets at risk.

Bankers are required to institute internal processes and procedures to ensure compliance with the consumer protection framework. To this end, periodic compliance plans must be submitted by banks for approval based on the guidelines issued by the Bank. Banks must also identify risks peculiar to their operations which could hinder the effective implementation of this framework as well as measures to mitigate them.¹⁹⁰ Bank has to continuously monitor operators to ensure compliance with approved plans. The 'so-called fiduciary character existing between the banker and his customer' was considered to be analogous to that whereby 'agents', 'factors' and 'stewards' were entrusted with the property of their principals and employers.¹⁹¹

¹⁸⁸ Ibid.

¹⁸⁹https://www2.deloitte.com/content/dam/Deloitte/lu/Documents/financial_services/performancemagazine/articles/lu-how-agile-regulatory-technology-is-helping-firms-better-understand-and-manage-their-risks

¹⁹⁰ Ibid.

¹⁹¹ Glover, John (1995) "*Banks and Fiduciary Relationships*," Bond Law Review: Vol. 7: Iss. 1, Article 5.

The Bank should work with key stakeholders such as the Burundian investment authority, the ministry of finance, the Central Bank, to facilitate the protection of consumer rights. The bank may sign memorandum of understanding (MOU) with these stakeholders to effectively coordinate the various to consumer protection activities. If necessary, the views of stakeholders shall be sought in the policy/regulatory development processes.¹⁹²

Financial consumer protection frameworks set regulatory and supervisory objectives while recognising that it is not always possible to list all of the circumstances¹⁹³ under which regulators and/or supervisor may be called upon to act in pursuit of these objectives goal.¹⁹⁴

To promote transparency, bankers have to periodically submit reports and publish (if necessary) information on their operations covering performance statistics, current and planned initiatives between others. On the subject of risk-based supervision of consumer, this approach consists of identifying and focusing on products and services that pose significant risk to consumers.¹⁹⁵

¹⁹² Ibid.

¹⁹³: <http://epublications.bond.edu.au/blr/vol7/iss1/5>.

¹⁹⁴Organisation for Economic Co-operation and Development, 2 rue André-Pascal, 75775 Paris cedex 16, France www.oecd.org.

¹⁹⁵ Ibid.

4.7 Agreement Terms

The BRB should issue guidelines for setting minimum disclosure requirements for products and services in contract between bankers and customers of financial products and services. Contractual language must also to be precise, clear and unambiguous.¹⁹⁶

The information must be communicated in clear and simple language in order to limit the risk of misinterpretation. Any fees, charges or payments that a consumer must make for a product or service must be documented. Banks have also to proactively inform consumers of the possibility of variations in terms and conditions of the contracts, if the condition to which the terms of the contract have been reached changes. In addition, banks are responsible for making reasonable efforts to ensure that consumers of financial products know what products/service they want to purchase. Financial operators need to post specific information (such as interest rates, foreign exchange rates) in a visible place at customer engagement areas such as branches, cash centers, website and other electronic channels, on a daily basis.

4.7.1 Fair Dealing

Equitable treatment suggests that all consumers should have equal access to basic banking services by paying even greater attention to the needs of vulnerable groups.

The concept of fairness in the provision of financial services suggests that consumers should be treated fairly without bias at all stages of their relationship with financial operators. Vulnerable groups include the elderly, the less educated, physically handicapped, foreigners, the critically ill, refugees, immigrants, the mentally handicapped individuals, low income earners or any other category of people who may have a higher risk to be excluded financially than the general population because of the possession of certain characteristics.¹⁹⁷ The main issues to be addressed in the context of fair treatment include, Access to finance: consumers must have access to financial products and services; about equity, bankers should not to discriminate against consumers for any reason; in the case of Unfair

¹⁹⁶ Ibid.

¹⁹⁷ clause 6 (1) Bank of Uganda Financial Consumer Protection guidelines ,2011.

Contract Terms, contract terms must not affect the rights of consumers who confer an undue advantage on the bankers.¹⁹⁸

4.7.2 Unfair Contractual Terms

A financial services provider shall ensure that contracts and other documentation relating to the financial products and services they provide are summarized in key facts document written in plain language, setting out clearly and briefly all the key information relating to the product or service that a consumer is considering buying.¹⁹⁹ It is the responsibility of consumers or other stakeholders to report contractual clauses that are in conflict with regulations. In deciding whether an advertisement or other marketing material is fair, clear and not misleading, the standard should be whether it is likely to be significantly imprecise, misleading or otherwise unfair to consumers who are likely to have seen the material.

The Burundian central bank has to nullify these contractual conditions, apply appropriate sanctions and obtain the commitment of the bankers to waive the use of such conditions.²⁰⁰ Terms and conditions must clearly define the respective rights, responsibilities and obligations of all parties to the transactions in plain language. The use of technical languages should be limited or avoided in contract documents, where they are used; operators must ensure that these terms are clearly explained to consumers. The second element of vulnerability is that some consumers experience a greater loss than other consumers by making inappropriate purchasing decisions²⁰¹ .

Contract terms may be considered unfair where there is a significant imbalance between the rights and obligations of one party to the detriment of the other. The following amongst others are considered unfair terms;²⁰² a) to exclude and eliminate the right of the consumer to take legal action should infraction occur b) limit the liability of the financial operator in the event of total or partial non-performance of

¹⁹⁸Ibid.

¹⁹⁹clause 8(2) Bank of Uganda Financial Consumer Protection guidelines ,2011.

²⁰⁰Ibid.

²⁰¹ R Burden (1998), *Vulnerable Consumer Groups: Quantification and Analysis* (OFT Research Paper 15, April).

²⁰² Director general of fair trading v first national bank [2002]1AC 482,[2001]UKHL52.

contractual obligations; c) termination or modification of clauses without the consent of the consumer or reasonable notice to the consumer; d) to limit the obligation of operator vis-a-vis commitments made by their agents; e) excluding the liability of the operator in the event of its negligence to the detriment of the consumer; f) giving the operator the possibility of transferring his rights and obligations under the contract, where this may reduce the rights of the consumers, without their agreement; g) clauses binding a consumer while the corresponding obligation of the operator is conditional .

4.8 Complaints treatment

The existence of effective, affordable, fair, timely, transparent, accessible and independent complaints mechanisms would enhance overall consumer confidence in the financial system.

Disputes are inevitable in all interactions and relationships including the relationship between banker-customer and appropriate measures should be taken to address them when they arise. The main areas to be addressed in the complaints and redress process are, remedies: several remedies must be easily accessible to consumer.²⁰³ Consumers should be made aware of the different recourse mechanisms. Complaints management processes or procedures: The processes and procedures for complaints management must be simple and able to support the effective resolution of consumer complaints. *According to the clause 9 (2) of Bank of Uganda Financial Consumer Protection guidelines , A financial services provider shall have in place and operate appropriate and effective procedures, which it has documented, for receiving, considering and responding to complaints. A financial services provider shall ensure that information about its procedures for handling complaints is easily available at its branches, websites and any other communication channels which it uses.*²⁰⁴

The Complaints redress: there should be provisions for fair redress and consumer compensation of wrongful treatment. Collaborations with other organizations:

²⁰³ Ibid.

²⁰⁴ clause 9(2),(3),Bank of Uganda Financial Consumer Protection Guidelines,2011.

effective collaborations with other industry dispute resolution bodies should be established to ensure full coverage of consumer complaints handling.²⁰⁵

4.9 Protection of Customer Resources and Privacy

The Bank must establish guidelines to ensure the protection of consumer goods and the protection of privacy against unauthorized usage. The financial and personal information of the consumers must be protected by operators at all times and have not to be disclosed to a third party without the consent of consumers, except in cases provided by law. The following information at a minimum is considered confidential and must be protected at all times; Contact information, account number and balance, statement of accounts and any other confidential information known to the financial operator under the existing banking relationship.

It has been suggested that "the main problem with disclosure regulation is not to ensure business compliance, but rather that consumers are unaware of the information disclosed, do not appreciate its importance, or simply do not use the information provided in the market place"²⁰⁶

In the case, *Standard Chartered Bank Kenya Ltd versus Intercom Services Ltd and 4 others*²⁰⁷. Although the case related to the bank's duty of confidentiality to its customer, the court indicated that there exists an express and implied duty arising from a contract between a banker and the customer. In the context of this case the evidence on the contract does not establish the alleged express terms of the parties contract. To imply out of the proven contract that the Defendant was obligated to call all signatories to a cheque or instructions before paying it would impose an onerous duty on the banker. However, it is reasonable to expect the Defendant to act with due care and in the interest of its customer. This duty calls upon the banker to exercise skill while dealing with transactions on the customer's account.

The consent of consumers must be obtained before their data is shared with unauthorized third parties. All personal information of customers of banks must

²⁰⁵ Ibid.

²⁰⁶ C Scott and J Black (2000), *Cranston's Consumers and the Law*, (Butterworths), p 372.

²⁰⁷(2004) eKLR.

be kept in confidential. As a duty of care, financial services operators are required to protect the confidentiality privacy of their customers' data.²⁰⁸ Appropriate data protection measures, including security measures, including staff training have to be in place to prevent unauthorized access.

In addition, bankers have to obtain the prior consent of customers before using this information for future promotional offers via e-mail, short message service (SMS), phone calls and other channels. Banks may not disclose consumer information to a third party without the express consent of the customer, except in the following cases: a) at the request of the Central Bank (BRB) and other regulatory bodies; b) where there is a valid court order; c) in fulfillment of duty²⁰⁹.

4.10 Customer Responsibilities

Where there are rights, corresponding responsibilities shall exist. Thus, while the purpose of this framework is to ensure that bankers act in the best interest of consumers, the consumers must at least assume certain responsibilities as described below. They should give clear mandate to banks and report any changes to these orders in a timely manner. Consumers shall provide accurate and up-to-date information as may be requested by the financial institution.²¹⁰

4.11 Duty to Protect Payment Mechanisms and Information

Transactions or communications record between the bank and the consumer such as card receipts, account statements and transaction statements must be saved or disposed of properly to prevent unauthorised access.

The case of *Tidal Energy Ltd v Bank of Scotland plc*²¹¹ highlighted the situation where a bank had complied with a CHAPS (clearing house automated payment system) transfer mandate which had been authorised by the customer. The customer had been given the correct sort code and account number but had been

²⁰⁸ Ibid.

²⁰⁹ J Hansen and D Kysar(1999) “*Taking Behaviouralism seriously: The Problem of Market Manipulation*”. New York University Law Review 630.

²¹⁰ *Greenwood v martin’s Bank* HL [1933]AC51.

²¹¹[2014] EWCA Civ 1107

misled about the payee's name. Although the name on the form was incorrect, the bank was held to be not liable to the customer, since under the CHAPS rules, only the sort code and account number need to be correct for a bank to accept instructions to transfer payment. The court took into account the fact that the customer had the option of using the CHAPS system or not; because the benefit of that system was speed, it was unrealistic to impose an additional burden on banks to check whether the name on each CHAPS form corresponded with the beneficiary's account name of the payee's account name.²¹²

Consumers have to ensure that their personal information such as account numbers, Personal Identification Number (PIN), Bank Verification Number, access codes, payment instruments including cheques, Automated Teller Machine (ATM) cards are safely protected and not shared with third parties, including bank staff, for whatever reason.²¹³

4.12 Duty of Knowledge and Understanding

The ability to make informed financial decisions that should benefit the consumer depends on the depth of financial information acquired over time by the consumer. Therefore, it is important for the consumers to acquire financial knowledge that will help them manage personal finances.²¹⁴ The responsibilities of a consumer in this regard include, Display mental alertness and probe deeply in the characteristics of financial products and services. It is the responsibility of the consumer to read and seek much needed clarification regarding financial products and services, to ensure proper understanding of associated risks, contractual terms and conditions etc Self-education about consumer rights and responsibilities as well as other financial matters. Negotiate advantageous terms to ensure that financial products and services convene the need of consumers. Strive to obtain accurate information from credible sources and make comparison before subscribing to financial products and services. In particular, they argue that "they can only be useful if the consumer is

²¹² Ibid.

²¹³ Clause 4(b) bank of uganda financial consumer protection guidelines, 2011.

²¹⁴ Ibid.

intellectually and psychologically equipped to apply the information which disclosure regulation entitles him to have²¹⁵.

4.13 Duty to meet or honor Financial Duty

Consumers shall be required to always inform the bankers of any difficulties that may hinder their ability to fulfill their contractual obligations in order to explore possibilities of re-negotiating or reviewing contract. Consumers must also fulfill also their obligations in contractual relations with Financial Institutions.

4.14 Conclusion

Financial services are an essential part of the work of banks, which in turn are integral to the effective operation of any modern financial system. Based on the analysis presented in this chapter, it is strongly questionable that, in providing these services, banks maintain and must maintain fiduciary relationship with their clients which will require them to avoid conflicts of interest. This has important consequences for banks because their very nature of organisation makes conflicts possible, if not inevitable, and the measures they adopt in response to conflicts do not, in principle respect the fiduciary obligation. According to the information presented in this chapter, consumers should take immediate steps to inform operators of compromise in personal information in order to avoid financial losses. Consumers must exercise due diligence to ensure that they deal with only licensed financial institutions. In order to achieve the objectives of this framework, the Burundian Central Bank should establish appropriate structures to guide the implementation of the consumer protection framework. This chapter articulates the approach for the implementation of the different principles established by the consumer protection framework. The next chapter summarizes research findings, draws conclusions and forwards recommendations which could help in implementing the bank fiduciary duties in Burundi.

²¹⁵ D Cayne and MJ Trebilcock,(1973), *Market Considerations in the Formulation of Consumer Protection Policy* 23 University of T L J396 at p 406.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATION

5.1 Research findings

This chapter draws conclusions and recommendations based on the research findings. The conclusions are derived from the research findings and are based on the research objectives while the recommendations given are forwards on the basis of policy gaps.

5.1.1 Disparity of power

In Burundi it seems that there is similar preoccupation with the bank's conduct and with not the customer's confidence. The same wrong approach centered with its focus on the strongest party is taken. Therefore, even if one of these laws contains a clause intended to protect one of the parties to the contract, it can be assumed that in a situation of a disparity of power, the stronger party would contract from such a clause. Indeed, it is the situation in the banking context; banks make stipulations on various statutory clauses to protect their interests and to minimize their liability.

Additionally, this study concludes that the Burundian position implies that for a bank to give transactional advice is not an intrinsically fiduciary matter. Rather, giving bad or self-interested advice is an occasional mistake. When the plaintiff is able to establish the misconduct of a bank, the wrong will be repaired.

5.1.2 Banking disputes

This study also revealed that Burundi does not yet call a bank's transactional advice 'fiduciary'. Current case law in Burundi was inadequate in relation to the 'fairness' of guarantee liabilities as between banker and customer. The courts have adopted a very conservative attitude in the application of the law. They generally prefer not to intervene in the content of the banking contract and avoid removing depriving contractual clauses of the bank contracts. The banks have taken advantage of the court's passive attitude and continued to use contracts with unfair clauses.

In addition, it can be concluded that in summary, from an empirical point of view, the use of contract law in banking litigation has not has created a proper balance

between the banks and their customers, nor has it provided the customer with a suitable level of protection. It has been said that the Relevant advice and disclosure requirements are insufficient to regulate this and other aspects of the banking relationship, it replicates the law decided law in one part and goes further in others.

5.1.3 Banking Facility

This study also found that the experience accumulated in the application of the contractual approach to the bank-customer relationship reveals that true protection for the customer requires a specific and convincing arrangement. The contract law is the main law that regulates the contractual relationship between the bank and the customer in Burundi. It is intended to solve the problem of power disparity between the parties and to ensure that the bank does not abuse it to the detriment of the customer.

Similarly, even the contract law does not offer the customer full protection. The law deal with specific problems and does not provide any radical protection to the customer. A relationship of trust may not be so easy to deduce in this case either. It can also be concluded that Burundian financial institutions do not deal with common problems such as the provision of non objective financial advice or the complex issue of conflicts of interest in banking activities. Moreover, some laws are vaguely worded, their scope is sufficiently defined; for example on the prohibition of to deceive. It is disputed that this section imposes an active obligation of disclosure on the bank. Another problem with these laws is that the only remedy it offer is compensation. It does not include other basic remedies such as rescission of the contract.

5.1.4 Inequality positions

This study also concludes that when the transactional advice of a bank, result in an agreement for the benefit of the bank, and some element of disadvantage or inequality affects the position of the customer, we noted that the doctrines of 'undue influence dealing tend to be used in Burundi. The intuitive idea in both doctrines seems to be that the negotiation or profit of a bank cannot be maintained if the bank has obtained it by acting oppressively or from a position of strength.

This study also concludes that a huge disparity of power exists between the banks and most of their customers. There are huge differences in the level of professional knowledge, technical methods of managing and monitoring financial activities, financial power, bargaining power, and so on. The inferiority of the client in his relations with the bank characterizes each stage of their relationship from the negotiation stage until the signature of the banking contract, the period of the execution contract, and until the end of the relationship.

With regard to inequality, the following conclusions were made, the inferiority of the clients is reflected in cases of disputes with the bank given the existence of a great inequality in the financial capacity to conduct legal proceedings and the difficulties of proof due to the lack of full information; this is due to the inferiority of the bargaining position in the negotiation phase and the lack of experience in legal conflicts.

When a banker advises clients on their financial affairs, then the banker and customer relations may involve, in addition to all contractual rights, both contract law duties of care and fiduciary duties.

This research has therefore, seen the great inequality that exists between the bank and the typical customer. Moreover, the power inequality becomes problematic when it creates a dependency of the inferior party on the stronger party .Indeed, the enormous power given to the bank creates a real dependency of the customer. The customer is dependent on the bank in the provision of the service, the manner in which it is performed, the determination of the price, as well as in the determination of the legal arrangement that applies to it, as indicated below.

5.1.5 Customer Protection

In the Burundian financial sector, the starting point is inability to manage with the sophisticated markets of the modern world due to changes in market structure, technological innovations, and the variety of products and services.

In addition, it can be concluded that the inequality between the parties is due not only to the greater economic power of the bank , but also to factors such as the complexity of the transaction, the expertise of the dealer in the relevant field, and the lack of feasibility for the consumer to negotiate on the contract because of the low chances of success in such negotiations. The fiduciary relationship on the Burundian legal regime does not take into account to the position of the weaker party. The one who relies, is not the one who exploits the reliance. Customers, rather than bankers, are not their dominant concern.

5.1.6 Borrowing contracts

This study also concludes that the weakness of the consumer is reflected in various areas: both at the stage of the formation of the legal norm and at the stage of its exercising and in terms of bargaining power as well as in terms of informational gaps.

The erroneous or incomplete explanation of a borrowing transaction that does not provide an obvious benefit to the bank may be beyond the margins of the fiduciary sanction. Nevertheless, the researcher found that the inferiority of the consumer alone is not sufficient reason for the intervention of the law. The law should only be used to ensure that the inferiority of the consumer could be abused by the dealer. The contract law seeks to minimize the situations where the power of the dealer is abused by imposing limits on the dealer's conduct. The traditional justification for the special protection of the consumer's interest is therefore the protection against exploitation of the relative weakness of the consumer. The freedom of contract is compromised by the need for an intervention to protect the consumer, whose inferior position can be exploited by the dealer.

5.1.7 Effective supervisory

This study revealed that the bank has the discretion to accept or refuse to carry out the banking transaction that the customer requested by the customer. With respect to the opening of a current account, the obligation to provide the service is very limited and does not include providing credit, issuing checkbooks for the account, or providing a debit card. Hence, in most of the transactions, the customer is dependent on the bank's willingness to provide the service requested. A customer dependence on the service provider is not exclusive to the banking sector and therefore it is insufficient itself to justify the imposition of a fiduciary duty.

In the Burundian context, the customer is therefore unable to effectively supervise the bank's activities either because the customer lacks the professional knowhow and technical means required or because the client does not receives retrospective information in his account. Thus, even the hiring professional inspection services, which involve a high financial cost, will not solve the problem of supervision. The customer has no choice but to rely on the professionalism and integrity of the bank in exercising of its duties.

5.1.8 Consumer awareness

The research findings also showed that the prices of banking services offered to the client are prescribed by the bank. This study also concludes that breaches of privacy can result from client behavior, such as lack of a password protection, so consumer awareness is an important complement to regulation. In turn Regulation can reinforce consumer awareness, for example, by requiring providers to cover these bases in their disclosure. This study finally concludes that enforcing such a wide array of privacy-related regulation can be difficult, given the potential variety of regulators involved especially for cross-border services and data.

5.1.9 Records secrecy

It can be concluded that for less experienced financial consumers in particular, disclosure rules are not characterized by plain language and simple presentation and comparability of different products and different service providers. Where there are low levels of literacy, disclosure rules are not addressed to ensure effective communication to those who cannot read. It is unclear, whether complete and

accurate information including, in particular, disclosure on loans will affect consumers' behavior as much as expected, there may be trade-offs between data privacy rules and the goal of greater financial access for the poor. In a country like Burundi without reliable credit information systems, the informal information sharing may be the only way to protect against dangerous levels of cross-borrowing, even though such data sharing would violate current bank secrecy and consumer data privacy protections.

It has also been concluded that where specific regulatory barriers prevent information sharing between lenders serving poor clients, an argument can be made for relaxing these barriers to allow for credit reporting systems that mitigate over-indebtedness risk.

Moreover, approaches to disclosure designed for more affluent consumers in Burundi may not always work well, at least without modification, when serving poor consumers in poor countries like Burundi. And more is not always better. At some point the volume of disclosure produces diminishing returns, so the focus is not on simplicity, quality, and clarity, but quantity.

5.2 Interest rate

This research found out that the Interest rate restrictions can restrict access by making it impossible to serve small or remote borrowers. It may be legally difficult to set a ceiling high enough to cover the unavoidable costs of micro lending and a sufficiently high profit margin to attract capital to low-income financial services.

This study also concludes that in theory, interest rate ceiling could be set at a level that allows for sustainable microfinance operations while eliminating excessive profits. But achieving that balance can be politically difficult for the government agency to identify (and implicitly sanction) a particular rate. Most people do not understand why small loans require high interest rates, so it tends to shock the public conscience when banks are allowed to charge very high rates to poor borrowers without enough information.

5.2.1 Identity fraud

Identity fraud in financial services involves assuming the identity of another person, or a fictitious identity, to obtain financial services or to appropriate funds providers can be both victims and facilitators of identity fraud. For example, fraudsters may assume fictitious identities and falsify information about their cash flow to obtain loans they don't intend to repay, or may assume the identity of a borrower with a solid credit rating for the same purpose. Additionally, this study concludes that identity theft is relatively easy when illiterate victims can be induced to sign documents they cannot understand. It can also result of a data security breach, or because the victim is induced to give up a password or personal identification number. Such activity is a crime in most countries. The focus should be on improved the application of the existing criminal sanctions and other data protection and privacy measures.

5.2.2 Conflicts of Interest

This study concludes that there is significant potential in the investment banking sector for conflicts of interest to occur. Indeed, conflicts are considered as an inevitable or inescapable feature of the business of investment banking. This is due to the lack of consumer protection, the multiple services offered by firms, the different capacities in which they operate, and their broad client base.

This study also concludes that positions of conflict with the interests of financial advisory clients can arise in several ways. First, an investment bank's self-interest may conflict with that of its financial advisory client. Examples of this would include competing with a client for an investment opportunity (or being part of a syndicate doing the same) and providing financial advisory services to the target company of an unsolicited takeover offer at the same time as the firm's asset management arm independently sells some of its holding of shares in that company.

5.2.3. Inadequate Systems

In the context of financial advisory services, this study concludes that the risk of loss to individuals is limited and, in large banks, inadequate systems and controls can mean that the management of a bank is unaware of emerging misconduct issues. Misconduct is rooted in conditions generally encountered in financial markets. This

study also concludes that the question is important for a number of reasons. First, in the absence of a fiduciary relationship and outside any express contractual undertaking, investment banks will, generally not be required to avoid conflicts of interest in providing these financial advisory services.

5.2.4 Competition policies

This study concludes that a lack of competition may lead banks to mis-sell products, as customers have a limited choice of banks. In addition, it may result in tacit collusion, especially in highly concentrated markets. An example is price fixing by a group of banks with the objective of reducing quantities and increasing margins at the expense of customers.

This study concludes that the ability of financial advisers to engage in ethical decision making and is critical to the achievement of widely held objectives to professionalise financial advisers and to ensure quality advisory outcomes. Arguably assumes that conduct which would amount to a breach of fiduciary obligations is lawful for investment banks. The question has received little judicial, regulatory or scholarly attention.

5.2.5 Information

This study concludes that Information may also occur within an institution, if for instance a risk or compliance department is unable to handle all the information coming from the front office properly. Likewise, conflicts of interest may arise between banks and other financial participants, for instance when a rating agency, auditor or consulting firm is paid by a bank. It can also occur within a bank, in cases, for example, where compensation policies are not aligned between advisory services and trading are not secure.

5.3 Recommendations

Basing on the research findings, especially on the gaps existing in the context of bank fiduciary obligations and financial activities in Burundi, the following recommendations have been proposed. Based on the results of the research, in particular on the gaps in bank fiduciary obligations and financial activities in Burundi, the following recommendations have been proposed.

5.3.1 Supervisory and compliance

First and foremost, supervisory and compliance framework, effective institutional arrangements must be established for the enforcement of consumer protection. Institutions responsible for consumer protection must have; the necessary authorities to fulfill their mandate, clear responsibilities supported by appropriate governance structures, operational independence and high professional standards. There is a need to have effective legal, regulatory and supervisory structures to protect consumers of banking and other financial services regulated by the Bank.

5.3.2 Accountable Lending

The Central Bank of Burundi should ensure that banks' establish structures to prohibit predatory lending and hence support a positive credit culture in the industry. Banks must provide detailed information on the terms and conditions of a loan agreement to consumers prior to executing the loan agreement. Such information must at a minimum include the pricing, repayment schedule, repayment amount, tenure and opt out options. Credit counselling facilities should also be available and accessible to all customers especially for customers that are most in need of this service or consumers that request this service. Most consumers buy only infrequently new financial products and services. Therefore, when buying a new financial product or service, they do not have much past knowledge or experience to rely on for taking decisions.²¹⁶ Consumers should also be made aware of such services and shall be encouraged to take advantage of such facilities provided by the banks. Bank shall provide credit counselling to prevent consumers' indebtedness due to limited financial knowledge. Credit counselling is the process of educating consumers to prevent unnecessary debt and support in debt settlement.

5.3.3 Communication

In any communication with customers, bankers have to act in the best interest of customers. Banks have also to shall encourage ethics and integrity in their business.

²¹⁶ Patrice Muller, economic and scientific policy, 2004

All requests for information must be responded to in writing, with clarity and in a timely manner.²¹⁷

Financial education programs have to be conducted nationwide by the Burundian central bank and relevant stakeholders to create awareness on consumer rights and responsibilities. These programs have to be designed to address the peculiarities of various consumer segments. There have also to be a mechanism for monitoring the performance of stakeholders with respect to implementation of various consumer financial education initiatives.

The Burundian Central Bank and relevant stakeholders have also to define a communication strategy for financial education. Stakeholders have also be encouraged to provide toll-free phone lines to support enquiring consumers on matters of consumer education or information which should be operated by trained agents and recorded or monitored for quality assurance purposes. The BRB, financial operators and other relevant stakeholders have also to leverage on a variety of media including traditional and new media to roll-out financial education programs. These materials may be developed in French and the indigenous language.²¹⁸ There can be little doubt that the idea of the perfect market has been powerful one in discourse on consumer protection, financial regulation and policy.²¹⁹

5.3.4 Debt Collection

Banks have to ensure that personnel assigned to recover debts are properly trained.²²⁰ Consumers have to be informed in advance before a recovery process is initiated.²²¹ In the event that consumers fail to meet their financial obligations, financial operators shall be encouraged to adopt ethical debt recovery practices such as recovery processes must be courteous, fair and non-coercive.²²²The Burundian Central Bank has to set guidelines for ethical debt collection practices in the industry.

²¹⁷ Ibid.

²¹⁸ Ibid.

²¹⁹ H Beales, R Craswell and S Salop,(1981) *„The efficient regulation of consumer information“* 24 Journal of Law and Economics p 491.

²²⁰House of Lords EU Committee 36th Report of Session 2005-6 *Consumer Credit in the EU* (HL 210-1) para 192.

²²¹Ibid.

²²² P Cartwright *Fairness, Financial Services and the Consumer in an Age of Principles-Based Regulation*, (Cambridge: Cambridge University Press, 2010).

These guidelines have to be based on dialogue, respect for the consumers' privacy and longevity of consumer-bank relationships amongst others

5.3.5 Transactions Advertising

Banks should be required to meet the demands of promotional offers. In addition, before the launch of any sales promotion, operators must provide the BRB with evidence of capability to manage the influx of customers without diminishing service quality. Financial operators shall also not take advantage of consumers' inexperience, gullibility or lack of understanding.²²³

Sales promotions or related activities should be conducted professionally and ethically. In a bid to generate increased business volumes or attract new customers, financial operators shall provide factual information and shall not seek to mislead consumers.²²⁴

Indeed, attempts are being made to see how the regimes might be coordinated²²⁵ Adverts have to disclose all conditions associated with the products and services. For example, where a promotional material makes reference to interest rates, banks have to indicate all other applicable charges. In addition, measures shall be provided for consumers to make further enquiries.²²⁶ Banks must be truthful and clear in all communication (including advertisements) with consumers. Communications, advertisements on financial products and services must at a minimum: not seek to misrepresent or exaggerate the benefits of the products or services, not be misleading and be clear and explicitly state the features of the products/services; undue influence to be divided into separate categories, the House of Lords has held that it represents a single doctrine that can be reached by separate path²²⁷.

The BRB must ensure also that adverts by banks align with approved product features. Adverts not in line with approved product features will attract appropriate penalty and can be recalled.

²²³ Ibid.

²²⁴ Ibid.

²²⁵ HM Government A, *Better Deal for Consumers* (Cm 7669) July 2009 para 4.3.

²²⁶ Ibid.

²²⁷ (*no.2*) [2002] 2 AC 773.

5.3.6 Notification of Variation

Bankers have to respond to requests for waivers, concession or other variations on credit facilities within specified timelines, failing which such requests would be deemed to have been accepted. Within a minimum timeline specified by the central bank, bankers have to notify consumers about changes to terms and conditions of contracts prior to the implementation of such changes. Banks should also provide periodic updates to consumers on outstanding obligations.²²⁸

5.3.7 Acting in the best interest of customer

This study also recommends that in any communication with customers, staff of banks should act in the best interest of customers. Remuneration and incentives structure in the industry should encourage ethics and integrity. All requests for information must be responded to in writing, with clarity and in a timely manner. For this purpose, mere acknowledgement of a request would not suffice as a response.

The study also recommends also that in Burundi, banks should act in the best interest of consumers in the provision of advice and execution of transactions. For consumers to make informed decisions in choosing financial products and services, they must be acquainted with the features.

Thus, before consumers sign up for any financial products, banks should also assess the consumers' ability to fulfill the terms and conditions associated with the financial products and services; assess whether the products or services of interest suit the consumers' needs. Where a product requested does not meet the needs of the customer, the bank is obliged to advise or caution the customer in writing before granting such and give clear information on the features of the services.

Access to basic banking and other financial services is a critical theme around consumer protection in the provision of financial products and services to consumers. The BRB should establish policies and structures to enhance access to financial products/services, especially amongst vulnerable groups.

²²⁸ HM Government A ,*Better Deal for Consumers* (Cm 7669) July 2009.

5.3.8 Financial education

Consumer Financial Education is the process of impacting financial knowledge and skill to consumers to enable them manage their personal finances effectively and make informed decisions. The Burundian central bank and other relevant stakeholders shall work towards enhancing the quality of consumers' financial knowledge through the roll-out of a robust financial education or enlightenment program. To enable consumers know their rights and responsibilities and make informed financial decisions when purchasing financial products or services. In the perfect market the rational, perfectly informed consumer makes consistent decisions in accordance with his or her preferences.²²⁹

This study also recommends that financial education programs should be conducted nationwide by the Burundian Central Bank and relevant stakeholders to create awareness on consumer rights and responsibilities. These programs should be designed to address the peculiarities of various consumer segments. There shall be a mechanism for monitoring the performance of stakeholders with respect to implementation of various consumer financial education initiatives.

It is hereby recommended that The Burundian Central Bank and relevant stakeholders should also define a communication strategy for financial education. Stakeholders should be encouraged to provide toll-free phone lines to support enquiring consumers on matters of consumer education or information which should be operated by trained agents and recorded or monitored for quality assurance purposes. The BRB, Banks and other relevant stakeholders should leverage on a variety of media including traditional and new media to roll-out financial education programs.

A critical objective of consumer financial education, amongst others is to have a more financially informed populace as well as help consumers understand financial matters towards managing their finances better. This is a novel framework

²²⁹G Hadfield, R Howse and M Trebilcock „*Information-Based Principles for Rethinking Consumer Protection Policy*“ (1998) 21 *Journal of Consumer Policy* 131.

consisting of a set of elements which, taken together, help to identify where vulnerability is liable to exist.²³⁰

5.3.9 Transparency as a fiduciary duty

This study also recommends that banks should provide accurate information on financial products and services to consumers at all times to enable them make informed decisions. Such information must be timely, detailed, clear and unambiguous. Secondly, contract terms, banks should also inform consumers of the possibility of variations in terms and conditions of contracts due to changes in economic conditions before such contracts are executed. Contract terms should contain adequate information that will enhance consumers' decision making process prior to execution of the contract. Banks should give prior notice to consumers within the time specified in contracts, before implementing variations in terms and conditions of contracts.

5.3.10 Supervisory Framework

This study also recommends that the BRB should continue to develop mechanisms to ensure effective supervision of banks in the area of fiduciary duties. The mechanisms should include the following amongst others; co-operation with other financial services oversight authorities and between authorities or departments in charge of sectoral issues should be promoted. Contractual language should be precise, clear and unambiguous. Information must be communicated in plain and simple language to limit the possibility of misinterpretation. All fees, charges or payments to be made by a consumer for a product or service must be documented. Banks should also proactively inform consumers of the possibility of variations in terms and conditions of contracts should the condition upon which contract terms were reached change.

The BRB should continue to develop mechanisms to ensure effective supervision of banks in the area of fiduciary duties. The mechanisms should include the following amongst others; Co-operation with other financial services oversight authorities and

²³⁰ WC Whitford „*The Functions of Disclosure Regulation in Consumer Transactions*“ (1973) Wisconsin Law Review 400.

between authorities or departments in charge of sectoral issues should be promoted.²³¹

5.3.11 Fair treatment

This study also suggests that every consumer should be given equal access to basic banking services with even more consideration accorded to the needs of vulnerable groups. The concept of fairness in the provision of financial services suggests that consumers should be treated equitably without bias at all stages of their relationship with financial operators.

This study also recommends that operators should treat consumers with utmost respect and should never engage in practices such as threats, intimidation, humiliation, misrepresentation, deception or unfair inducements. Financial operators shall not discriminate against consumers' access to financial products services solely on the basis of attributes such as financial standing, physical ability, marital status, gender, age, religion or tribe.

5.3.12 Data Privacy

This study also recommends that the need for adequate controls to be put in place to prevent unauthorized access to consumers' confidential information. Appropriate measures should be established to guarantee protection of consumer assets and privacy. Consumers' financial and personal information should be protected by banks at all times and shall not be released to a third party without the consent of consumers, except in cases provided by law.

This study also recommends that banks should create sufficient awareness on emerging fraudulent practices and consumers' responsibilities to guide against such. Within a timeline to be specified by the BRB, banks should request customers to update their details. Customers are obliged to update their records as need arises in order to ensure data accuracy and ultimately enhance protection. Banks should create convenient avenues through which customers can make these updates.

²³¹G20 high-level principles on financial consumer protection, october 2011.

5.4 Conclusion

It can be concluded that in Burundi, the implementation of contract law in the banking context can create a problem because, contract law does not take into consideration situations of inequality of power between the parties. This study also concludes that, in Burundi, within the trusting type of fiduciary relationship, some identifiable 'undue influence' must be found in order to relieve the customer on the same facts.

This study also concludes that contract law determines arrangements that seek to balance the interests of the contracting parties based on the presumption that they are equal in power. In situations of a serious power disparity between the parties, these laws do not provide any particular protection for the weaker party. In Burundi, the bank customer relationship is characterized by a huge inequality of power, and therefore contract law is not an appropriate tool for the regulation of this contractual relationship. If the recommendations presented above are implemented a remarkable improvement will be seen in the banking sector in Burundi.

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