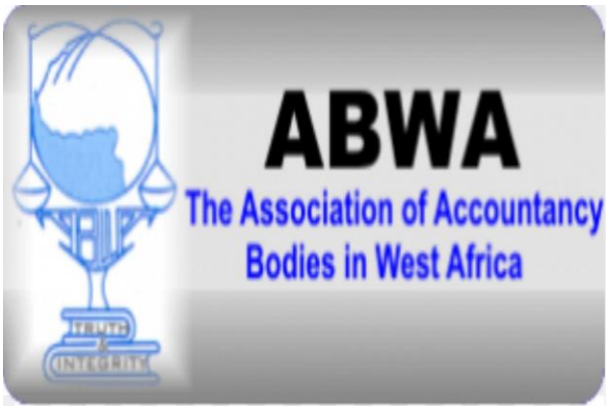

ATSWA

ACCOUNTING TECHNICIANS SCHEME WEST AFRICA

STUDY TEXT

PART I

BUSINESS LAW

PUBLICATION OF ASSOCIATION OF ACCOUNTANCY BODIES IN WEST AFRICA (ABWA)

ASSOCIATION OF ACCOUNTANCY BODIES IN WEST AFRICA (ABWA)

ACCOUNTING TECHNICIANS SCHEME

WEST AFRICA (ATSWA)

STUDY TEXT FOR

BUSINESS LAW

FIFTH EDITION

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This book is published by ABWA; however, the views are entirely those of the writers.

PREFACE

INTRODUCTION

The Council of the Association of Accountancy Bodies in West Africa (ABWA) recognised the difficulty of students when preparing for the Accounting Technicians Scheme West Africa examinations. One of the major difficulties has been the non-availability of study materials purposely written for the scheme. Consequently, students relied on textbooks written in economic and socio-cultural environments quite different from the West African environment.

AIM OF THE STUDY TEXT

In view of the above, the quest for good study materials for the subjects of the examinations and the commitment of the ABWA Council to bridge the gap in technical accounting training in West Africa, led to the production of this Study Text.

The Study Text assumes a minimum prior knowledge and every chapter reappraises basic methods and ideas in line with the syllabus.

READERSHIP

The Study Text is primarily intended to provide comprehensive study materials for students preparing to write the ATSWA examinations.

Other beneficiaries of the Study Text include candidates of other Professional Institutes, students of Universities and Polytechnics pursuing undergraduate and post graduate studies in Accounting, advanced degrees in Accounting as well as Professional Accountants who may use the Study Text as reference material.

APPROACH

The Study Text has been designed for independent study by students and as such concepts have been developed methodically or as a text to be used in conjunction with tuition at schools and colleges. The Study Text can be effectively used as a course text and for revision. It is recommended that readers have their own copies.

FOREWORD

The ABWA Council, in order to actualize its desire and ensure the success of students at the examinations of the Accounting Technicians Scheme West Africa (ATSWA), put in place a Harmonisation Committee, to among other things, facilitate the production of Study Texts for students. Hitherto, the major obstacle faced by students was the dearth of Study Texts, which they needed to prepare for the examinations.

The Committee took up the challenge and commenced the task in earnest. To start off the process, the existing syllabus in use by some member Institutes were harmonized and reviewed. Renowned professionals in private and public sectors, the academia, as well as eminent scholars who had previously written books on the relevant subjects and distinguished themselves in the profession, were commissioned to produce Study Texts for the twelve subjects of the examination.

A minimum of two Writers and a Reviewer were tasked with the preparation of Study Text for each subject. Their output was subjected to a comprehensive review by experienced imprimaturs. The Study Texts cover the following subjects:

PART I

1 Basic Accounting

2 Economics

3 Business Law

4 Communication Skills

PART II

1 Financial Accounting

2 Public Sector Accounting

3 Quantitative Analysis

4 Information Technology

PART III

1 Principles of Auditing & Assurance

2 Cost Accounting

3 Taxation

4 Management

Although, these Study Texts have been specially designed to assist candidates preparing for the technicians' examinations of ABWA, they should be used in conjunction with other materials listed in the bibliography and recommended text.

PRESIDENT, ABWA

STRUCTURE OF THE STUDY TEXT

The layout of the chapters has been standardized to present information in a simple form that is easy to assimilate.

The Study Text is organised into chapters. Each chapter deals with a particular area of the subject, starting with a summary of sections and learning objectives contained therein.

The introduction also gives specific guidance to the reader based on the contents of the current syllabus and the current trends in examinations. The main body of the chapter is subdivided into sections to make for easy and coherent reading. However, in some chapters, the emphasis is on the principles or applications while others emphasise method and procedures.

At the end of each chapter is found the following:

- Summary;
- Points to note (these are used for purposes of emphasis or clarification);
- Examination type questions; and
- Suggested answers.

HOW TO USE THE STUDY TEXT

Students are advised to read the Study Text, attempt the questions before checking the suggested answers.

ACKNOWLEDGMENTS

The ATSWA Harmonisation and Implementation Committee, on the publication of the first edition of the ATSWA Study Texts acknowledges the contributions of the following groups of people. The ABWA Council, for their inspiration, which gave birth to the whole idea of having a West African Technicians Programme. Their support and encouragement as well as financial support cannot be overemphasized. We are eternally grateful.

To The Councils of the Institute of Chartered Accountants of Nigeria (ICAN), and the Institute of Chartered Accountants, Ghana (ICAG), Institute of Chartered Accountants Sierra Leone (ICASL), Gambia Institute of Chartered Accountants (GICA) and the Liberia Institute of Certified Public Accountants (LICPA) for their financial commitment and the release of staff at various points to work on the programme and for hosting the several meetings of the Committee, we say kudos.

We are grateful to the following copyright holders for permission to use their intellectual properties:

- The Institute of Chartered Accountants of Nigeria (ICAN) for the use of the Institute's examination materials;
- International Federation of Accountants (IFAC) for the use of her various publications;
- International Accounting Standards Board (IASB) for the use of International Accounting Standards and International Financial Reporting Standards;
- Owners of Trademarks and Trade names referred to or mentioned in this Study Text.

We have made every effort to obtain permission for use of intellectual materials in this Study Texts from the appropriate sources.

We wish to acknowledge the immense contributions of the writers and reviewers of this manual.

Our sincere appreciation also goes to various imprimaturs and workshop facilitators. Without their input, we would not have had these Study Texts. We salute them.

Chairman
ATSWA Harmonization & Implementation Committee

A new syllabus for the ATSWA Examinations has been approved by ABWA Council and the various PAOs. Following the approval of the new syllabus, which becomes effective from the September 2026 diet a team was constituted to undertake a comprehensive review of the Study Texts in line with the syllabus under the supervision of an editorial board.

The Reviewers and Editorial board members are:

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SYLLABUS AND EXAMINATION QUESTIONS OUTLINE

PAPER 3: BUSINESS LAW

Aim

To examine candidates' knowledge and understanding of the legal environment in which organisations in general and the accountancy profession in particular operate as well as the laws on different business relationships.

Objectives

On completion of this paper, candidates should:

a. Know the structure, jurisdiction and functions of the legal systems and the rules applicable to them;
b. Have a working knowledge of the general principles of contract to aid their daily accounting activities;
c. Be familiar with the legal rules governing specific contracts;
d. Be able to distinguish between the various forms of business associations and be conversant with the main rules governing their operations;
e. Be able to identify and appreciate the respective duties of bankers and customers as well as recognise the nature of negotiable instruments; and
f. Be able to apply the principles of law to simple case studies.

Structure of paper

The paper will be a three-hour paper divided into two sections:

Section A (50 Marks): This shall consist of 5 0 compulsory questions made up o f 3 0 multiple-choice questions and 20 short answer questions covering the entire syllabus. **Section B** (50 Marks): Six questions, out of which, candidates are expected to answer any four, at $12^1/_2$ marks each.

Contents

1. **The legal system and court system 15%**

a. Sources of law

i. Explain the constitution and its characteristics
ii. Explain Received English Law - Common Law, Doctrines of Equity (emphasis on maxims) and Statutes of General Application.
iii. Explain judicial precedent, statutes and their enactment, customary law, and international law such as treaties, conventions, protocols.

b. The legal and court system

i. Outline the structure and hierarchy of courts.
ii. State the composition and jurisdiction of the various courts.
iii. Explain special courts and tribunals.
iv. Distinguish between law and ethics.

c. Forms of legal liability

i. Distinguish between criminal and civil liability.
ii. Explain torts and their types
iii. Explain vicarious liability.
iv. Explain negligence and its consequences.

d. Law of contract 20%

i. Explain contract and its essential elements: offer, acceptance, consideration, intention to create legal relations, capacity and consent.
ii. Explain privity of contract and its exceptions.
iii. Explain terms of a contract (conditions, warranties) and exemption clauses.
iv. Explain illegal and void contracts.
v. Explain factors that vitiate contracts.
vi. Explain termination or discharge of contracts and remedies for breach of contract.
vii. Explain e-contract.

Special contracts 25%

(a) Agency

i. Explain creation and types of agency.
ii. Explain authority of agents
iii. Explain the rights and duties of principal and agent.
iv. Explain termination of agency.

(b) Sales of goods

i. Define and classify goods.
ii. Differentiate between sale of goods and other contracts.
iii. Explain implied terms.
iv. Explain the *caveat emptor* doctrine.
v. Explain transfer of title, passing of risk, and the *nemo dat quod non habet* rule.
vi. Explain breach of sale of goods contract and remedies of the parties.
vii, Explain the rights and duties of buyers and sellers.

(c) Hire purchase and equipment leasing

i. Define hire purchase and explain the formalities under the Common Law and the Hire Purchase Act.
ii. Explain implied and void terms.
iii. S t a t e t h e rights and obligations of the parties.
iv. Explain termination of hire purchase contract.
v. Explain operating and finance leasing.

(d) Contract of employment

i. Explain the nature and formation of employment contract.
ii. State the rights and duties of the parties.
iii. Explain termination of employment and dismissal.
iv. Explain the remedies for breach of contract.
v. Explain redundancy.

(e) Insurance

i. Define and classify insurance contract.
ii. State the minimum share capital requirements of insurers.
iii. Explain the following concepts and principles: insurable interest, premium, indemnity, materiality of information, utmost good faith, conditions and warranties, subrogation and contribution.

Law of business associations 25%

(f) Partnership

i. Explain partnership and its elements.
ii. Explain types and attributes of partnership (general partnership, limited partnership, and limited liability partnership).
iii. Explain the procedure for management of a partnership including the rights and duties of partners, their relationship *inter se* and with third parties.
iv. Explain the attributes of a limited partnership and a limited liability partnership.
v. Explain limited partnership and limited liability partnership accounts and audit, annual returns, as well as assignability of partners‟ interest.
vi. Explain investigation and litigation in limited liability partnership as well as criminal proceedings by the Attorney-General of the Federation.
v. State the statutory requirements for operation of a foreign limited liability partnership.
vi. Explain winding up and dissolution of partnership.

(g) Companies

i. State the composition and functions of the Corporate Affairs Commission.
ii. Explain the Administrative Committee of the Corporate Affair Commission and state its functions as well as procedures.
iii. Explain the types of company, including single shareholder and small company as well as their implications.

iv. Explain the procedure for incorporation of a company, documents of incorporation, and replacement of statutory declaration with statement of compliance with requirements of incorporation.

v. Explain pre-incorporation contracts as well as promoters and their duties.

vi. State the contents of memorandum and articles of association and how they can be amended.

vii. Explain the procedures for issue of and transmission of shares and debentures (corporate bonds).

viii. Explain the ways in which the capital of a company is maintained or preserved including the laws relating to acquisition of own share by company as well as distribution of profits.

ix. Explain the appointment, powers, duties, and removal of directors. x. State the minimum number of non-executive and executive directors (in applicable situations).

x. State the law on company secretary's appointment, qualifications, status, and removal.

xi. State briefly the law on company meetings (statutory meeting annual general meeting, and extraordinary general meeting)to include:

1. Notices and resolutions;
2. Right to receive notice, attend, and requisition meeting
3. Voting, companies that need not hold annual general meeting; and
4. Authority of private company and small company to hold virtual meeting.

xii. State the law on the appointment, qualifications, rights, duties and removal of company auditors.

xiii. Explain the rationale for administration of companies as well as appointment and functions of the administrator.

xiv. Explain arrangement, compromise, netting and winding-up (in outline).

xv. Define mergers and its types under the Federal Competition and Consumer Protection Act, 2018.

(h) Others

i. State the conditions and requirements for registration of business names as well as incorporated trustees.

ii. Define collective investment scheme and its types.

iii. Explain Alternative Dispute Resolution (ADR) mechanisms and state their advantages.

(i) Banking and negotiable instruments 10%

i. Explain the legal relationship between a banker and customer and state their respective duties and rights.

ii. State the meaning and characteristics of negotiable instruments. iii. Explain bills of exchange, cheques and promissory notes.

iii. Explain crossing of cheques.

iv. Explain holder, holder for value and holder-in- due-course.

v. State the rights and duties of the parties to a negotiable instrument.

(j) Law of trusts 5%

i. Explain trusts and the parties thereto.

ii. Distinguish between private trust and public trust.

iii. Explain the types and uses of public trust.

iv. State the duties, powers and rights of trustees (including investment powers under Trustee Investment Act).

Recommended texts

1. ATSWA Study Pack on Business Law
2. Etomi, George (2014) -*An Introduction to commercial law in Nigeria: Texts cases* and materials, MIJ Professional Publishers, Lagos
3. Obilade, A.O. - *The Nigerian legal system*, Spectrum books, Ibadan.

Statutes

Arbitration and Mediation Act, 2023

Banks and Other Financial Institutions Act, 2020

Business Facilitation (Miscellaneous Provisions) Act, 2023

Bills of Exchange Act, Laws of the Federation of Nigeria, Cap B8, Laws of the Federation of Nigeria, 2004

Central Bank of Nigeria Act, 2007, Laws of the Federation of Nigeria

Companies and Allied Matters Act, 2020

Criminal Code Act, Laws of the Federation of Nigeria, 2004

Cybercrimes (Prohibition, Prevention, etc.) (Amendment) Act, 2024

Economic and Financial Crimes Commission (Establishment) Act, Laws of the Federation of Nigeria, 2004

Hire Purchase Act, Cap H4, Laws of the Federation of Nigeria, 2004 Insurance Act, Laws of the

Federation of Nigeria, 2004

Investments and Securities Act, 2025

Labour Act, Laws of the Federation of Nigeria, 2004

Marine Insurance Act, Laws of the Federation of Nigeria, 2004

Money Laundering (Prevention and Prohibition) Act, 2022

Partnership Act, 1890 / Partnership Laws of States of the Federation of Nigeria

Sale of Goods Act, 1893/Sale of Goods Laws of the States of the Federation of Nigeria Trustee

Investments Act, Cap T22, Laws of the Federation of Nigeria, 2004.

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Jones v Padavatton [1969] 1WLR 328

Kessie v Charmant [1973] 2 GLR 194

Merritt v Merritt [1970]1 WLR 1121, CA

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Partridge v Crittenden [1968] WLR 204
Payne v Cave (1789) 3 Term Rep. 148
Pharmaceutical Society v Boots Cash Chemists Ltd [1953] QB 40
Pinnel's case (1602) 5 Co Rep 117
Pioneer Construction Products Ltd v Faddool [1974] 1 GLR 76

Rose and Frank Co. v Crompton Brothers [1925] AC 445 HL

Salomon v Salomon [1897] AC 22
Spencer v Harding (1870) L.R. 5.C.P. 561

CHAPTER ONE

Sources of law

1.0 Chapter contents

- Learning objectives
- Introduction
- Law and its sources
- Meaning of law
- Sources of law
- Summary
- Revision questions

1.0.1 Learning objectives

Upon completion of this chapter, readers should be able to:

- define law
- explain the purpose of law
- identify the laws of Nigeria as Nigerian candidates and the laws of Ghana as Ghanaian candidates
- discuss the ambit of the laws of Nigeria
- state and explain the forms of legislation in Nigeria; and
- differentiate the approaches to law interpretation

1.1 Introduction

Legal issues confront us all the time. Some legal knowledge is therefore important for everyday living. Laws ensure orderliness in society, and every human activity is regulated by law. In order to become functional persons in the community, we need to appreciate the laws that regulate the various activities we are engaged in. The purpose of this chapter is to explain law and its role in society. The chapter is also to identify the major classification of the laws of Nigeria and their sources. To avoid chaos and ensure orderliness, every human grouping must have rules and regulations that guide behaviour. The development of the law and how the laws are applied discussed in this chapter. Finally, the chapter examines the various ways by which laws are interpreted to give meaning to them.

1.2 Law and its sources

1.2.1 Meaning of law

Law basically consists of a body of rules and regulations. These rules and regulations are usually designed to regulate human conduct in the society. All human behaviour is shaped in one way or the other by various laws. Law, once made is meant to be obeyed, but it is discovered that people may not voluntarily want to meet the expectations of the law. As a result, there may be the need to introduce some elements of sanctions against acts of violation or defiance so as to ensure compliance with the law. (T. O. Dada, *General Principles of Law* 3rd ed. 2008 Lagos, p. 1).

1.3 Sources of law

The term "source of law" is used in various senses but we shall restrict ourselves to just three senses: the formal, the literary and the legal sources of law. The formal source means the origin of the whole body of legal system – the source from which the system derives its validity, be it the electorate, a special body, the general will or the will of a dictator. The literary source of law refers to materials containing the rules of law. Statute books, law reports and textbooks are sources of law in this sense. The legal source of law means the fountain of authority of a rule of law, that is, the origin from which a legal rule derives its authority. It is the means through which through which a rule forms part of the body of law. Examples of legal sources are legislation and judicial precedents. It is in this third sense that the term is used both in Nigeria.

The sources of Nigerian law are: (a) Nigerian Constitution; (b) Nigerian legislation; (c) the Received English law which consists of: (i) the common law; the doctrines of equity; statutes of general application in force in England on January 1, 1900 and (ii) English law made before October 1, 1960 and extending into Nigeria; (d) Customary law and (e) Judicial precedents.

The application of the sources involves, in varying degrees, interpretation of statutes. Therefore, it could be helpful to study the principles and rules applied by court in interpreting statutes, in order to understand the sources clearly. (Obilade, A. O. *The Nigerian Legal System* (2005) Spectrum Books (Ibadan) pp. 55-56).

1.3.1 **Constitution**

A Constitution is a document containing the rules and regulations including the norms and ethics concerning the ways and manner in which a country is to be governed. The Constitution regulates the activity of the government as well as safeguards and protects the interests of the governed. (T. O. Dada, *General Principles of Law* 3rd ed. 2008 Lagos, p. 466).

According to Wade and Bradley:

> A Constitution is a document having a special legal sanctity, which sets out the framework and the principal functions of the organs of government of state and declares the principles governing the operation of these organs.

The Constitution of the Federal Republic of Nigeria 1999 has the following features or characteristics:

(a) Supremacy of the Constitution

The provisions of the Constitution are binding on all authorities and persons throughout Nigeria. Being the basic law of the land, its provisions are supreme over all other laws and any law inconsistent with its provisions shall be null and void. In addition, no part of the country shall be governed except in accordance with the Constitution. See *Obaba v. Governor of Kwara State* (1994) 4 NWLR (Pt. 294); *Olu of Warri v. Kperegbeyi* (1994) 4 NWLR (Pt. 294) p. 416; *Anoh v. Hirnyam* (1997) 2 NWLR (Pt. 486) p. 174, 187.

(b) Written form

The Constitution of the Federal Republic of Nigeria is a written Constitution. It is written not merely in the sense that it is a document, but essentially because it is one in which fundamental principles concerning the organisation of government, the powers of its various agencies and the rights of the subjects are written in one document. (A. Toriola Oyewo, *Constitutional Law and Procedure in Nigeria* 2009 Ibadan p. 4.

(c) Rigidity

The Constitution of Nigeria is rigid. A rigid constitution cannot be changed or amended easily because it requires special process which is not only difficult but is also complicated and the special process is actually laid down in the Constitutions themselves. It should be noted that a rigid constitution is necessarily written, but we should also note that not all written constitutions are rigid, that is, a constitution may be written and still remain flexible,

as in the case of Ghana in her first Republic Constitution and that of New Zealand (A. Toriola Oyewo, *Constitutional Law and Procedure in Nigeria* 2009 Ibadan p. 5).The basic objective of the makers of the Nigerian Constitution being its supremacy and overriding authority over all persons or authorities, it has been made rigid and unalterable by the ordinary law.

(d) Federal system

The Constitution creates a federal system of government. This is true not only in Nigeria but Ghana. In a federal system of governance, the powers of government have been distributed between one level of government and another. Each state is autonomous to the extent of the powers and duties conferred on it by the constitution. Under the 1999 Federal Constitution, Nigeria remains a federation consisting of thirty-six States and the Federal Capital Territory. See sections 2(2) and 3 of the CFRN, 1999. The Federal structure recognises three tiers of government namely: The Federal, State and Local government

In addition to the federal system, Ghana has a unitary system. Unitarismis the national or the central government that is supreme over other levels (tiers) of government that might exist in the state and in this context, other levels of government referred to the Local Authorities. In short, the powers of the Local Authorities have not been derived from the Constitution but as a result of the wishes of the national government.

(e) Separation of powers

The Constitution separates the powers of government into Executive, Legislative and Judicial branches. Separation of powers implies that the various organs of government should function separately and independently of one another. That way, they constitute checks and balances. Under the Constitution of the Federal Republic of Nigeria 1999, the various functions to be performed by each organ of government are clearly stated in such a way and manner that each organ was made to know the extent and limits of its functions and jurisdictions. No arm of government is entitled to infringe on the functions of the other.

(f) Fundamental rights

These are basic rights to which every citizen is entitled within the polity as entrenched in the Constitution of the Federal Republic of Nigeria, 1999. They are often referred to as inalienable rights. Any attempt by any person, group or the government to tamper with the rights may be subject of court action. (T. O. Dada, *General Principles of Law* 3rd ed. 2008 Lagos, p. 481). Fundamental rights are preserved and protected under the Constitution.

The fundamental rights are as follows:

i. rights are right to life;
ii. right to dignity of human person;
iii. right to personal liberty;
iv. right to fair hearing;
v. right to private and family life;
vi. right to freedom of thoughts, conscience and religion;
vii. right to freedom of expression and the press;
viii. right to peaceful assembly and association;
ix. right to freedom of movement;
x. right to freedom from discrimination;
xi. right to acquire immovable property anywhere in Nigeria; and
xii. right to compensation upon compulsory acquisition.

1.3.2 The Common Law

1.3.2.1 Meaning of Common Law

The term "Common Law" as a part of the Received English Law in Nigeria means the law developed by the old common law courts of England, namely, the King's Bench, the Court of Common Pleas and the Court of Exchequer. There were originally several systems of local customs in England. But under the guise of enforcing the customs of the realm, the common law judges developed a system of law known as the common law of England. Rules of the common law are, therefore, found in judicial decisions. The rules cover criminal law and civil law. But with the exception of the law on contempt of court the common law of crime is not part of Nigerian law. (Obilade, A. O. *The Nigerian Legal System* (2005) Spectrum Books (Ibadan) p. 10).

1.3.2.2 Doctrines of equity

Equity is the law developed by the old English Court of Chancery as a result of the rigidity of the common law. Whenever the rules of the common law worked hardship or injustice, the litigant sent a petition to the sovereign as the fountain of justice and the Royal Council. The Lord Chancellor granted relief on behalf of the sovereign and the Council as the thought fit. He followed no established principles in dealing with such matters. Accordingly, whenever there was a conflict between a rule of equity and a rule of common law on the same matter, the rule of equity was to prevail. Finally, it should be mentioned that because equity was developed by a court, its rules are found only in judicial decisions, except that there are many equitable rules that have been incorporated into statutes. (Obilade, A. O. *The Nigerian Legal System* (2005) Spectrum Books (Ibadan) pp. 10-11).

Maxims of equity

Maxims of equity are legal maxims that serve as a set of general principles, which point the way in which equity operates.

The twelve equitable maxims are:

1. Equity will not suffer a wrong without a remedy;
2. Equity follows the law;
3. Where there is equal equity, the law shall prevail;
4. Where the equities are equal, the first in time shall prevail;
5. He who seeks equity must do equity;
6. He who comes into equity must come with clean hands;
7. Delay defeats equity;
8. Equality is equity;
9. Equity looks to the intent rather than the form;
10. Equity looks on that as done which ought to be done;
11. Equity imputes an intention to fulfil an obligation; and,
12. Equity acts *in personam*.

1.3.3 Statutes of General Application

Statutes of general application that were in force in England on the 1st day of January, 1900, form the third group of Received English Law in Nigeria. The courts are entrusted with the responsibility of ascertaining and applying those statutes that meet the laid down criteria for application under the general provision. Statutes of General Application do not apply in

States of the Federation of Nigeria that have their local laws or statutes. As a matter of fact, they have never applied in the States of the defunct Western Region. (Asein, J.O. *Introduction to Nigerian Legal System* 2 ed. 2005, (Lagos) pp. 107-108.)

1.3.4 Judicial precedents

Judicial precedent or case law consists of laws found in judicial decisions. A judicial precedent is the principle of law on which a judicial decision is based. It is the *ratio decidendi* (literally, the reason for the decision). It follows that it is not everything said by a judge in the course of his judgment that constitutes a precedent. Only the pronouncement on law in relation to the material facts before the judge constitutes a precedent. Any other pronouncement on law made in the course of a judgment is an *obiter dictum* (a statement by the way) and it does not form part of the *ratio decidendi.* (Obilade, A. O. *The Nigerian Legal System* (2005) Spectrum Books (Ibadan) pp. 111).

1.3.5 Legislation

Legislation comprises laws passed by Parliament or the legislative branch of government, that is the State House of Assembly or the National Assembly. They are called Acts at the federal level and Laws at the state level. Legislation may also be exemplified by the Constitution and Subsidiary legislation.

Since the coming into force of the 1992 Constitution in Ghana, many Acts of Parliament have been passed. These are the enactments made by or under the authority of the Parliament established by the Constitution. Their numbers are growing by the day and it is expected that the dire need for law reforms in many areas will continue to increase their scope.

The situation in Ghana is almost the same with that of Nigeria. However, while both countries have federal constitutions, Ghana has a unitary constitution.

1.3.5.1 Nigerian tax laws

The Nigerian tax laws are of statutory sources, comprising Acts of the National Assembly, which are as follows:

a. **Nigeria Tax Act, 2025, No. 7** - This Act provides a unified fiscal legislation, which applies throughout Nigeria to all persons that are required to comply with any provision of any tax law personally or on behalf of another person. It provides for taxation of income, transactions, instruments, and related matters.

It repealed the:

- Capital Gains Act, Cap. C1, Laws of the Federation of Nigeria, 2004;
- Casino Act, Cap. C3, Laws of the Federation of Nigeria, 2004;
- Companies Income Tax Act, Cap. C21, Laws of the Federation of Nigeria, 2004;
- Deep Offshore and Inland Basin Act, Cap. D3, Laws of the Federation of Nigeria, 2004
- The Industrial Development (Income Tax Relief) Act, Cap. 117, Laws of the Federation of Nigeria, 2004;
- Income Tax (Authorised Communications) Act Cap. C14, Laws of the Federation of Nigeria, 2004
- Personal Income Tax Act, Cap. P8, Laws of the Federation of Nigeria, 2004;
- Petroleum Profits Tax Act, Cap. P13, Laws of the Federation of Nigeria, 2004
- Stamp Duties Act, Cap. S8, Laws of the Federation of Nigeria, 2004;
- Taxes and Levies (Approved List Collection) Act, Cap. T2, Laws of the Federation of Nigeria, 2004;
- Value Added Tax, Cap. V1, Laws of the Federation of Nigeria, 2004; and
- Venture Capital (Incentives) Act, Cap. V2, Laws of the Federation of Nigeria, 2004.

It amended

- The Petroleum Industry Act, No. 6, 2021
- Nigeria Export Processing Zones Act, Cap.107, Laws of the Federation of Nigeria, 2004
- The Oil and Gas Export Free Trade Zone Act, Cap. O5, Laws of the Federation of Nigeria, 2004

- National Information Technology Development Agency Act, No. 27, 2007;
- Tertiary Education Trust Fund (Establishment, Etc.) Act, 2011;
- National Agency for Science and Engineering Infrastructure Act, Cap. N3, Laws of the Federation of Nigeria, 2004;
- The Customs, Excise Tariffs, Etc. (Consolidation) Act, Cap. C49, Laws of the Federation of Nigeria, 2004;
- National Lottery Act, No. 7, 2005;
- National Minerals and Mining Act, No. 20, 2007;
- Nigeria Start-Up Act, No 32, 2002;
- The Export (Incentives and Miscellaneous Provisions) Act, Cap. E19, Laws of the Federation of Nigeria, 2004;
- Federal Roads Maintenance Agency (Establishment, Etc.) Act, Cap. F38, Laws of the Federation of Nigeria, 2004;
- The Student Loans (Access to Higher Education) Act, 2024 and
- Cybercrime (Prohibition, Prevention, Etc.) Act, No. 17, 2015.

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a. **Nigeria Revenue Service (Establishment) Act, 2025, No. 4** – This Act provides a legal, institutional, and regulatory framework for the administration of the taxes and revenue that are due or accruable to the Government of the Federation of Nigeria as provided for by the National Assembly. The Act established the Nigeria Revenue Service (NRS) in replacement of the Federal Inland Revenue Service (FIRS), and specifies its functions as well as other related matters.

b. **Nigeria Tax Administration Act, 2025, No. 5** - This Act facilitates tax compliance by taxpayers and optimises tax revenue accruable to the government. It seeks to achieve that by providing uniform procedures for a consistent and efficient administration of the tax laws. It applies to all taxable persons personally or in representative capacity. Among other things, it makes provisions on -\

- Tax identification number;
- Income tax returns for companies;
- Estimated income tax returns for companies engaged in liquefied natural gas;
- Income tax returns for individuals;
- Pay As You Earn;
- Simplified annual income tax returns;
- Returns for upstream petroleum operations;
- Monthly returns of petroleum royalty;
- Annual returns of petroleum royalty;
- Monthly returns of mineral royalty;
- Penalties for violations;
- Returns for Value Added Tax; and
- Offences and penalty for violation.

According to section 145(1) of the Act, it "… shall take precedence over any other laws with regards to the administration, assessment, collection, accounting and enforcement of taxes and levies due to the relevant tiers of Government and if the provisions of any other law are inconsistent with the provisions of this Act, the provisions of this Act shall prevail and the provisions of that other law shall, to the extent of the inconsistency, be void."

c. **Joint Revenue Board of Nigeria (Establishment) Act, 2025, No. 7 –** This Act establishes the Joint Revenue Board, the Tax Appeal Tribunal, and the Office of the Tax Ombudman. The latter is set up to protect the rights of taxpayers and resolve their complaints against revenue authorities quickly so as to build trust in the tax system. Among other objectives, the Act aims to ensure efficient and coordinated revenue administration at all levels of government. It also facilitates cooperation, information sharing, and harmonisation of tax policies as well as practices of the revenue authorities of all such levels. Its application is to reduce multiple-taxation, and resolve conflict of tax jurisdiction of the respective authorities.

1.3.6.1 Composition of Joint Revenue Board

The Board consists of –

a. the Chairman, who shall be the Executive Chairman of the Nigeria Revenue Service;

b. the Chairman of each State Internal Revenue Service and the Federal Capital Territory Internal Revenue Service; and

c. the following *ex-officio* members –

i. a representative of the Ministry responsible for Finance not below the rank of a Director;

ii. a representative of the National Identity Management Commission not below the rank of a Director;

iii. The Chairman of the Revenue Mobilisation, Allocation and Fiscal Commission or its representative not below the rank of Director;

iv. The Comptroller-General of the Nigerian Immigration Service or a representative not below the rank of Assistant Comptroller-General;

v. The Corps Marshall of the Federal Road Safety Corps or its representative not below the rank of Assistant Corps Marshall;

vi. The Comptroller-General of the Nigeria Customs Service or its representative not below the rank of an Assistant Comptroller-General; and

vii. A representative of the Nigeria Revenue Service not below the rank of a Director.

1.3.6.2 Functions of the Board

a. Integration and maintenance of a database of Tax Identification Numbers for every taxable person in Nigeria in collaboration with the Nigeria Revenue Service, State Internal Revenue Service, Federal Capital Territory Internal Revenue Service, Local Government Revenue Committee and other relevant government agencies;

b. Resolution of disputes between various tax authorities on the issue of determination of residency;

c. Advising government on double taxation matters within Nigeria, and in respect of double taxation arrangements concluded or under consideration with any other country, including other taxation matters that have effect in Nigeria;

d. Resolution of disputes between different tax authorities;

e. Maintaining a platform for revenue data collection, integration and exchange of information among various tax authorities in Nigeria;

f. Promoting harmonisation of taxes, levies, rates, charges and other payments, and ensuring uniformity in revenue administration across Nigeria;

g. Advising the Federal and State Governments on introduction of new taxes and existing ones;

h. Providing periodic impact analysis with recommendations on tax framework and capacity building for all tiers of government;

i. Collaborating with relevant agencies to carry out surveys, ascertaining and publishing relevant tax indices and statistics;

j. Recommending, participating, facilitating, or initiating fiscal and tax policy reform in collaboration with relevant bodies;

k. Receiving, collating, analysing and publishing tax expenditure on account of tax waivers, exemptions or incentives granted by each government;

l. Collaborating with tax authorities to undertake or support research or similar measures with a view to stimulating economic development and determining the manifestation, extent, magnitude and effects of tax fraud, evasion or other matters that affect effective tax administration and making recommendations to the government on appropriate intervention and preventive measures;

m. Providing guidance for the accreditation of tax agents by the relevant tax authorities in accordance with the relevant law; and

n. Carrying out any other function as may be assigned to it by an Act of the National Assembly.

1.3.6 Customary law

1.3.6.1 The meaning and development of customary law

Customary law means the rules of law, which by custom are applicable to particular communities in Ghana and Nigeria. They are therefore the customs accepted by members of a particular community as binding upon them. In Nigeria, customary law consists of two classes, namely, ethnic customary law and Islamic customary law (Sharia'h). Ethnic customary law in Nigeria is indigenous. Each system of such customary law applies to members of a particular ethnic group. Moslem law is religious law based on the Moslem faith and applicable to members of the faith. In Nigeria, it is not indigenous law; it is received customary law introduced into the country as part of Islam. Ethnic customary law is unwritten. There are several systems of customary law in the country, each ethnic group having its own separate system. Unlike ethnic customary law, Islamic customary law is principally in written form. The sources of Moslem law are the Holy Koran, the practice of the Prophet (the *sunna*), the consensus of scholars, and analogical deductions from the Holy Koran and from the practice of the prophet. (Obilade, A. O. *The Nigerian Legal System* (2005) Spectrum Books (Ibadan) p. 83).

1.3.6.2 Characteristics of customary law

Ethnic customary law has the following characteristics:

(a) It is largely unwritten;

(b) Members of the community or group to which it relates generally consider it as binding. As such, it is often described as "a mirror of accepted usage";

(c) It is established by proof through assessors or authoritative books if it has not been so used by the courts to be judicially noticed. In the Gold Coast case of *Angu v Atta* (1916) PC thus: "As is the case of all customary law, it has to be proved in the first instance by calling witnesses acquainted with the native customs until the particular

customs have, by frequent proof in the Courts, become so notorious that the Courts take judicial notice of them; and

(d) It is largely flexible.

1.3.6.3 Establishing customary law

Before a custom becomes law and is recognised by the court, the custom must passed the following validity tests:

(a) The repugnancy test: It must not be repugnant to natural justice, equity (fairness) and good conscience. In *Edet v. Essien* the court held that a rule of customary law which gives the custody of a child fathered by a husband to another, merely because the bride price paid by that other had not been returned, was repugnant to natural justice, equity and good conscience;

(b) It must not be incompatible with any existing law; and

(c) It must not be contrary to public policy.

1.3.7 Treaties

A treaty is a formally concluded and ratified agreement between sovereign states. It is an agreement under international law entered into by actors in international law, namely sovereign states and international organisations. A treaty may also be known as an international agreement, protocol, covenant, convention, pact, or exchange of letters, among other terms.

1.4 Summary and conclusion

The chapter surveyed legal systems, particularly, law and its role in society. It also explains the sources of law.

1.5 REVISION QUESTIONS

MULTIPLE CHOICE QUESTIONS

1. In a country with a written constitution, the doctrine of "supremacy of the constitution" means one of the following:

   (a) The constitution is flexible.

   (b) The constitution contains rules and regulations by which the country is administered.

   (c) The constitution is rigid.

   *****(d) The provisions of the constitution are binding on all authorities and persons throughout the country where the constitution applies

   (e) The appointments of public officers by head of government of the country, requires the approval of Senate.

2. Which of the following is not a characteristic of a constitution?

(a) Separation of powers

(b) Supremacy

(c) Fundamental Human Rights

(d) Federalism

*****(e) Informality

3. 'Judicial precedent' is also known as _____

(a) President of the judiciary in Ghana

*(b) Case law

(c) Statute law

(d) Statute of General Application

(e) Laws of the Federation of Nigeria

SHORT ANSWER QUESTIONS

1. Basic rights to which every citizen is entitled within a polity is referred to as _____*****Fundamental rights.

2. The third part of Received English Law in addition to Doctrines of Equity and Statutes of General Application is the _____ ***** Common Law

3. The repugnancy test of validity of customary law requires that for customary law to be valid, it must not be repugnant to natural justice, _____, and_____*****equity and good conscience

ESSAY QUESTIONS

Question 1

State ten (10) maxims of equity.

Solution

Maxims of equity are legal maxims that serve as a set of general principles, which show the way in which equity operates.

The twelve equitable maxims are:

1. Equity will not suffer a wrong without a remedy;
2. Equity follows the law;
3. Where there is equal equity, the law shall prevail;
4. Where the equities are equal, the first in time shall prevail;
5. He who seeks equity must do equity;
6. He who comes into equity must come with clean hands;
7. Delay defeats equity;Equality is equity;
8. Equity looks to the intent rather than the form;
9. Equity looks on that as done which ought to be done;
10. Equity imputes an intention to fulfill an obligation; and,
11. Equity acts *in personam*.

Question 2

Enumerate the sources of Nigerian Law

Solution

The sources of Nigerian law are as follows:

(a) Nigerian Constitution;

(b) Nigerian Legislation;

(c) English law which consists of

- The Received English law comprising the common law, the doctrines of equity and statute of general application in force in England on Jan. 1, 1900
- English law made before October 1, 1960, extending into Nigeria

(d) Customary law; and

(e) Judicial precedent

Question 3

Define Constitution and differentiate between a rigid and a flexible constitution.

Solution

(b) A Constitution is a document containing the rules and regulations including the norms and ethics concerning the ways and manner in which a country is to be administered.

(c) The difference between a rigid and a flexible constitution is based on the terms of the procedure for their amendments. A rigid constitution cannot be changed or amended easily because it requires special process which is not only difficult but is also complicated and the special process is actually laid down in the Constitutions themselves. An example of a rigid constitution is that of the U.S. and that of the Federal Republic of Nigeria. It should be noted that a rigid constitution is necessarily written, but we should also note that not all written constitutions are rigid, that is, a constitution may be written and still remain flexible, as in the case of Ghana in her first Republic Constitution and that of New Zealand.

On the other hand, a flexible constitution is one that can be easily amended as the procedure for its amendment is not cumbersome. Example of a flexible constitution is that of Ghana.

CHAPTER TWO

The court system

2.0 Chapter contents

- Learning objectives
- Role of Courts in administration of justice
- Classification into superior and inferior Courts
- Hierarchy of Courts
- Distinction between criminal and civil liability
- Professional ethics
- Meaning of torts
- Summary
- Revision questions

2.0.1 Learning objectives

Upon completion of this chapter, readers should be able to:

- explain the role of courts in the administration of justice
- identify the two broad groups of courts – superior and inferior
- state the hierarchy and composition of the courts
- discuss the scope of the jurisdiction of each of the courts
- distinguish between criminal and civil liabilities
- explain the torts of vicarious liability and negligent misstatements

2.1 Role of Courts in the administration of justice

The administration of justice is usually the function of the judiciary or the judicature comprising the court system and the judicial personnel that administer justice in these courts. The courts are often viewed as the last resort of the citizen. According to Muntaka-Coomassie, JCA in *Zekeri v. Alhassan* [2002] 52 W.R.N. 119 (CA) at 141, "The court plays an important role in the interpretation of the constitution, protects the right of citizens from encroachment by any organ of the government, and generally has the inherent jurisdiction to determine cases between persons and persons and government." (Asein, J.O. *Introduction to Nigerian Legal System* 2 ed. 2005, (Lagos) p. 169.) The courts are major fora for conflict resolution and the interpretation of laws. Courts are institutions designed for settling disputes. They are concerned with the administration of justice. The processes within these courts and the ease or difficulty with which justice may be obtained have a strong impact on business.

2.2 Classification into superior and inferior courts

Courts may be classified in several ways. But the most important forms of classification are, first, classification into superior courts and inferior courts, and, second, classification into courts of record and courts other than courts of record.

The Courts for a long time have been divided into two main groups namely the superior and inferior/lower courts. The superior courts consist of the Supreme Court, Court of Appeal, Sharia Court of Appeal, Customary Court of Appeal, Federal High Court, and High Courts of the Federal Capital Territory and the States of the Federation. The inferior courts are made up of the Magistrate Courts (Nigeria), the District Court, the Juvenile Court, Customary/Area Courts (Nigeria), and such other lower courts as legislature may by law establish.

2.3 Hierarchy of Courts

2.3.1 Superior Courts

(a) **The Supreme Court**

The Supreme Court of Nigeria is the highest or apex Court in Nigeria. It consists of the Chief Justice as the head and not more than 21 Justices of the Supreme Court (S.230 of the Constitution of the Federal Republic of Nigeria. The Supreme Court is duly constituted for its business by not less than five Justices of the Court. However, for the purpose of reviewing its own decision, it is constituted by not less than seven Justices of the Court. The qualifications for appointment as a Justice of the Supreme Court are high moral character, proven integrity, and not less than fifteen years post-call experience as a legal practitioner.

The Supreme Court of Nigeria has the same status with the Supreme Court of Ghana in terms of composition, powers and requirement for appointment. The Supreme Court of Nigeria is established under Section 230 of the 1999 Constitution of the Federal Republic (as amended).

The Supreme Court has original jurisdiction in the following:

i. Any matter between the Federal Government and the States, or between any two or more States, or the National Assembly and the Federation, or State Houses of Assembly and the Federation;

ii. All matters relating to the enforcement or interpretation of the Constitution and all matters arising as to whether an enactment was made in excess of the powers conferred on Parliament or any other authority or person bylaw or under the Constitution.

However, by S.233 of the Constitution, the Supreme Court shall not have original jurisdiction in criminal matters.

The Supreme Court is the final appellate court. It has supervisory jurisdiction over all courts and over any adjudicating authority and may in the exercise of that supervisory jurisdiction, issue orders and directions including orders in the nature of *habeas corpus*, *certiorari*, *mandamus*, prohibition and *quo warrant o*f or the purpose of enforcing or securing the enforcement of its supervisory power. The Supreme Court may also review any previous decision made or given by it.

(b) Court of Appeal

The Court of Appeal is the next in hierarchy to the Supreme Court. Appeals from the High Court, Federal High Court, Sharia Court of Appeal, Customary Court of Appeal, National Industrial Court, Investments and Securities Tribunal, and other tribunals on the same level go the Court of Appeal.

The Court of Appeal is duly constituted by any three of its Judges and when so constituted the most senior of the Judges presides.

The Court of Appeal is presided over by the President of the Court of Appeal. Its jurisdiction is as follows:

i. It is an appellate Court, by virtue of section 239 of the 1999 Constitution; and

ii. It has original jurisdiction to hear and determine any question as to whether any person has been validly elected into the office of the President or Vice President; or whether their terms of office have ceased, or their offices have become vacant. The qualification for appointment to the Court of Appeal is high moral character, proven integrity and not less than twelve years standing as a lawyer.

A single Judge of the Court of Appeal is empowered to sit alone to hear applications to the Court, which do not involve the decision of a cause or matter before the Court of Appeal.

(c) Federal High Court

The Constitution of the Federal Republic of Nigeria provides for the creation of the Federal High Court. The court has the following criminal and civil jurisdiction by virtue of section 250:

i. The revenue of the government of the federation;
ii. The taxation of companies and other persons subject to federal taxation;
iii. Customs, excise, and export duties;
iv. Banking, banks and other financial institutions, including any action between one bank and another;
v. Any action by or against the Central Bank of Nigeria;
vi. Admiralty matters;
vii. Diplomatic, consular and trade representations matters;
viii. Citizenship, naturalisation, extradition, passport and visa matters;
ix. Bankruptcy and insolvency issues;
x. Aviation and safety of aircrafts;
xi. Arms, ammunitions and explosives;
xii. Drugs and poisons;
xiii. Weights and measures;
xiv. Administration, management and control of the Federal Government and any of its agencies; and
xv. Treason

(d) The High Court

Section 225 of the Constitution establishes a High Court for the Federal Capital Territory, and section 270 provides for each State of the Federation a High Court. The High Court has unlimited original jurisdiction in both civil and criminal matters, and may exercise appellate jurisdiction on decisions of inferior courts such as Magistrates Court, District Court, etc.

A High Court is constituted basically by one judge, and for a legal practitioner to be a judge of the Court, he must be at least ten years at the Bar.

(d) Sharia Court of Appeal

The Nigerian constitution provided that a State may have a Sharia Court of Appeal if it so desires.

The court exercises appellate and supervisory jurisdiction in civil proceeding touching on Islamic person law coming on appeal from the Area Court.

(e) Customary Court of Appeal

The Nigerian Constitution provides that "there shall be for any State that requires it, a Customary Court of Appeal for that State".

The court has appellate and supervisory jurisdiction over proceedings coming on appeal from customary courts on question of customary law.

(f) National Industrial Court

The Constitution of Nigerian establishes the National Industrial Court. The Court comprises the President and 4 ordinary members. All the members must be persons of good standing and who are well acquainted with employment matters in Nigeria, at least one of them being a person who shall have competent knowledge of economics, industry or trade.

Jurisdiction

The court has original jurisdiction to the exclusion of any other court in civil causes or matters relating to or connected with any labour, employment, trade union, industrial relations and matters arising from workplace, the conditions of service including health, safety, welfare of labour, employee, worker and matters incidental thereto.

2.3.2 Inferior Courts

The establishment, jurisdiction and composition of inferior courts are generally at the discretion of the individual States that so desire them. For example, each of the 36 states in Nigeria and the Federal Capital Territory, Abuja has its own hierarchy of inferior courts made up of different grades as the appropriate state legislature may deem necessary to create.

(a) Magistrate Courts/District Courts

In Nigeria, Magistrates Courts are the creation of various States and governed by the various States Magistrates Courts "Laws. Magistrates Courts, like the High Courts, have jurisdiction in civil and criminal matters in most southern states. They also administer both common law and equity, with powers to grant virtually all legal and

equitable remedies, up to certain prescribed limits specified by the law setting them up in each instance. District Courts are on the same level with Magistrates Courts. However, they sit on civil cases only.

Both the Magistrate and District Courts act as Juvenile Court by hearing and determining matters affecting juveniles and also function as family tribunal.

(b) Other Lower Courts

In Nigeria, the lower courts include Customary Courts, Sharia Court, Area Courts in the Northern States. The Customary Court is presided over by a President, while the Alkali presides over Area Court.

2.3.3 Special Courts

Juvenile Court

Juvenile courts are special courts established for the trial of young offenders and for the welfare of the young. The courts exist in different states by virtue of their respective but similar *Children and Young Persons Laws*. The courts are in fact Magistrates' or District courts specially designated and constituted for the purpose of trying juveniles. A child is defined as any person under the age of 14 years, while a young person is any person who gas attained the age of 14 years but is less than 17 years (in the southern states) or 18 years (in the northern states). Unless a juvenile is charged jointly with a non-juvenile, the court generally sits either in a different building or room from that in which it ordinarily sits, or on different days or at different times from those at which it ordinary sittings are held. This is intended to protect the interest of the juvenile and guarantee the requisite special treatment.

(a) Coroners Court

A coroner is a person empowered to hold inquest on the body of a deceased person who appears to have died a violent or an unnatural death, or on the body of a deceased person belonging to any other class specified by the appropriate Coroners Law. There is provision in the law of each State of the federation for coroners' inquests. Every Magistrate is a coroner. In addition, other fit persons may be appointed coroners. A coroner's inquest must normally be held where it appears that a deceased person has died a violent or unnatural death, where the deceased has died a sudden death of which the cause is unknown, where the deceased has died while confined in a lunatic

asylum or in any place or circumstances which in the coroner's opinion makes the holding of an inquest necessary or desirable, and where a prisoner or any person in police custody has died.

(c) Military Courts

There are military courts in the country. Normally, only members of the Armed Forces – the Nigerian Army, the Nigerian Navy and the Nigerian Air Force – are subject to the jurisdiction of the military courts. The Armed Forces Act provides for various offences, the punishment thereof and the mode of trial for erring members of the armed forces. One of the special courts for the trial of persons for more serious offences in the armed forces is the court martial. The system of courts martial was introduced along with military law in Nigeria. The composition, jurisdiction and powers of Court Martials in the three armed forces are provided for jointly in the Armed Forces Act.

A court martial is duly constituted if it consists of the President of the court martial, not less than two other officers and a waiting member.

(d) **Tribunals**

Tribunals are an integral part of the entire adjudicatory system. Created by states, they serve to complement the traditional court system by exercising judicial or quasi-judicial functions. They are often referred to as administrative tribunals although in truth, many of them are better described as judicial since they handle more than mere administrative matters. Statutory or special tribunals may be a more generic description. There is a subtle difference between judicial tribunals and mere administrative inquiries. The latter are fact finding bodies whose assignment may either precede a policy decision by government of be subsequent to a local dispute or disturbance, for instance, a public inquiry to ascertain the immediate and remote causes of a religious disturbance in a particular locality. Unlike a tribunal, such administrative inquiry does not usually extend to the determination of guilt or the imposition of sanctions.

Tax Appeal Tribunal

The Tax Appeal Tribunal is a tax dispute resolution forum established by section 23 of the Joint Revenue Board of Nigeria (Establishment) Act, 2025. It adjudicates on all disputes arising from the application of all tax laws.

1. Composition of the tribunal

a. The tribunal consists of five members appointed by the Minister of Finance, who are designated as Tax Appeal Commissioners. The qualification required of a commissioner is any of those contained in section 25 of the establishment Act as follows:

   i. Requisite qualifications from recognised institutions, with at least 10 years of cognate experience in law, accounting, business administration, finance, economics, or taxation;

   ii. Retired public servant, with at least 10 years experience in tax administration; or

   iii. A member of the organised private sector (registered business association in Nigeria).

b. Each zone of the tribunal shall have a Chairman who shall be a legal practitioner with not less than 10 years cognate experience in tax legislation and tax matters.

c. The Chairman presides at every meeting of the tribunal, while a member appointed by all members presides in the absence of the Chairman.

d. The quorum at any sitting of the tribunal must be three members. (S.24.)

2. Jurisdiction of the tribunal

a. The tribunal has power to adjudicate on tax disputes and controversies that arise from the application of the Nigeria Tax Act, 2025, the Nigeria Tax Administration Act, 2025, or any other tax law made by the National Assembly or the House of assembly of a State.

b. In the determination or resolution of the dispute or controversy before it, the tribunal shall apply any of the laws in (a) above applicable to the matter. (S.29).

2.4 Distinction between criminal and civil liability

The distinctions between criminal law and civil law are as follows:

(a) Criminal law creates offences, that is, acts and omissions that are punishable. Civil law, on the other hand, protects the rights and interests of citizens in their interpersonal relationships;

(b) The aim of criminal law is to punish offenders by way of imprisonment, fine or both. Conversely, civil law aims at compensating an injured or aggrieved person;

(c) The standard of proof in criminal law is proof beyond reasonable doubt, but the standard of proof in civil law is preponderance of evidence or balance of probabilities;

(d) In criminal cases, there is no limitation of time to prosecute the offender, but in civil cases, the limitation time to institute an action ranges from six to twelve years, otherwise, the case is statute-barred;

(e) Prosecution in criminal matters in by the State or government, whereas it is a decision for the aggrieved person to sue the defendant in a civil case;

(f) In criminal law, once the case against the accused person is proved, the court pronounces him guilty and convicts him. Conversely, in civil cases, once a plaintiff proves his case against the defendant, the court pronounces the defendant liable and makes him to pay damages/compensation to the plaintiff or subjects him to equitable orders such as injunction or specific performance; and

(g) The parties to a criminal case are the State and the Accused, but the parties to a civil case are the plaintiff and the defendant.

2.5 Professional ethics Meaning of tort

A tort is a civil wrong. It is an offence without criminal consequences. It is a breach of personal duties fixed by law and. Such duty is owed to persons generally and when it is breached, an action lies in damages, for its remedy with the aim of deterring future breaches.

While it is possible for an action to constitute both a crime and a tort, the remedies available from the legal proceedings on both sides are quite different. A person accused of a crime is prosecuted by the state with the aim of punishing the offender with a conviction and sentence including possible rehabilitation, a civil action seeks to restore to the aggrieved person some compensation for the wrong done him.

A wrong cannot usually be redressed in tort unless it amounts to a legal injury and the aggrieved person can prove that he has suffered some wrong. There are a few torts where actual damage need not be proved and all that an aggrieved person need prove is an infringement of his legal right.

2.5.1 Vicarious liability

This liability falls upon an individual without his fault. It is a liability imposed upon a person by the actions of another person who is under his control. A good example is a Master/Servant relationship. There are some tests used as criteria in determining whether the relationship is a master/servant relationship where vicarious liability applies or a Master and

independent contractor. These include

(i) Whether the employer is a master who shows the employee how to do his work which would distinguish the servant from an independent worker who is trained in his trade or profession and works without supervision.

(ii) Where one person pays the other wages and salaries.

(iii) Where one person has power to hire and fire another.

(iv) Whether the employee is an integral part of the organisation or not.

(v) Whether the employee was acting within the scope of his employment.

The master is not liable for the tort of his servant unless the tort is committed in the course or the scope of the servant's employment. The act must be lawful and incidental to the servant's employment. The master may be vicariously liable if the act is either expressly or impliedly authorised by the master or if the servant performs a duty, which is authorised by the master in a wrongful and unauthorised manner.

There are cases where a master gives the servant instructions and the servant fails to comply with the instructions. Failure of the servant to comply with his master's instructions may sometimes exonerate the master from liability. Thus, in Twine v. Bean's Express Limited, a master forbade a servant from giving lifts to passengers in its vehicles. The court held that the master was not liable for the death of a passenger carried by the driver against his master's instructions.

Where a servant however perpetrates fraud in the course of the master's business, the master could be held liable whether or not the fraud was for his benefit.

Liability for negligent misstatements

The courts have always imposed a duty of care on individuals to avoid making careless statements, which result in harm to other persons, yet it has drawn a distinction between a careless statement that causes physical injury to a person and that causes financial and economic loss. In cases of physical injury, it has long been settled that a duty of care exists. In cases of statements causing financial and economic loss, the position had hitherto been that unless there is a fiduciary or contractual obligation involved, no liability would accrue.

It was in ***Hedley Byrne & Co. Ltd.* v *Heller & Partners Ltd.* (1963) 3 W.L.R. 101** that the English House of Lords laid down an authoritative rule creating a duty of care regarding negligent misstatements even where no fiduciary or contractual relationship exists. In the said case, the plaintiffs who were advertising agents wanted to know whether they could give credit to a company and thereafter sought banker's reference through their bankers. On two occasions, the defendants gave favourable references for the company who shortly after went into liquidation. The court held that except there is an express and effective disclaimer of liability, a negligent mis-statement without fraud could give rise to an action for damages for financial loss suffered by a person who acted on the mis-statements.

2.6 Key provisions of the Cybercrimes (Prohibition, Detection, Prevention, etc) Act 2024

The Federal Government of Nigeria enacted the Cybercrimes (Prohibition and Prevention, etc.) Act, 2024 to combat cybercrimes. Among other things, it makes offences with penalties many acts that include the following:

(a) Identity theft, which attracts imprisonment for a term of not more than 7 years or a fine of N5 million or both such fine and term of imprisonment: Section 22(1);

(b) Offence committed against computer systems, networks and information infrastructure that the President of the Federal Republic of Nigeria designates critical national infrastructure, which is punishable with imprisonment for a term of not more than 10 years without an option of fine, or 15 years if the offence causes grievous bodily harm – Section 5;

(c) Unlawful and intentional accessing or hacking of a computer system, including internet fraud, which is punishable with a fine of up to N5 million or a term of not more than 5-year imprisonment, or both such fine and imprisonment - section 6;

(d) Obtaining computer data, securing access to any programme, commercial or industrial secrets or classified information without authorization, which is punishable by a term of imprisonment for not more than 7 years, or a fine of not more than N7 million, or both such fine and imprisonment.

(e) Unlawful and intentional hindering of the functioning of a computer system by inputting, transmitting, damaging, deleting, deteriorating, altering or suppressing computer data. This is punishable with imprisonment for a term of not more than 2 years or a fine of not more than N5 million, or both such fine and imprisonment. – Section 8.

(f) Phishing, that is, obtaining sensitive information such as usernames, passwords, or credit card details by pretending to be a trustworthy entity in electronic communications. This is punishable with a term of 3-year imprisonment or a fine of N1million, or both - Section 32.

(g) Deliberate and malicious spreading of viruses or any malware (ransomware, spyware, spyware, worms, and trojans) that damage critical information in public, private, or financial institution's computers. This is punishable with a term of 3-year imprisonment or a fine of N1million, or both - Section 32.

(h) Offering for sale, sale, and distribution of hardware, software, or other tools that are employed to commit cybercrime. This is punishable by imprisonment for a term of not more than three years, a fine of not more than N 7 million, or both – Section 28(1).

(i) Cyber-stalking and cyber-bullying, punishable with a fine of not more than N7 million or imprisonment for a term of not more than 3 years, or to both such fine and imprisonment - Section 24;

a. Cybersquatting, that is, registering or using internet domain name or other word that is registered, business name, trademark, owned by an individual or corporate and government with criminal intent so as to interfere with the use by the legitimate owner or prior user. This is punishable with not more than 2-year imprisonment or a fine of not more than N5 million or both such fine and term of imprisonment – Section 25(1);

2.7 The governing principles of the Nigerian Data Protection Regulation, 2019

The National Information Technology Development Agency (NITDA) issued the Nigerian Data Protection Regulation in 2019, pursuant to its enabling power under the NITDA Act 2007. Without prejudice to other procedures in the regulation or any instrument for the time being in force, the regulation has the governing principles (Principle 2.1) of data processing to the effect that,

(a) "Personal data shall be:

i. Collected and processed in accordance with specific, legitimate and lawful purpose consented to by the Data Subject; provided that:

(b) A further processing may be done only for archiving, scientific research, historical research or statistical purposes for public interest; and

(c) Any person or entity carrying out or purporting to carry out data processing under the provisions of this paragraph shall not transfer any Personal Data to any person;

ii. Adequate, accurate and without prejudice to the dignity of human person;

iii. Stored only for the period within which it is reasonably needed; and

iv. Secured against all foreseeable hazards and breaches such as theft, cyber attack, viral attack, dissemination, manipulations of any kind, damage by rain, fire or exposure to other natural elements;

(d) Anyone who is entrusted with Personal Data of a data subject or who is in possession of the Personal Data of a Data Subject owes a duty of care to the said Data Subject; and

(e) Anyone who is entrusted with Personal data of a Data Subject or who is in possession of the Personal Data of a Data Subject shall be accountable for his acts and omissions in respect of data processing, and in accordance with the principles contained in this Regulation."

2.8 Summary

Courts are important institutions within the legal environment. A general study of the courts, in terms of the hierarchy and their general jurisdictions, is required for a proper appreciation of their role. Introduction to the basic judicial processes by which an action could be initiated and the various forms of enforcement would give the candidates a deeper insight to other aspects of the legal system.

In addition, the chapters covered the distinctions between criminal and civil liability. The chapter also introduced candidates to torts, which in no small measure, would contribute to their understanding of the law.

Finally, the chapter offered candidates a basic understanding of the law and regulations on cyber security and data protection.

2.9 REVISION QUESTIONS

Essay Questions

Question 1

Describe the jurisdiction of the Magistrates Courts.

Solution

In Nigeria, the Magistrate Courts are the equivalent of the District Court in Ghana; they are not stated in the Constitution, but are the creation of various states and governed by the various States Magistrate Courts "Laws. Magistrate Courts, like the High Courts, have jurisdiction in civil and criminal matters in most southern states. They also administer both common law and equity, with powers to grant virtually all legal and equitable remedies, up to certain prescribed limits specified by the law setting them up in each instance.

In addition, Magistrates Courts act as Juvenile Court by hearing and determining matters affecting juveniles and also function as family tribunal.

Question 2

Explain vicarious liability in the law of torts.

Solution

Vicarious liability

This liability falls upon an individual without his fault. It is a liability imposed upon a person by the actions of another person who is under his control. A good example is a Master/Servant relationship. There are some tests used as criteria in determining whether the relationship is a master/servant relationship where vicarious liability applies or a Master and independent contractor. These include

(vi) Whether the employer is a master who shows the employee how to do his work, which would distinguish the servant from an independent worker who is trained in his trade or profession and works without supervision.

(vii) Where one person pays the other wages and salaries.

(viii) Where one person has power to hire and fire another.

(ix) Whether the employee is an integral part of the organisation or not.

(x) Whether the employee was acting within the scope of his employment.

The master is not liable for the tort of his servant unless the tort is committed in the course or the scope of the servant's employment. The act must be lawful and incidental to the servant's employment. The master may be vicariously liable if the act is either expressly or impliedly authorised by the master or if the servant performs a duty, which is authorised by the master in a wrongful and unauthorised manner.

There are cases where a master gives the servant instructions and the servant fails to comply with the instructions. Failure of the servant to comply with his master's instructions may sometimes exonerate the master from liability. Thus, in Twine v. Bean's Express Limited, a master forbade a servant from giving lifts to passengers in its vehicles. The court held that the master was not liable for the death of a passenger carried by the driver against his master's instructions.

Where a servant however perpetrates fraud in the course of the master's business, the master could be held liable whether or not the fraud was for his benefit.

Question 3

What is negligent misstatement and what are the effects it may have on a person who rely on it?

Solution

Negligent misstatement is a careless or reckless or inadvertent false statement in circumstances where care should have been taken. A negligent misstatement may have either of the following effects;

- it may cause physical damage to the person who relies on it; or
- it may cause purely financial (or economic) loss to such person.

MULTIPLE CHOICE QUESTIONS

1. The highest court in Nigeria is

   A. Court of Appeal
   B. Federal High Court
   C. National Industrial Court
   *D. Supreme Court.
   E. Customary Court of Appeal

2. The Supreme Court in Nigeria is headed by

A. The Deputy Chairman National Judicial Council
*****B. The Chief Justice of Nigeria
C. The President Court of Appeal (PCA)
D. The Minister of Justice and Attorney General of the Federation.
E. The President of the Nigerian Bar Association.

3. Which of the following is a function of civil law?

A. Punishment to the litigants
*B. Award of damages to the claimants
C. Imprisonment of parties
D. Pronouncement of death sentence
E. Arraignment of offenders

4. The Customary Court of Appeal has appellate and supervisory jurisdiction over proceedings coming on appeal from

A. Magistrate Court
*B. Customary Court
C. Industrial Court
D. National Judicial Council (NJC)
E. Rent Tribunal

5. A master is not liable for the tort of his servant EXCEPT a

*A. Tort is committed in the course of the servant's employment
B. The master knows the servant overtime
C. The servant is loyal to the master
D. The tort is unavoidable
E. The parties have an agreement

SHORT ANSWER QUESTIONS

1. The Justice of the Supreme Court of Nigeria, including the Chief Justice, are appointed by the President on the recommendation of_____

2. The system of law that is indigenous to Nigeria is _____*****Customary Law

3. A person is not qualified for appointment as a Justice of the Court of Appeal except he has been qualified to practice as a legal practitioner in Nigeria or Ghana for at least..... years. *****12 years

CHAPTER THREE

Law of contract

Chapter contents

- Learning objectives
- Introduction
- Definition and elements of contract
- Offer and acceptance
- Consideration
- Intention to create legal relations
- Capacity to enter into contract
- Privity of contract
- Summary
- Practice questions

3.01 Learning objectives

Upon completion of this chapter, readers should be able to:

- explain the legal meaning of a contract
- identify the essential elements of contract
- distinguish offer from invitation to treat
- explain acceptance
- discuss the scope of consideration
- demonstrate an understanding of the intention to create legal relations
- explain the concept of capacity
- discuss the scope of the forms and contents of a contract

3.0 Introduction

The law of contract is at the centre of most human activities. All of us, within a day, make several contracts without sometimes even realizing that. When you engage somebody to weed around your house for pay, you have established a contractual relationship. When you enter a bus going to a particular place along a particular route and you pay the fare, you have made a contract with the party running the service. When you put an item on sale at a

particular price and another person agrees to buy it at that rate you have both entered into a contract. Since contracts regulate a lot of our activities it is necessary to have an appreciation of it. This will make it easy for parties to know the obligations they have imposed on themselves. Parties will then be in no doubt about what their liabilities are on failure to fulfill their part of the contract and what will be their remedies if the other party is in breach.

3.1 Definition and elements of contract

3.2.1 Definition of contract

Whenever two or more people undertake to engage in an activity for which either of them may resort to the law for it to been forced if a party fails to perform, a contract is said to have been formed. A contract has therefore been simply referred to as a promise or set of promises, which the law will enforce.

3.2.2 The essential elements of contract

For a valid contract to be in place there must be some essential elements. These are agreement, consideration, an intention to create legal relations, form, capacity and legality. There is the requirement that there must be two or more parties to the contract who have agreed to it. Such agreement must have been entered into freely. The parties must also give promises that are supported by consideration. It means each party must give or do something for the other. The intention to create legal relations means that each party is ready to have his or her promise enforced by the law. Some contracts must also meet a certain form; they will only be valid when they are in writing. Again only persons who are legally competent or have capacity can enter into a contract. Finally the agreement must not be for an illegal purpose and also not contrary to public policy.

3.2 Offer and acceptance

3.3.1 Offer

Whenever a person proposes terms to another person and shows willingness that if that person accepts those terms he is ready to contract with him, then those terms constitute an offer. For example if Kofi tells Adenuga that the will sell his house to him at a certain price, that constitutes an offer which will bind him should Adenuga agree to buy the house on the same terms. An offer is thus a definite promise made by one party with the intention that it shall be binding on him once it is accepted by the party to whom it is addressed. Generally an offer may be made expressly by words, but may also be implied from the conduct of the person making the offer (the offeror). An offer may be directed to an individual, a group of persons or the world at large. It means an offer has to be communicated to the Person it is intended for (the offeree). It is said that if one is ignorant of an offer he cannot accept it. There are a number of ways by which an offer may be terminated. These include non-acceptance of the offeror withdrawing the offer before it is accepted which amounts to a revocation and the offeree not accepting the terms of the offer, which is a rejection. Where an offer is made and it is to be accepted at a particular time, failure to do so terminate the offer by lapse of times. The death of the offeror or offeree before acceptance terminates the offer. Even death after acceptance, where personal service is involved terminates the contract.

3.3.2 Invitation to treat

This precedes an offer. It is thus a preliminary communication, which indicates a willingness to enter into negotiations. It is an invitation to the person to whom it is directed (the recipient) to make an offer. It is therefore described as an offer to negotiate or an offer to receive an offer. An invitation to treat cannot be accepted to bring a contract into being. Circumstances which amount to invitation to treat include advertisements, display of goods for sale, auctions and tenders. When there is an advertisement it is only intended to be an invitation to treat i.e.to negotiate. In **Partridge v Crittenden [1968] (WLR) 204** where an advertisement was put in the

periodical 'Case and Aviary Birds' which stated' Bramble finch cocks, bramble finch hens, 25shillings each, a reader wrote in for a hen which Partridge sent to him. The appellant was charged with unlawfully offering for sale a wildlife bird contrary to the Protection of Birds Act. His conviction was quashed by the Divisional Court on the ground that he had made no offer for sale, merely an invitation to treat.

Goods on display with price tickets attached in a self services to re exemplify an invitation to treat. Any potential customer who enters the shop is invited to make an offer. The picking of the goods by the customer and the presentation to the cashier constitute the offer. The cashier then has an option to either accept the offeror reject it. If he accepts the offer a contract comes into being but if he rejects it no contractual obligation would be imposed. In **Pharmaceutical Society v Boots Cash Chemists Ltd [1953] (QB 40)**, the defendants, Boots, operated a self-

Service supermarket with a Pharmacist on hand, to supervise the sale of specified drugs, which could only be lawfully sold under him. Two customers selected such drugs from the shelves and put them in a wire basket provided by the defendants. The Pharmaceutical Society brought an action alleging an infringement of the Act. The Court of Appeal held that the display was merely an invitation to treat. The customer, by presenting the goods at the cash desk, made an offer to buy, which the cashier, under the pharmacists supervision could accept or reject.

When an auctioneer makes a request forbids it amounts to an invitation to treat. The bids that are made in response to the request constitute offers. It is when a bid is accepted that a contract is made. In **Payne v Cave (1789) 3Term Rep.148, KB**, Cave withdrew his bid at an auction before the fall of the auctioneer's hammer. It was held that the bid was the offer, the auctioneer only made an invitation to bid. As Cave's offer had been withdrawn before the auctioneer had accepted it, there was no contract.

Invitations for tender are also invitations to treat. The tender is the offer and it may be accepted or rejected. In **Spencer v Harding (1870) L.R. 5 C.P. 561**, the defendants sent out a circular inviting tenders for the purchase of certain stock-in- trade. The plaintiff's tender proved to be the highest submitted, but the defendants refused to sell to them. Judgment was given to the defendants because a tender itself is an offer, which the party who invited it, may or may not accept. The defendants could only have been bound if they had promised to sell to the highest bidder.

3.3.3 Acceptance

It is the expression of as sent to the terms of the offer made by the person to whom the offer was made (the offeree). In the example where John offered his house to Adenuga at a certain price, the agreement by Adenuga to buy the house on those terms constituted acceptance. An offer is not accepted by mere silence on the part of the offeree. Acceptance has to be communicated to the offeror. It is not deemed to be communicated until it is actually brought to the notice of the offeror. When acceptance is by a return promise its performance leads to a unilateral contract. In instances where the offeror authorizes acceptance by post, postage of a

properly addressed letter of acceptance indicates proper communication of acceptance. The offeree may revoke his acceptance at any time before it is communicated to the offeror. Since an acceptance cannot be made in ignorance of an offer, where two parties each simultaneously make identical offers to each other they amount to cross offer which do not conclude a contract.

It is important at this stage to make a distinction between acceptance and a counter offer. As indicated earlier, on acceptance connotes assent to the terms of theo ffer. In a counter offer, the offeree's reply indicates a willingness to be bound on terms different from those contained in the offer. In **Hyde v Wrench (1840) 3 Bea v 334**, Wrench offered to sell his farm to Hyde for £1000. Hyde offered to buy it for £950. Wrench wrote to reject the counter-offer. Hyde then purported to accept Wrench's original offer of £1000 and sued the farm. The Court held that the counter offer of £950 destroyed the original offer which could not then be revived by Hyde. A counter-offer thus puts an end to the previous offer

and is infact a new offer which the original offeror (now the offeree) may accept to bring a contract into being or reject and terminate the negotiations.

3.3 Consideration

3.4.1 Definition

Consideration is something of value in the eye of the law. It is also seen as the price, which need not be monetary, paid by each party for the promise of the other. In **Curie v Misa (1875) LR10Ex153**, it was stated that "…valuable consideration in the sense of the law, may consist either in some right, interest, profit or some forbearance, detriment, lossor responsibility given, suffered or undertaken by the other".

It is also important to know that a contract is generally not binding unless it is supported by consideration, but a contract under seal binds the parties without the requirement of consideration. In other words, a contract under seal may dispense with consideration. A contract under seal exists where the parties sign, seal, and deliver the contract document. Such a document is known as a deed, or specialty contracts, or a formal contract. The law takes these kinds of contracts very seriously. In the olden days, red wax and signets were used to seal documents, but nowadays little round redstick or seals are used.

The contracts required by law to be under seal include conveyances, gratuitous grants of property, leases for more than three years, power of attorney and transfer of Nigerian ships or shares in them.

It must be noted that unless the law requires a contract to be under seal, it may be in writing or oral form (by parol). In both cases, it is mandatory to support it with consideration.

The Nigerian Law requires hat, for certain contracts to be enforceable, they must be in writing. These include bills of exchange, promissory notes, hire purchase agreements, contracts for the transfer of shares in a public company, marine insurance contracts, bills of sale, and acknowledgments of debts, which have been barred by the Limitation Laws.

Contracts for the sale or other disposition of land or of interests in land and contracts of guarantee must also be in writing, supported by consideration. Such written evidence must acknowledge the existence of the contract, contain all the material terms, and be signed by at least the person to be held liable on it.

3.4.2 Types of consideration

Consideration may be executory or executed. Under executory consideration, valuable consideration may be provided by mutual promises, which will give rise to a bilateral contract. It is a promise to do or forbear from doing some act in the future. The whole transaction remains to be performed in the future.

Executed consideration is an act by one party in exchange for a promise made or an act done by the other. A promise for an act gives rise to a unilateral contract as in **Carlill vs. Carbolic Smoke Ball Company [1893] 1 QB 256**. An advertisement by the company promised to pay one hundred pounds to anyone who caught influenza after using the carbolic smokeball as directed. Mrs. Carlill purchased the ball and used it as directed but contracted influenza. She therefore sued for the one hundred pounds. The Court of Appeal decided that the Company had made an offer to the whole world, which would ripen into a contract with anybody who bought and used the ball in the specified way.

3.4.3 General rules

Past consideration is no consideration. It is a promise, which follows a completed act. Such a promise is independent of the act or service performed. It is therefore not enforceable. **In Re McArdle [1951] Ch 669**, on the death of McArdle his widow under his will obtained a bungalow for her lifetime and their children were to become owners after that. Monty McArdle and his wife, Majorie who lived there, made extensive repairs to the bungalow after which all the children wrote to Majorie promising to pay her 'in consideration of your carrying out certain alterations and improvements'. The money was not paid and the widow died. The Court of Appeal held that, as all the work had been finished before the promise was made, the work was past consideration and so there was no obligation to pay. A promise to perform an existing obligation is not good consideration but a promise to do something different is good consideration. Thus if a creditor agrees to take a smaller sum of

money in full satisfaction, its payment is not a satisfaction of an agreement to pay a larger sum. **In Pinnel's Case (1602) 5 Co Rep 117** it was stated that 'payment of a lesser sum on the day it is due in satisfaction of a greater cannot be any satisfaction for the whole. The payment and acceptance before the day in satisfaction of the whole would be good satisfaction'.

The doctrine of promissory estoppels adds a new dimension to consideration. It applies only to a promise made between parties who are already in a contractual relationship. Where one of the parties makes a promise which is intended to be binding and is relied on and acted upon, the promissory would be prevented from enforcinghisoriginalrightssinceitwillamounttohisgoingbackonhispromise. In **Hughes v Metropolitan Railway Co. (1877) 2 App. Cas. 439 H.L**., the appellant landlord gave the respondents six months in which to repair some houses as they were expected to do under their lease. They later started negotiations to purchase the freehold and based on that did nothing about the repairs. The negotiations, however, failed two months after commencement and the appellant when the original six months were up brought an action to eject the respondents for their failure to repair. The House of Lord sheld that the appellant must fail since the respondents had relied on the negotiations as being in effect, a promise that the appellant landlord would not enforce his demands while the negotiations continued. The six months notice must run from the failure of the negotiations. Consideration must move from the promisee. Its import is that the promise must provide the consideration. It is based on the principle that a stranger to a contract cannot sue on it. This is the doctrine of privity of contract. In **Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd [1915] AC 847, HL**, the appellants sold some of their tyres to Dew & Co. Under a contract whereby they undertook not to sell the tyres below Dunlop 'shit prices and agreed, as Dunlop's agent to obtain a similar undertaking from other traders. Dew & Co sold some of the tyres to the respondents who agreed not to sell below Dunlop's list prices. They broke this contract and Dunlop sued for its breach. They failed. Dunlop could not enforce the contract because no consideration moved from them. The appellants were not a party to the contract between Dew & Co and the respondents and only a person who is a party to a contract can sue on it.

3.4.4 Modifications

This rule is however subject to several exceptions. Under the common law, exceptions cover the trust device, land, agency, assignment and insurance matters. Some statutory provisions have reinforced these exceptions.

3.4 Intention to create legal relations

Parties intend to create legal rights and duties out of their agreement and thus to invoke the assistance of the ordinary courts on breach of the contract. The law determines whether or not there is an intention to create legal relations through the aid of presumptions. In a given set of circumstances, the law presumes a certain intent. In a domestic or social setting or act of friendship there is are but table presumption that the parties do not intend to create legal relations. In a commercial setting there is are but table presumption that the parties intend to create legal relations. Both presumptions are rebuttable, that is the assumption stands until the contrary can be proved.

3.5.1 Domestic and social agreements

Domestic arrangements are made between husband and wife, parent and child and among relatives. Within this class the rule is that there is are but table presumption that the parties do not intend to create legal relations. Those arrangements or many of them do not result in contracts at all because the parties did not intend that they should be attended by legal consequences. In **Jones v Padavatton [1969] 1WLR 328**, Mrs. Padavatton was working as a secretary in the United States. Her mother, Mrs. Jones, offered to provide her daughter's up keep if she would return to England and read for the Bar. Her, daughter accepted. A little later, Mrs. Jones offered in addition to provide a house for her daughter, some of the rooms to be left to tenants. Mrs. Padavatton accepted this, too, but later she became so unco-operative that two years later, Mrs. Jones claimed possession of the house. Her daughter resisted this on the ground that her mother was contractually bound to this arrangement. It was held that Mrs. Jones was entitled to possession. The original agreement was motivated by the mother's desire for her daughter to succeed at the Bar. They were originally on good terms and they had no intention to enter a “stiff contractual operation.”

The presumption that domestic arrangements are not intended to be legally binding is displaced where the spouses are not living together inamity at the time of the agreement. It does not apply where the spouses are about to separate or are separated or are contemplating a divorce or are divorced. Whether there is contractual intention or not may be ascertained from the words used in the agreement or the surrounding circumstances of the case. **In Merritt v Merritt [1970] 1 WLR 1121**, CA the defendant left his wife to live with another woman. The matrimonial home which was in their joint names was subject to an outstanding mortgage. Mr. Merritt, at his wife's insistence, signed a document which stated: 'In consideration of the fact that you (the wife) will pay all charges in connection with the house…until such time as the mortgage repayment has been completed...I will agree to transfer the property into your sole ownership.' Mrs. Merritt paid off the mortgage, but her husband refused to transfer the house to her. The Court of Appeal held that the usual presumption as to agreements between spouses living happily together did not apply when they were unhappy and separated, or about to separate and the written document was therefore a binding contract, which Mr. Merritt must comply with.

Social agreements are those between parties who are not relatives. They are largely acts of friendship. Many social arrangements do not amount to contracts because they are not intended to be legally binding.

3.5.2 Commercial agreements

In commercial transactions, there is a strong presumption that the parties intend to create legal relations. The parties intend legal consequences to follow. In **Edwards v Skyways Ltd [1964] 1 WLR 349** the defendants declared the plaintiff, one of their pilots, to be redundant, and ultimately agreed to pay all pilots who were made redundant an exgratia sum. The defendants then refused to make any such payments (mainly because of the large number of redundancies). The plaintiff brought an action for breach of contract. The Court held that in business relations, the presumption is that the parties intend to create legal relations by their agreements.

The strong presumption may be displaced either expressly or impliedly. To oust expressly the presumption, clear words must be used. The burden of rebutting contractual intention in commercial transactions is an extremely difficult one and is not lightly taken. In **Rose and Frank Co. v Crompton Brothers [1925] AC 445 HL**, the appellants, dealers in carbon paper and the respondents signed a document by which the appellants, were appointed sole agents of the respondents to sell their products in the United States. The document concluded 'This arrangement is not entered into, nor is this memorandum written, as a formal or legal agreement… but…is only a definite expression and record of the purpose and intention of the…parties concerned, to which they each honourably pledge themselves…' The respondents later ended the agreement, and the appellants sued for its enforcement. It was held that the usual presumption that commercial agreements constitute enforceable contracts was rebutted by the clear words used, although individuals "orders given and accepted were enforceable contracts.

3.5 Capacity to enter into contract

Capacity is the ability to incur legal rights and obligations. The law presumes that everyone is competent to bind himself to any contract he chooses to make provided that it is not illegal or void on public policy grounds. A few classes of people are under a disability. These are infants or minors, mentally disordered persons or lunatics, drunken persons and corporations or companies.

As a general rule contracts made by a minor with an adult are binding on the adult and not the minor. There is a protective principle in a minor's contractual capacity. Valid contracts for minors are divisible into contracts for necessaries and beneficial contracts of service or contracts for employment.

Necessaries are articles, which are reasonably necessary to the minor in terms of his status in life. A minor is only liable when the goods are suitable to his condition in life, necessary to his requirements at the time of delivery. Goods will not be necessaries if them in or was already well supplied with such goods.

A minor must pay a reasonable price for necessities supplied to him. In **Nash v Inman [1908] 2 KB 1**, the defendant, an undergraduate at Cambridge, bought eleven fancy waist coats from the plaintiff tailor. At the time he was adequately provided with clothes. It was held that the waistcoats were not necessaries and the defendant was not liable to pay for any of them.

Not every contract for the benefit of a minor is binding on him. However, contracts for his education, service or apprenticeship or for enabling him to earn his living are binding unless they are detrimental to the interests of the minor. In **Doyle v White City Stadium Ltd [1935] 1 KB 110 CA**, the plaintiff was an infant professional boxer. He entered into a contract with the defendants to box at the White City. The contract was made subject to the Rules of the British Boxing Board of Control, one of which provided that if a boxer were disqualified he would lose his purse. Doyle was disqualified for hitting below the belt, and the purse was with held. The plaintiff sued for it. The Court of Appeal held that, taken as a whole, his contract was advantageous to him, a sit allowed him to get a licence to Box which allowed him to become proficient in his chosen career. The contract was therefore binding and his action failed

In **De Francesco v Barnum [1890] 45 Ch. D. 430,** an infant and her mother executed a deed by which the infant was to be apprenticed to the plaintiff or seven years in order to learn stage dancing. They further agreed that the infant would not marry; would not accept any professional engagements during the apprenticeship without the plaintiff's consent, and would get no pay unless the plaintiff actually employed her (which he was not bound to do). After a fair trial, the plaintiff could end the contract if the infant was unsuitable. The infant broke the agreement by accepting a contract to dance for the defendant. The plaintiff sued. He failed. The deed was unreasonably harsh and could not been forced against the infant or her mother.

Certain contracts are voidable in that they are binding on a minor unless he repudiates them during his minority or within a reasonable time after he comes of age. They cannot been forced against him during his minority but after he attains full age, he will be bound, unless he repudiates them within reasonable time. Such contracts include leases, partnerships and shareholding in a company.

Companies or corporations that act beyond their powers are said to have acted 'ultra vires'. As a general rule, an *ultra vires* contract by a company is unenforceable. However, the current law on the subject is that a company cannot avoid a contractual obligation on ground of *ultra* vires because it must know what it lacks authority to do. The law on the subject long before the Companies and Allied Matters Act,2020 was as decided in **Ashbury Railway Carriage Co v Riche (1875) LR 7 HL 653.** In that case, the objects of the appellant company, which had been established by statute, were "to make and sell, or lend, or hire, railway carriages and wagons, and all kinds of railway plant, fittings, machinery and rolling stock; to carry on the business of mechanical engineers and general contractors; to purchase, lease and sell mines, minerals, land and buildings; to purchase and sell as merchants, timber, coal, metals and other materials; and to buy and sell any such materials on commission, or as agents. "The company purchased a concession for building a railway in Belgium and contracted the respondent, Riche, that he should construct the railway track. The appellants subsequently repudiated the contract on the ground that it was *ultra vires*. The respondent sued. The House of Lords held, that the contract for the construction of a railway was indeed ultravires and void as it was not a type envisaged in the objects of the company.

3.6 Privity of contract

The principle of privity of contract is that a person who is not a party to a contract cannot bring action on it. Except expressly stated in the contract, a person who is not a party to a contract cannot enjoy the benefit or suffer the burdens of the contract, because it is a relationship that exists between parties to the contract.

There are however exemptions to this rule, and they are as follows:

a. Insurance contract

Under third party motor vehicle insurance contract, a third party can sue the insurance company for loss or injury sustained in vehicle accident caused by the insured;

b. Trust

A trustee that holds property in trust for another can sue in respect of the trust property;

c. Inheritance under will

Although a legatee or beneficiary under a will is not a party to the will, he may sue on the legacy or bequeath;

d. Agency

Under the law of agency, a principal may sue or be sued in respect of transactions entered into on his behalf by his agent;

e. Negotiable Instruments

In a situation where a person stands as a guarantor to another in deals with negotiable instruments, the guarantor can be sued in substitution of the person involved in the contract;

f. Chose in action

Under legal assignment, the assignee of chose in action on a debt or financial liability may sue the original debtor; and

g. Restrictive covenants

This occurs in land law and relates to restriction as to the purpose the land is to be used for as agreed between the original owner and the first purchaser. This will be binding on the subsequent purchaser.

3.7 Summary

Since contracts constitute an integral part of human existence, it is worthwhile to have a fair understanding of them. It was therefore necessary to introduce candidates to the essential elements of contract as well as capacity to enter into contract and privity of contract so as to let them have a full appreciation of them. The issues of enforceability of contracts and the obligations imposed on parties have to be well appreciated to avoid liabilities.

CHAPTER FOUR

Law of contracts - II

4.0 Chapter contents

- Learning Objectives
- Introduction
- Conditions and warranties
- Exemption and limiting terms
- Illegal contracts
- Vitiating elements in contract
- Termination or discharge of contract
- Summary
- Revision questions

4.0.1 Learning objectives

On completion of this chapter, readers should be able to:

- understand the form and contents of a contract
- identify the vitiating elements of a contract
- state and explain the remedies for breach of a contract
- understand the consequences of illegality in contracts
- explain the various methods by which a contract may be discharged

4.1 Introduction

In law, parties are to make their contracts. The Courts will not make the contracts but will only interpret them as discernible from the terms the parties have put in their contracts. The terms of a contract may be express or implied. They are express when the parties state clearly what they want in their contract. Otherwise, they are implied when, though not expressly stated, they are read into the contract to give business efficacy to it. For instance, certain terms are implied into a sale of goods contract.

4.1.1 Conditions and warranties

The actual terms of a contract may be conditions or warranties. Of the two terms, conditions are more fundamental than warranties. In other words, a very important term in a contract is called a "condition". A term of lesser importance is called a "warranty". For a breach of condition, the buyer can cancel or repudiate the contract. For a breach of warranty, he cannot, but may sue for damages.

A Condition is an essential term which goes to the root of the contract, the breach of which entitles the affected party to repudiate the contract. It is thus an undertaking that a certain state of affairs exists or will exist or a promise that a certain thing shall or shall not be done, the fulfilment of which undertaking is very fundamental to the contract.

A Warranty, on the other hand, is an agreement on goods, which are the subject of a contract, but is not the main purpose of the contract. Its breach, gives rise to a claim for damages only, but not a right to reject the goods or treat the contract as repudiated.

4.2 Exemption and limiting terms

These are terms inserted into a contract by parties to limit or exclude the obligations that the undertaking would have attracted. They are mostly found in the so-called standard form contracts, i.e. contracts where terms are contained in printed forms and are used for all contracts of the same kind. Examples are contracts for laundry and dry cleaning services, hotel accommodation as well as journey by land, rail, air or sea. They exempt the supplier or provider from his contractual liability, and their purpose is to deprive the consumer of compensation ordinarily due to him for loss or injury arising from the contract. The courts do not like exemption clauses because they go against the spirit and intent of a contract. They enforce them only if the party for whose benefit it was made can satisfy them about the following:

(1) **That it was a term of the contract:** There are two ways by which an exclusion clause can enter a contract and become a term of the contract, and these are:

(a) By Signature: The general rule is that a man is bound by what he signs whether or not he has read it, and if he has read it whether or not he

understands it, except when the injured party successful plead *non est factum* (it is not my act) **L'estrange v Graucob (1934)**

(b) By Notice: The need here arises, where the clause is not on a document to be signed, but in some other form such as a poster or sign on a wall or a ticket. Such notice given must be "effective" notice. For example, in the ticket case, was the ticket a contractual document or just a ticket? Was it folded? In addition, it must be given pre-contractually, i.e. before the contract is formed, and the other party must have had the opportunity to see and recognise it as a term of the contract. (See **Chapelton v Barry U.D.C. 2 (1940); Olley v Marlborough Court (1949); Thornton v Shoe Lane Parking (1971).**

It is also important to note that a notice of a clause is effectively given if both parties are in the same trade and such clauses are widely known and in common use in that trade; and

(2) **That it covered the damage complained of by the plaintiff - Baldry v Marshall (1925).**

4.3 Illegal contracts

A contract that is illegal is absolutely void. It may be illegal because it is forbidden by law, or because the Courts will not enforce it because of the overriding consideration of public policy. Thus, some contracts are prohibited by statute, some are prohibited at common law. These are properly called "illegal contracts". Some contracts are not completely prohibited, but they are denied full validity, either by statute or at common law. These, we call "Void Contracts".

(1) Illegal Contracts are of two broad types, namely:

(a) **Contracts prohibited by statute: T**he (then in force), prohibited the buying and selling of gold by unauthorised person.

(b) **Contracts prohibited at common law:** These set of contracts are basically prohibited under the concept called "Public policy". Although no new categories are created there are however seven settled categories:

(i) Contracts to commit a crime, tort or fraud: In **Beresford v Royal Insurance Co**. Ltd., 'R' shot himself a few minutes before his life insurance policy expired. The court held that it is against public policy to allow a man benefit his estate by committing a crime. Hence, the sum assured was not recoverable. Likewise in **Allen Vs Rescous (1676)** the Plaintiff paid the Defendant 20shillings to assault and evict another person, which the defendant failed to do. The Court held that the Plaintiff could not recover his money.

Contracts involving maintenance or champerty fall into this class i.e. contracts where by a person promises to support another improperly in bringing an action at law;

(ii) Contracts prejudicial to the safety of the country (e.g. trading with the enemy in wartime);

(iii) Contracts prejudicial to the Country's foreign relations, e.g. to trade with South Africa during the apartheid regime was contrary to Nigeria's foreign policy;

(iv) Contracts prejudicial to the administration of justice: A contract not to prosecute, or to compromise criminal proceedings is illegal unless the proceedings could have been initiated in civil law for torts.

In addition, a contract where an accused person indemnifies a person who has got bail for him is illegal.

(v) Contracts prejudicial to honesty in public life, (e.g. trying to buy a merit award or offer a bribe for it). In **Parkinson v College of Ambulance (1925)**, Parkinson gave the secretary of a charitable organization $3000 on the understanding that he would secure a knight hood for him. The title was not forthcoming and he sought to recover his money. It was held that the agreement was illegal, and Parkins on could not recover.

(vi) Contracts designed to defraud the revenue: In **Miller Vs Karlinski (1945),** an agreement between employer and employees to hide part of their salary as expenses in order to avoid paying tax was held illegal, thus the employee could not reclaim salary arrears from the employer.

(vii) Contracts to promote sexual immorality: In **Alake v Oderinlo (1975)**, the defendant, a woman who was married under customary law, promised to marry the plaintiff and received ₦100 from him to enable her divorce her husband. It was held that since the agreement tended to break up the existing marriage and encourage immorality it was void.

Likewise, in **Pearce v Brooks (1866),** a prostitute made a form of hire purchase contract for a carriage to assist her in her trade. The seller knew what she wanted it for. The court held that he could not enforce the contract against her.

4.3.1 Consequences of illegality

The general rule is that no action could be successfully brought by a party to an illegal contract, i.e. *ex turpi causa non oritur actio.* Thus:

(a) No action will lie, for the recovery of the money paid or property transferred under an illegal contract as in Parkinson's case above.

(b) No action will lie for a breach of an illegal contract – **Pearce v Brooks, Beresford v Royal Insurance Co. Ltd, Allen v Rescous;**

(c) Where part of an illegal contract would have been lawful by itself, the court will not sever the good from the bad; and

(d) Any contract that is collateral to the illegal contract is also tainted with illegality and is treated as being illegal even though it would have been lawful by itself.

There are, however, exceptions to this general rule of non-recovery: A party to an illegal contract may sue to recover money paid or property transferred as follows:

(a) Where the parties are not *in pari delicto,* i.e. are equally at fault:
Where a party is innocent of the illegality as may be where he does not know the purpose for which the other party is entering the contract, as where the owner of the coach in the **Pearce v Brooks** case could have recovered where he did not know the purpose for which he was hired by the defendant;

(b) Where a substantial part of the illegal act has not been performed, a truly repentant party may recover; and

(c) Where it is possible to sue without relying on the contract itself; i.e. suing in tort for conversion.

4.3.2 Void contracts

A contract, which is void, does not give rise to rights and obligations, but the full consequences of illegality are not present.

(1) **Contracts declared void by statute**: A good example is wagering contracts. The attitude of the legislature to these contracts can be seen in the Gaming Act 1845, Section 18 "All contracts or agreements, whether by parol or in writing, by way of gaming or wagering shall be null and void; and no suit shall be brought or maintained in any court of law and equity for recovering any sum of money or valuable thing alleged to be won upon any wager or which shall have been deposited in the hands of any person to bid the event to which any wager shall have been made". i.e. that the loser cannot be made to pay and a stakeholder cannot be forced to handover money left with him. The Act also prevents agents recovering money or commission paid out or earned by them on behalf of a principal.

(2) **Contracts void at common law**

(a) **Contracts in restraint of trade:** The common law by tradition declares all contracts in restraint of trade as being contrary to public policy. This tradition protects the right to trade freely with goods, money and labour. Any restriction or limitation is prima facie void. It is a contract in restraint of trade.

However, if the restrictions are regarded as being reasonable then it may be upheld in spite of being void.

Thus, obviously, if the restraint is unreasonable, the contract or at least the offending part of it remains void. In assessing reasonableness there, the courts study the equality of the bargaining power between the parties, the extent of the interest being restricted and the extent of possible injury to the public interest.

These restraint clauses appear in 3 main kinds of contract:

(i) Contract between the seller of a business and the buyer where the buyer will seek to prevent the seller from setting up a business again, nearby, that will compete with the business he bought from him (or else he might be able to woo back all his old customers). **Nordenfelt v Maxim Nordenfelt**

(ii) Contracts between employers and their employees in order to prevent their servants working for competitors and taking trade secrets to them, or setting up business to compete with his employer and otherwise acting to the employer's disadvantage generally. The issues of the duration of the restraint and the area to be affected in terms of distance are relevant and material, but more important is the nature of work the employee concerned was doing. For example if he was a chemist who knows the secret formula responsible for the large sales of the company's beverage, the court may uphold a restraint which prevents him from taking such to a rival company, however if he was an accounting technician the courts maybe unwilling to uphold such restraint except where it would be prejudicial to the financial wellbeing of the company as during the times of mergers, amalgamations, etc. See **Pearce v. Cullen (1912),** in which the Courts held a covenant restraining a grocery store counter-hand from working for competing firms within a radius of 2 miles of any of the employer's shops for a year as an unreasonable restraint.

(iii) Soul ties – A garage, a public house, or a food canteen will agree that, in return for financial advantages of one kind or another, it will sell only the product of one petrol company, or brewery, or soft drinks or beverage company “tied” to it.

These agreements are in restraint of trade and are, *prima facie*, void. However, the Courts are willing to allow them, provided they are reasonable. **Esso Petroleum v. Harper's Garage (1968).** The Defendant owned 2 garages. In return for lower prices for petroleum supplied and also for mortgage facilities, they were both tied to the company. One tie was for 4 years 5 months, the other was for 21 years. The former was held to be reasonable and the latter unreasonable.

(b) Contracts to oust the jurisdiction of the courts: If an agreement seeks to prevent access to court, the agreement is void to that extent. If however, access is not prevented but only made subject to an arbitration procedure first, this will usually be permitted, but the courts will not allow themselves to be excluded altogether.

(c) Contracts prejudicial to the sanctity of marriage: These include agreements restraining the liberty to marry, procuring a marriage for a fee, encouraging immorality or infidelity in an existing marriage, and promising marriage after a future separation. They are all against public policy and therefore void.

(d) Contracts impeding parental duties: A contract by which a party deprives himself of the custody of his child is void. However a court order to the same effect is binding.

4.3.3 Consequences of void contract

Generally, only the part that offends against the various rules is affected. This is severed from the rest of the contract. What remains is then enforced.

4.4 Vitiating elements of contract

The parties to a contract must have agreed to the terms of their contract. It must indeed be very clear that they have agreed freely, without some form of compulsion or some other defect that may make the apparently valid contract defective. Where there is such an element that may spoil or make such contract defective, such an element is known as a vitiating element. The vitiating elements we shall consider are mistake, misrepresentation, duress, undue influence and illegality. The nature of the vitiating element determines the kind of defect the contract may have, the contract may not be enforceable at all, it may be

enforceable in certain ways or manners, or there may be no contract at all. It is thus apposite to explain the nature of the defects first to better appreciate the effect of the vitiating elements before considering the elements themselves.

Unenforceable Contracts: These are contracts where the contract truly exists but neither party can sue the other. Examples abound from our earlier consideration of types of contracts which must be in writing or be evidenced in writing. Such contracts, if entered into contrary to the requirements of the law are binding between the parties, but neither party can sue for a breach in the absence of written evidence. Goods or money, which are passed under such a contract are validly transferred and cannot be reclaimed, but the courts will not give effect to the contract if one of the parties fail to abide with the terms.

Voidable contracts:

These types of contracts are generally recognisable in law and even given effect, which is however subject to certain conditions. The law allows one of the parties to such contracts to withdraw from them if he wants to. These contracts include contracts entered into by minors, or other contractual persons affected by lack of capacity such as illiterates, drunks or insane persons. Contracts vitiated by misrepresentation, undue influence and duress also come under these types of contract.

Void contracts:

These are contracts that have no legal effect. The parties have only attempted to contract as the Courts will not give effect to their agreements at all. The effect of mistake as a vitiating element is to make a contract void, i.e. destitute of all legal rights. The distinction between void and void able contracts is better appreciated when third party rights are considered. Where a contract of a sale of goods is void, the buyer does not become owner of the goods, so he cannot sell them to anyone else, the original owner can recover them from whoever he sells them to. Whereas if it was voidable, for example as one affected by duress, it is still a valid contract until the aggrieved party decides to cancel it, thus if the buyer resells it before the aggrieved party takes steps to cancel the contract, the third party who buys from him will have a good title where he is not aware of his seller's (i.e. the original buyer) defective title.

4.4.1 Mistake: The general rule is that mistake does not ordinarily affect the validity of a contract. If a man made a mistake as to the value or the type of thing he bought, it is his ill luck as there is no remedy under the law for him unless the other party had given him a wrong impression that misled him buy it. Likewise, a mistake of the applicable law does not affect the validity of a contract since ignorance of the law never an excuse, otherwise every party would plead that he was mistaken as to the law.

However, in some circumstances, mistake of fact could affect a contract, and if sufficiently serious, may nullify the contact or render it void. Let us now examine such instances where a mistake of fact may vitiate a contract.

Common mistake is a mistake shared by both parties. For instance, when negotiating the consideration payable under a haulage contract, the two parties mistakenly put the price of diesel at N1,000 instead of the pump price of N1,100. Here, both parties misled themselves about a key element of the contract. Another example is when the subject matter of the contract had been destroyed last night in a distant warehouse unknown to both parties when they made the agreement.

A mutual mistake occurs when either party was unaware of the intention of the other party at the time of contracting, thus working or agreeing at cross-purposes. An example is a situation in which Ben had three BMW cars of the same model but three different colurs. Danie agreed to buy the blue coloured car while Ben intended to sell the white coloured one.

A unilateral mistake occurs where only one party to the contract is mistaken, for example as to the identity of the other party he is contracting with or as to the nature of document she is signing.

(a) **Mistake as to the nature of the instrument i.e. as to signed documents**.

This mistake rarely avails a party, for any party to successfully raise it, however he must show that:

(i) the document signed was radically different from the one he thought he signed.

(ii) the signing had not been done negligently (carelessly)

(iii) had the true contents of the documents been made known to him he would not have signed.

See **Foster v. McKinnon (1869) -** Here the Defendant, an old man with failing eyesight was induced to sign a document which he thought was a guarantee, whereas he was indorsing a bill of exchange for 3000 pounds for which he would be personally liable. He was able to succeed because he satisfied the Court as to the three elements above particularly that he was not negligent.

This plea is also known as *Non est factum* (i.e. It is not my deed.)

(b) Mistake by one party as to the identity of the other party. It is avitiating fact or if identity is a material factor. In case of ordinary shopping, it is not avitiating factor, as you intend to contract with the person in front of you. The test is, did the mistaken party intend to contract with one person and with him only? It makes no difference that the contracting parties met face to face. The pertinent question is did the mistaken party intend to contract with the person in front of him irrespective of his identity? If this were so, he would not be able to successfully plead mistake. However if he wants to contract with A, and he believes that B who he is contracting with is A, he may be able to successfully plead mistake. In **Lewis v. Averay [1972] Civ 4**, the plaintiff, Lewis, parted with his car on sale to a rogue who pretended to be Richard Greene, the actor. The rogue paid by a cheque, which was dishonoured, and then sold the car subsequently to Averay who bought it in good faith. The Court held that the contract between Lewis and the rogue was not vitiated by mistake as Lewis could not prove that he wanted only to sell to Richard Greene and to nobody else. (***See also*** **Cundy v. Lindsay (1877 - 78) LR 3 App Cas 459; Phillips v Brooks (1919) 2 KB 243)**

(c) Mistake as to subject matter

(i) Mistake as to identity: In **Raffless v Wichelhaus [1864] EWHC Exch J19,** a cargo of cotton was described as being on a ship, the SS Peerless from Bombay. Another ship also sailing from Bombay had the same name with 3 months interval between them. The buyer assumed the seller would put the cargo on the first ship, where as the seller intended to put it on the second. The Court held that the contract was vitiated by the mutual mistake of the parties.

(ii) Mistake as to existence: In **Couturier v Hastie [1856] 5 HLC 673, the** contract concerned a cargo of wheat which unknown to seller and buyer had been sold by the captain of the ship even before they contracted. The Court held that the contract was vitiated by the common mistake of both parties.

Equity's attitude to mistake:

Where a mistake is operative at common law, the contract is void, otherwise it binds both parties and this can be punitive on the parties. Equity, however, assists where common law is unjust. It could admit that the contract is not void but valid (because the mistake is in operative) but take it apart, in order to be fair to both parties and this is called Rescission on Terms".

Also, equity could alter a written contract made pursuant to an oral one where it does not represent the intention of the parties and it is a mistake of expression only since at common law parties were bound by what they had written. Equity allows the document to be altered to represent what was agreed, i.e."rectification".

4.4.2 Misrepresentation: This is a false statement of fact (not law) made by one party which induces the other (innocent) party into making a contract. The Statement must have been intended to be acted up on and must have actually induced the other party to make the contract. For it to avail a party he must show that:

4.4.3 (a) the statement is a statement of fact as opposed to an expression of an opinion e.g. "doctors have recommended that this product is good" as opposed to "this is the best caviar in the world". The first is a statement of fact which may induce a party to buy a particular drug which if it turns out was not what it is stated to do may amount to a misrepresentation. The second statement is only an expression of opinion by the Seller as to his wares and does not amount to a representation where it turns out to be false. It is important to note that there are instances where even silence could amount to a misrepresentation as where a party has a positive duty to speak and nothing is said as may arise in the following instances:

(i) Contracts uberrimae fidei (or of the utmost good faith i.e. contracts where one party alone has full knowledge of the material facts and the law imposes on him a duty to disclose)

(ii) Fiduciary Relationships e.g. solicitor and client, doctor and patient, etc.

(iii) Changed circumstances, etc.

(iv) Where a past truth amounts to a falsehood.

(c) The statement must also induce the contract, i.e. one party must have been taken seriously by the other party so that here lied on it and not upon his own judgment. It is immaterial whether the means of verifying a statement was made available to him - **Redgrave v Hurd (1881) 20 Ch D 1.**

Remedies available to an innocent party: This depends on the type of misrepresentation, which could be either innocent or fraudulent. Fraudulent Misrepresentation: arises where any statement is made fraudulently i.e. deliberately or without belief in its truth or being careless whether it is true, or false.

Remedies

(i) The innocent party can sue for damages in tort for deceit.

(ii) He can affirm the contract and go on with it.

(iii) He can disaffirm the contract and refuse further performance and under here he may either:

(a) take no legal action and plead fraud as a defence and sue for damages.

(b) bring an action for rescission of the contract.

Innocent Misrepresentation: any statement made with an honest belief in its truth is innocent.

Remedies:

(i) He may affirm the contract and treat it as binding. (ii) He may claim for rescission in the Courts.

It is important to note however that there is no general right to damages. It should also be noted that rescission means taking the contract apart and it is usually accompanied by an order for restitution i.e. each party will have his property returned but since it is an equitable right it may be lost as where an innocent third party has acquired title to goods under the contracts, as the effect of misrepresentation is that the contract is only voidable. Also where restitution is impossible the right to sue for rescission is lost.

4.4.3 Duress: is pressure brought to bear upon one of the contracting parties to induce him to enter into the contract. It consists in the actual or threatened personal violence, imprisonment or restraint of personal liberty either to him, wife, child or parent. It has been held in decided cases that threat to goods are not enough (see **Cummings v. Ince (1887).** It should also be noted that the effect of misrepresentation is to render the contract voidable and not void.

4.4.4 Undue Influence: Undue Influence is the use of any influence by which the exercise of freewill and deliberate judgment is excluded i.e. it relies upon the wrongful use of influence that one party may have over the other although influence by itself is not unlawful. It may arise anyhow but the substance is that the parties to a contract are not on equal footing. It is for the party benefiting from the contract to show that the other party contracted freely using his own freewill or had other independent advice. The actual relations may show that one

has exerted overbearing influence on the other e.g. Parent & Child, Lawyer & Client, Doctor & Patient, Spiritual Advisor & Devotee, Accountant & Client, Trustee & Beneficiary and other fiduciary relationships. The effect is to allow the weaker party rescind the contract promptly after the withdrawal of the overbearing influence; otherwise it will be termed as consent. It also renders a contract voidable and not void. In **Williams v Bayley (1866) LR 1 HL 200**, a father gave security for his son's debts because of the lender's threat to prosecute his son. The Courts held this contract to be vitiated by undue influence.

4.5 Termination or discharge of contract

A contract is discharged when the obligation created by it ceases to be binding on the promisor who is no longer under a duty to perform his side of it. The implication of discharge is that the parties are released and freed from their mutual obligations. This may arise in the following ways:-

4.5.1 Express agreement

4.5.2 Performance

4.5.3 Breach

4.5.4 Frustration, or

4.5.5 Death

(1) Since contracts come into being by agreements, they can also come to an end where the parties bound by it, agree to end the contract. For the discharge to be operative, this agreement to terminate must be supported by consideration. Where neither party has performed there is a full release as consideration is easily furnished by their agreement to be released from their obligations under the contract. This is known as waiver. But where a party has already performed his obligation under the contract, the other party has to provide some fresh consideration. This kind of discharge is known as accord and satisfaction, i.e. apart from the agreement of the parties (accord), the party to be released from his original obligation is providing some consideration for the other party (satisfaction). An agreement to terminate a contract may also take the form of replacing the old contract with a new one and which may be made between the same parties with fresh terms or made by one of the old parties with a third party, and this is known as **novation.**

On the other hand, the parties, by the contract itself, may have provided for the circumstances under which the contract will be discharged (i.e. come to an end). This could be on the occurrence of a certain event, or on the expiration of a specified period of time mutually agreed, or at the option of one or other of the parties, or on the fulfillment of a condition precedent.

(2) **Performance**: Where the parties have done that which they contracted to do the contract becomes discharged by performance. However, if performance is to be an absolute discharge of a contract nothing must remain to be done there under by either party i.e. they must have fulfilled both their promises. **Cutter v. Powell (1795)**

(3) **Breach**: A breach occurs where one party fails to do that which he has promised under the contract, either wholly or partly. Such failure destroys the contract. Truly speaking, a breach does not discharge a contract but the injured party may rescind the contract and sue for damages. It also relieves him from further obligations under the contract. Every breach of a contract entitles the injured party to claim damages. It is not every breach however, that entitles the injured party to rescind the contract and say he is no longer going on with it. He can only treat the contract as discharged where the breach is total as where it affects a vital part of the contract that makes the contract incapable of performance. It is also total where it is discernible that the party guilty of the breach has no intention to go on with the contract. It is important to also note that where the party guilty of the breach has informed the injured party before he is to perform his own part of the contract that he does not so intend, such will be known as anticipatory breach. Here the injured party can either sue on the breach immediately or wait until the due date, but if he must wait he must continue to perform his own side of the contract.

Generally, a party to a contract may commit a breach of contract in the following ways:

(a) by repudiating his liability under the contract before the time for performance is due(i.e. anticipatory breach)

(b) by failing to fulfill his obligations when purporting to perform the contract.

(c) by his self incapacitating act of performance of the contract

4.6 Remedies for breach of contract

(a) A right of action for damages in respect of the breach of the contractor some term of it. An innocent party has the right to get damages for the losses occasioned him from the breach.

(b) A right of action on *quantum meruit* i.e. a right to sue in respect of what he had already done before the breach occurred. This remedy avails a party when one party abandons or refuses to perform the contract, when work has been done and accepted under a void contract and when there is no provision for remuneration. Thus in the event of a breach of contract, the injured party may not claim damages, but claim payment for that he has done under the contract. His right to payment is not based on the original contract, but on an implied promise by the other party arising from the acceptance of an executed consideration.

(c) A decree of specific performance compelling the other party to carry out his obligations. This is an equity-based remedy. Thus, it is based on the discretion of the Court and cannot be insisted upon by the party. A party is not entitled to specific performance

- where damages would be adequate;
- in contracts for personal services;
- where it cannot be awarded to the other party (e.g. a minor)
- where the court cannot supervise the execution of the contract, e.g. a building contract; or
- in contracts to lend money.

(d) An injunction restraining him from violating them. An injunction like specific performance is also a discretionary remedy and is not available to a party where damages would be adequate compensation. It is generally given to prevent a party from acting in breach of a contract.

(e) Rescission. The effect of this remedy is to put the parties where they were before they entered the contract.

(f) Rectification. This equitable remedy allows the parties to rectify their documents in order to give effect to the true intent of their contract. To obtain rectification it must however be proved that:

- there was complete agreement between the parties on all important terms;
- the agreement continued unchanged until it was reduced into writing; and
- the writing did not express what the parties had already agreed.

(g) Action to account for profits from breach. In exceptional circumstances, the court may allow an injured party to get an account of the profits which may have accrued from that breach to the party in breach. **A-Gv. Blake (2001).** The equitable remedy is available and allowed only where remedies of damages, specific performance and injunction would be inadequate remedy.

(h) Action for price or some other sum. This is appropriate where property has passed, and the breach consists of a party`s failure to pay the agreed price, remuneration or debt due under the contract.

(4) Death: Ordinarily, the death of a party to a contract will not operate to vitiate the contract. However, a contract may be discharged upon the death of one of the parties where the contract is for personal service, and he dies before the personal service could be performed.

(5) Frustration: Occurs when a contract has become incapable of performance.

It generally, does not discharge a contract and the defaulting party is liable in damages, in spite of the fact that his inability to perform is due to circumstances beyond his control. However it will discharge a contract:-

(a) Where the impossibility is caused by a change in the law or supervening circumstance. For example, where A agrees to import an item for sale to B

and Government bans the importation of such an item, such contract of sale becomes discharged by frustration.

(b) Where the accidental destruction of a specific thing upon which the contract depends renders performance impossible **Taylor v. Caldwell (1863) 28.** A, hired a music hall from B, and an accidental fire destroyed the hall. It was held that the contract was discharged.

(c) Where the contract depends upon the happening of a specific event which does not occur. **Krell v. Henry (1903) 29.** The Defendant hired a room to view a coronation procession that will pass along there, but the procession was however cancelled. It was decided by the Court that the contract had become discharged upon the procession being called off.

(d) Where, through vital change of circumstances, the contract as a commercial venture is frustrated-war. For example a carrier who has agreed to haul goods through a shorter route may be availed by frustration where such route is destroyed and he has to go through a longer and costlier route such that the contract is no longer commercially viable.

(e) The death of either party to a personal contract terminates it generally. Likewise bankruptcy or illness that goes to the root of the contract will also terminate the contract.

The effect of frustration on a contract is to automatically bring the contract to an end and render it void, thus all sums paid before the discharge by frustration in respect of the contract could be recovered while those sums not yet paid need not be paid. In the old Western Region of Nigeria, this general rule was rested in its Contracts Law, but with two exceptions, which now forms part of the laws of the States created out of the defunct Western Region (Ogun, Oyo, Osun, Ekiti, Ondo, Edo and Delta) Such applicable provisions are found in the Contracts Law of Ogun State.

The relevant Sections show the following:

1. All sums paid to any party in pursuance of the contract before it is discharged are in principle, recoverable. Sums payable but yet to be paid, cease to be payable.
2. Where one party has, by reason of anything done by the other party to the contract,

obtained a valuable benefit (other than the payment of money) that other party may recover from him such sum as the Court considers just.

Payments under contracts of insurance are to be discountenanced when considering sums due for retention or recovery in the instances mentioned above.

The Law also allows severance of a wholly performed contract from frustratedcontractsifseveranceispossibleandthelawshallonlyapplyto the part affected by frustration.

It should be noted however that the Law does not apply to the following:

a. Contracts containing a provision to meet the case of frustration.
b. Contracts for the sale of specific goods, which have perished before the risk has passed to the buyer, and any contract of sale where the contract is frustrated because of the fact that the goods have perished.

3. Where the frustrating event was brought about by his own fault or deliberate conduct, that party cannot rely on the doctrine of frustration. **Maritime National Fish Ltd v. Ocean Trawlers Ltd. (1935)**

4.6 Summary

This chapter dealt extensively with the law of contract, terms of a contract, exemption clauses, illegal contracts, void and voidable contracts, especially contracts in restraint of trade. Furthermore, it discusses the vitiating elements of contract, pointing out the effects of mistake, misrepresentation, duress, and undue influence on a contract.

Lastly, it contains an explanation of termination or discharge of contract, showing the different means of discharging a contract, the remedies for the breach of contract and frustration of contract.

Remember that a contract is basically on agreement between the parties, which is binding on them and would been forced by the Courts, as long as it is not illegal or void, or vitiated by elements.

4.7 REVISION QUESTIONS

MULTIPLE CHOICE QUESTIONS

1. The following are essential elements of a valid contract EXCEPT
   A. Consideration
   B. Acceptance
   C. Authority *
   D. Offer
   E. Intention to create legal relations

2. Which one of the following is NOT an invitation to treat?
   A. Tenders
   B. Auctions Negotiation
   C. Display of goods for sale
   D. Price bargain *
   E. Advertisement

3. Where an offeror dies before acceptance,
   A. The offeree files new documents.
   B. The offeror's family takes over
   C. The offer continues undisturbed
   D. The offer lapses *
   E. The offeree sues for damages

4. When a promise is made after the performance of an act that prompted the promise, it is called
   A. Existing consideration
   B. Past consideration *
   C. Acceptable consideration
   D. Sufficient consideration
   E. Considered consideration

5. A contract may be discharged in any of the following ways EXCEPT
   A. Agreement
   B. Breach
   C. By a third party *
   D. By lapse of time
   E. By performance

SHORT-ANSWER QUESTIONS

1. A new condition introduced by the offeree in the acceptance of an offer is called _____*****_**counter-offer.**_

2. Articles which are reasonably necessary to a minor having regard to his status in life are called _____*****_**nessesaries.**_

3. Under the law of contract, when an obligation is to be performed in the future, the consideration is said to be _____***** ***executory.***

4. What defence could be pleaded by a person who is induced by fraud to sign a Document ? ***** ***Non est factum (not my deed)***

5. The principle of law which states that a person who is not a party to a contract cannot bring action on it is called_____*****_***Privity of Contract***

ESSAY QUESTIONS

1. Under the law of contract, mistake is a factor which may invalidate a contract.

   You are required to state and explain briefly 2 (two) other types of mistakes under the law of Contract.

Answer

Two types of mistake under the law of contract are as follows:

a. Common mistake.

Common mistake occurs where both parties to a contract are mistaken on the same subject matter of the contract. Example is if, unknown to both parties, the subject matter of the contract is non-existent. This mistake makes the contract void absolutely.

b. Mutual mistake:

In mutual mistake, the parties are mistaken about different things. For example, each Party to the contract may be mistaken as to the other party's intention or undertaken, but neither party knows he has been misunderstood. This mistake makes the contract voidable.

2. Abba met car dealer to buy a brand new Honda Accord saloon car. He paid the price and arranged that it should be delivered to his house. However, when the car was delivered, he discovered that the engine was not new. Abba intends sue the car dealer.

Required:

Advise Abba, stating the legal issues involved.

Answer

The legal issue involved in this case relates to condition in a contract, which is fundamental and goes to the root of a contract.

Abba negotiated and paid for a brand new car, but was supplied a car with used engine, which is a breach of the condition of the contract by the dealer. A breach of condition entitles the wronged party to repudiate the contract and bring it to an end.

Thus Abba is advised to repudiate the contract, return the car to the dealer and collect money he paid for the car.

3. Under the law of contract, a minor is not bound by any contract made during his minority.

   You are required to explain briefly contract for necessaries as an exception to this rule.

Answer

Necessaries are goods that are reasonably necessary to the minor in terms of his status in life as well as his needs. A minor is only liable when the goods are suitable to his condition in life, necessary to his requirements at the time of delivery. Goods would not be necessaries if the minor were already well supplied with such goods. A minor must pay a reasonable price for necessaries supplied to him.

However contracts for his education, service or apprenticeship or for enabling him to earn his living are binding unless they are detrimental to the interests of the minor.

CHAPTER FIVE

Agency

5.0 Chapter contents

- Learning objectives
- Definition, creation, and types of agency
- Creation of agency
- General agents and special agents
- Authority of agents
- Rights and obligations of principal agent
- Termination of agency
- Summary
- Revision questions

5.0.1 Learning objectives

At the end of this chapter, readers should be able to:

- understand agency
- identify types of agency
- explain consent as basis of agency and distinguish between express and implied consent
- explain agency by operation of law
- understand agency of necessity and agency of cohabitation
- explain ratification
- understand the rights of the principal and that of the agent
- distinguish between the obligations of the principal and those of the agent
- discuss the modes of termination of agency

5.1 Introduction

Anytime we ask somebody to do something for us, which will create a legal relationship between us and third parties, we create an agency relationship. We are the principals and the persons we ask to act on our behalf are the agents. The various ways through which agency relationship could be created as well as the rights and obligations of agency and ways of terminating agency are treated in this chapter

5.2 Definition, creation and types

5.2.1 Definition of agency

Agency is a relationship arising out of the use of one person by another for the performance of certain tasks on his behalf. It is a situation where one person called the agent has an authority or capacity to create legal relations between a person called the principal and third parties. The relationship exists between the two persons because one of them has expressly or impliedly consented that the other should represent him or act on his behalf, and the other has similarly consented to represent the former as directed.

Agency has been described as a triangular relationship. These are principal/agent relationship, agent/third party relationship and principal/third party relationship.

The three features of agency are service, representation and power to affect the legal position of the principal. An agent can acquire rights for his principal and subject his principal to liabilities. In the case of *Montgomerie v. United Kingdom Mutual Steamship Association,* **(1891) 1 QB 3704, *Wright, J*** opined that "where a person contracts as an agent for a principal, the contract is that of the principal and not that of the agent; and, prima facie, at common law the only person who may sue is the principal.". See also *Okwejiminor v. Gbakeji* **(2005) 5 NWLR (pt. 1079) 223.**

5.3 Creation of agency

Agency relationship may be created or may arise in any of the following ways:

(a) **Express appointment**

A principal may appoint an agent expressly either orally or in writing. The expectation is that both the principal and the agent must be competent to act. Agency may be created through a power of attorney. The power of attorney, then, is the instrument which confers the agency and the production of a copy of it would be conclusive evidence of the existence of such agency. Contrarily, where there is an express prohibition precluding the existence of an agency relationship, any act done by the purported agent will be invalid. In *White v. Lucas* (1887) 3 TLR 516, A firm of

estate agents acted contrary to an express statement of the owner of a property prohibiting them from acting as his agents, the court decided that the estate agents could not claim remuneration for acting as agents of the property.

(b) Implied agency

This is agency that arises by implication. Parties are taken as having agreed or consented to an agency relationship due to the way they have conducted themselves towards each other.

Implied agency may arise through usual, customary and apparent or ostensible authority. Usual authority relates to the kind of authority that an agent in a trade, business and profession or at his place of employment is vested with, to enable him discharge his commission. In terms of customary authority, the agent must act impliedly according to the customs and usages of the place, market or business. Such customary authority must either be known to the principal or must be so notorious that the principal cannot deny knowledge of it. With apparent or ostensible authority, a person is allowed to appear as if he is the principal's agent when in fact he is not. The principal has led other parties to believe that a person has the authority to represent him.

In the Ghanaian case of ***Buama* v *Oppong,*** [1992] 2 GLR 213 the defendant was the owner/driver of a commercial vehicle. The plaintiff who paid a fare to travel on the vehicle could not find his bag on reaching his destination. He had paid freight for the bag to a bookman who took the bag from him and kept it in the booth of the vehicle. The plaintiff sued for the value of the bag and the items in it, consequential loss and damages. In his defence the defendant contended inter alia that the bookman was not his agent. It was found that the bookman gave the money he had received as freight from the plaintiff to the defendant and that even though the bookmen were employees of the Ghana Private Road Transport Union they were the ones who dealt with the passengers by collecting the fares and freight from them. The defendant was vicariously liable for the loss of the plaintiff's bag by the bookman because if a person is represented or permitted himself to be represented, that representative had authority to act on his behalf, and he would be bound in the same way a she would be if that

other had infact authority to act. Since the defendant was present when the fee was charged and also clear that the defendant had given authority to him, it was an apparent authority to the bookman to act on his behalf. Accordingly, there was an agent and principal relationship between the bookman and the driver. Again, in law, the usage of the trade or business in which an agent was employed would in the absence of express direction, frequently determine the liability of the principal.

(c) Agency of necessity

This agency may arise in emergency situations where a person is obliged to act to prevent irreparable loss to another. Such an agency may be implied where the following conditions exist:

i. It must be impossible or impracticable to communicate with owner of the goods so as to get his instructions;

ii. There must be real or imminent commercial necessity; and

iii. The agent must have acted in the best interest of the principal.

(d) Agency by ratification

This is a situation whereby a person acts without authorisation but the person on whose behalf the act was purported to have been carried out subsequently adopts the act. It is a retrospective constitution of agency. The contract is not binding on the principal until ratification. An action that was void *ab initio* could not be ratified. In *Brook v. Hook* (1870) LR 6 Ex 89 where Jones forged the signature of Hook on a Promissory Note, the court decided that the purported ratification by Hook was ineffective as this amounted to a nullity. A contract can be ratified only under certain circumstances. These include the following:

(i) The agent must expressly have been contracted as an agent. The contract can only be ratified by the principal who was named or can be ascertained when the contract was made. An undisclosed principal cannot ratify a contract. See *Keighley Maxsted & Co. v. Durrant* (1901) AC 240;

(ii) The principal must have been in existence at the time the agent entered into the contract. See *Kelner v. Baxter & Others* (1866-67) LR 2 GP 174;

(iii) The principal must have had legal capacity to enter into the contract at the time when it was made and at the date of ratification. *See Boston Deep Sea Fishing & Ice co Ltd* v *Farnham (Inspector of Taxes)* (1957) 1 WLR 1051.

(iv) The principal must at the time of ratification have full knowledge of all the material facts. See *Suncorp Insurance & Finance* v *Milano Assicurazioni SpA* [1993] 2 Lloyds Rep 225 (QB);

(v) The principal must adopt the whole contract;

(vi) The principal must ratify within the time set or within a reasonable time. See *Metropolitan Asylums Board v Kingham & Sons* (1890) 6 TLR 217 (QB)

(e) Agency by estoppel

It is a general principle of law that a person is not bound by the actions of another person who acts without his written or oral authority. However, when the natural consequence of the party's conduct it to portray someone as his agent, and as a result of the portrayal, an innocent third party enters into a contract with the agent, the principal would be prevented or stopped from denying the existence of the agency.

(f) Apparent agency

This occurs when a principal has not taken due precaution to prevent a situation in which somebody portrays himself as having authority to act as his agent.

5.4 General agents and special agents

A general agent is an agent with authority to perform a series of transactions in the ordinary course of business, trade or profession usually of continuous nature. Where the appointment of a general agent is unrestricted, such an agent is a universal agent.

On the contrary, an agent that is appointed for a special purpose or a specific occasion is called a special agent, which are of four types as follows:

(a) Factor

A factor is a merchantile agent who, in the course of his business, has the authority to sell goods or to consign goods or raise money on security for goods.

(b) Broker

A broker has no possession of goods but is only involved in the negotiation of contracts on behalf of another for a commission known as brokerage.

(c) Auctioneer

An auctioneer is a person licensed by law and authorised to sell the goods or property of another person at a public sale. He may or may not have possession of the goods to be sold. An auctioneer is a double agent because he acts for both the seller and the agent.

(d) *Del credere* agent

A *del credere* agent is an agent who in return for a higher rate of commission promises to indemnify the principal if the third party with whom he contracts in respect of goods fails to pay or deliver under the contract. He is a surety of the buyer.

5.5 Authority of agents

Agency relationships are dependent on the nature of authority invested on the agent. The scope of the agent's authority is very important in determining the types of agency which exists between the principal and agent and accordingly, agency relationships have been classified as: Actual or Express authority; Implied Authority; Apparent authority; Ostensible authority; and usual authority. These forms of authority will be considered seriatim below.

5.5.1 Actual or express authority

This type of authority is invested on the agent in writing and sometimes by deed under seal.

5.5.2 Implied authority

This form of authority of the agent is usually inferred from the conduct of the parties especially the principal. An agent may also have the implied authority to acts that are incidental to the acts for which he has actual authority.

5.5.3 Apparent authority

An agent may by his conduct show to third parties that he has authority to contract for the principal and thereby make the principal liable.

5.5.4 Ostensible authority

This authority is inferred or observed from the words of the principal and the agent would also act within the confines of such authority.

5.5.5 Usual authority

This authority would normally derive from the agent's normal business for his principal. Such authority would not be ambiguous.

An agent's scope of authority must not exceed that of the principal to act on his own behalf. Where an agent acts outside the scope of his authority in good faith, the principal would be bound by the acts. An agent will however be personally liable if he has no authority at all to act on behalf of another and would indemnify the third parties in damages. An agent who is employed to act in the course of his work or profession or business has implied authority to do whatever is usual in such profession or business or trade. An agent's illegal act will not bind his principal; neither can he be remunerated for, or indemnified against an illegal act committed by him.

5.6 Rights and obligations of principal and agent

Agency imposes rights and duties on both the agent and the Principal.

5.6.1 Rights of an agent

Every agent has some rights, which include the following:

(a) As a general rule, an agent is to be indemnified by the principal in the course of the performance of his duties;

(b) An agent is to be paid the reward or commission for work done;

(c) An agent is entitled to have his lawful actions ratified by his principal;

(d) A disclosed principal must also assume responsibility and liability for the authorised act of an agent;

(e) An agent has the right to enforce a contract against a third party; and

(f) An agent has a right of lien over the goods of his principal for his commission and other moneys due to him.

5.6.2 Duties of an agent

The duties of an agent include the following:

(a) An agent is bound to follow the principal's instructions;

(b) An agent must not delegate his authority unless he is expressly authorised by his principal;

(c) An agent must act in good faith and avoid conflict of interests;

(d) An agent must exercise due care and skill professed by him;

(e) An agent must not make secret profit;

(f) An agent must not disclose confidential information; and

(g) An agent must render an account to the principal as at when due

5.6.3 Duties of the principal

The duties of the principal depend on the nature and type of the agency. Some of these duties include the following:

(a) Duty to pay the agent's fee or commission;

(b) Duty to indemnify the agent for all lawful acts carried out by the agent on the principal's behalf;

(c) Duty to ratify the act of the agent as the case may be;

(d) A disclosed principal must assume responsibility and liability of the authorised act of the agent; and

(e) The principal is liable to third parties under all contracts entered into by the agent within the agency whether the principal is disclosed or not.

5.7 Termination of agency

An agency relationship may be terminated in the following ways:

(a) Act of the parties

The parties can bring the contract of agency to an end by mutual agreement of the parties. This is when the termination is from both of them. In other instances, the termination comes from only one of the parties. It may either

originate from the principal or from the agent. The termination may be through revocation by the principal by notice or summarily. It may also be through renunciation of the agency by the agent;

(b) **Operation of law**

An agency may be terminated by operation of law under the following circumstances:

i. Through the death of either party;

ii. On the insanity of either party. In *Gordonv. Essien***,**[1992]1GLR232 where the principal had died and the daughter of the agent she had earlier appointed continued to collect rents on her behalf it was stated that "It was trite law that death was one of the events which automatically determined an agency; the conception of authority demanded a continuing consent of the principal to the agent's act on his behalf and with the death of the principal the consent would not continue because the mind from which it issued had ceased to exist";

iii. Upon the bankruptcy of either party;

iv. By frustration

v. If the subject matter of the agency is found to be illegal *ab initio;*

vi. Where the subject matter is no longer in existence;

vii. By expiration or effuxion of time;

viii. By subsequent illegality of either the transaction or of the status or capacity of either party.

5.8 Summary

Agency is one kind of relationship that runs through several human endeavours. In almost every activity, we sometimes find ourselves acting on behalf of other people or asking other people to act on our behalf. The proper understanding of agency is therefore essential for a true appreciation of its practical significance. The whole realm of what constitutes agency in terms of what agency is, the types, its creation, the obligations of the agency as it touch the duties of the principal and the agent, and how the relationship (of agency) is terminated, were highlighted to ensure a good grasp of the area of study.

5.9 REVISION QUESTIONS

Multiple Choice Questions

1. A person appointed by another person to act on his behalf generally is Known as ……

   A. Envoy
   B. Representative
   *C. Agent
   D. Proxy
   E. Delegate

2. An agent is entitled to claim from his principal…….

   A. Remuneration
   *B. Commission
   C. Reimbursement
   D. Interest
   E. Set off

3. Agency can be created by the following ways **EXCEPT**

   A. Agency by conduct/estoppel
   B. Agency by ratification
   *C. Agency by auction
   D. Agency by cohabitation
   E. Agency by necessity

4. Duties of an agent include the following **EXCEPT**

   A. Duty of loyalty
   B. Duty to exercise skill
   *C. Duty to assist the wife of the principal to recruit staff whenever the principal travels
   D. Duty not to make undisclosed profit/commission
   E. None of the above

5. Agency relationship may be terminated by the following **EXCEPT**

   A. Death of either party
   B. Bankruptcy of either party
   C. Effluxion of time
   *D. Advice of the principal's banker
   E. Insanity of either party.

SHORT ANSWER QUESTIONS

1. An agent appointed for a specific occasion is called a _____agent.***** Special
2. Agency relationship can be terminated in two main ways, which are, express acts of the parties and _____***** by operation of law
3. An agent's authority which is expressed in writing and sometimes by deed under seal is known as _____***** actual or express authority.

ESSAY QUESTIONS

1. List the conditions under which an agency of necessity can be created.

Answer

The conditions which must be satisfied before and agency can be created by necessity are 3 and they are:

(a) The impossibility of getting the principal's instructions.

(b) The happening of an actual and definite commercial necessity for the creation of the agency.

(c) the agent of necessity acting *bona fide* in the interest of the principal.

2. State the ways through an agency situation may arise.

Answer

An agency relationship may arise in any of the following ways:

(a) By agreement, whether contractual or not, express or implied.

(b) By subsequent ratification by the principal of acts done on his behalf by the agent.

(c) By operation of law under the doctrine of necessity.

3. List and briefly discuss the forms of authority in an agency relationship

Answer

(a) Actual or Express Authority

(b) Implied authority

(c) Apparent authority

(d) Ostensible authority

(e) Usual authority

II Brief discussion

(a) Actual or express authority

This type of authority is invested on the agent in writing and sometimes by deed under seal.

(b) Implied authority

This form of authority of the agent is usually inferred from the conduct of the parties especially the principal. An agent may also have the implied authority to acts that are incidental to the acts for which he has actual authority.

(c) Apparent authority

An agent may by his conduct show to third parties that he has authority to contract for the principal and thereby make the principal liable.

(d) Ostensible authority

This authority is inferred or observed from the words of the principal and the agent would also act within the confines of such authority.

(e) Usual authority

This authority would normally derive from the agent's normal business for his principal. Such authority would not be ambiguous.

CHAPTER SIX

Sale of goods

6.0 Chapter contents

- Learning objectives
- Introduction
- Classification of goods
- Sale of goods distinguished from other forms of contract
- Form of contract
- Terms of contract of sale of goods
- *Caveat emptor* doctrine
- Transfer of property in goods
- Passing of risk
- Transfer of title by non-owner
- Breach of contract and remedies
- Buyer's and seller's rights
- VAT on supplies under the Nigeria Tax Act (NTA), 2025
- Summary
- Revision questions

6.0.1 Learning objectives

Upon completion of this chapter, readers should be able to:

- define contract for sales of goods
- understand the general principles of a contract for sales of goods
- describe a contract for sales of goods
- state and explain the terms of a contract for sales of goods
- differentiate between a contract for sales of goods and other transactions.

6.1 Introduction

The contract of sale of goods is perhaps the most common of all commercial contracts. The basic principles that govern this specialised contract are still found within the general principles of law of contract.

The contract of sales of goods is basically governed by common law, the Sales of Goods Act of 1893 (by virtue of the fact that it is a Statute of General Application which applies to most parts of Nigeria other than the states which make up the Old Western Region of Nigeria who have their own Sales of Goods Law) still retained as the Sales of Goods Act in the Laws of the Federation of Nigeria 1990 and the 2004 Laws of the Federation of Nigeria, and the Sales of Goods Law 1978 in Ogun State.

By section 1 (1) of the *Sale of Goods Act 1893,* it is a contract whereby the seller transfers, or agrees to transfer, the property in goods to the buyer for a money consideration called the price. The essence of a sale of goods contract is that the parties intend to transfer ownership of property in the goods from the seller to the buyer. Where the property in the goods is transferred from the seller to the buyer, the contract is called a sale, but where the transfer of the property is to take place at a future time subject to some condition thereafter to be fulfilled, it is called an agreement.

6.2 Classification of goods

Many of the rules of the applicable statute depend largely upon the type of goods that are the subject matter of the contract that we have seen, basically, is the transfer of ownership. The common classification of goods under a contract for sale of goods is as follows:

(a) **Specific goods**: by section 62 of the Act these are goods that are identified and agreed on at the time a contract of sale is made. It must thus be perfectly clear which goods are being sold, e.g. "that blue car there, "in the car sales room or "those baking items there" on the shelf in the Supermarket. See ***Underwood* v *Burgh Castle1 Brick & Cement Syndicate*** **(1922)**;

(b) **Unascertained goods:** If goods are "identified and agreed on "at the time of sale, they are specific goods. However, if they are not "identified and agreed on "they are unascertained goods, for example, "500 bags of rice out of the bags kept in my warehouse".

(c) **Existing goods:** By section 5(1), these are goods which the seller owns or possesses at the time of the contract and they may be either specific or unascertained; and

(d) **Future goods:** These are goods that the seller is to manufacture or acquire after the contract of sale is made, and they are generally unascertained goods.

6.3 Sale of goods distinguished from other forms of contract

(a) Contract of sale and Hire Purchase: A contract of sale and hire purchase are similar but only to the extent that the end result is transfer of goods. However, while property is transferred upon sale of goods, in hire purchase, there is no

transfer of property until the last instalment is paid and the hirer exercises the option to purchase;

(b) Contract of Sale and Pledge: A pledge is the delivery of goods by a person to another to secure the repayment of a debt. Unlike sale of goods, there is no absolute transfer of property in a pledge;

(c) Contract of sale and Bailment: bailment is a mere transfer of possession while sale is a transfer of possession and property (ownership). Bailment is a transaction under which possession of goods is delivered by a bail or to a bailee on the terms requesting the bailee to hold on to the goods and later redeliver them as the bailor may direct; and

(d) Contract of sale and Mortgage: A mortgage is transfer of property from the mortgagor to the mortgagee to secure the repayment of a loan. The subject matter of the mortgage is redeemable upon the repayment of the debt unlike a sale of goods contract which permanently transfers the property.

6.4 Form of the contract

A Contract of Sale of goods may be in writing (with or without seal) or by word of mouth or partly in writing and partly by word of mouth or maybe implied by the conduct of the parties. It is worthy of note that there are no special rules about the contractual capacity of the parties, thus the basic law of contract applies.

6.5 Implied terms of contract of sale of goods

The following terms are implied in a contract for sale of goods:

(a) **Title**

There is an implied condition on the part of the seller that he has the right to sell the goods and pass property at the time of sale. There is also the implied warranty the goods sold are free from any charge or encumbrance not disclosed or known to the buyer before the contract is known and that the will enjoy quiet possession of the goods;

(b) **Description**

Where goods are sold by description, there is an implied condition that the goods supplied correspond with the description. If goods are sold by sample and description, they must correspond with both the sample and the description;

(c) **Sample**

Where the sale is by sample, there is an implied condition that:

i. The bulk of the goods will correspond with the sample and the buyer would have reasonable opportunity to compare the sample with the bulk; and

ii. The goods are free from any defect which would not be apparent on reasonable examination of the sample

(d) **Quality of goods**

Where a seller sells goods in the course of business, there is an implied condition that the goods are of satisfactory quality and are fit for the purpose for which they are intended. Under this, there are two sub-heads, which are:

i. Merchantable Quality: This requires that the goods must be of good quality, but this implied condition would not apply if the defect could have been revealed by examination of the goods by the buyer; and

ii. Fitness for Purpose: This is an implied condition that where a buyer makes known to the seller the purpose for which he requires the goods and that he trusts the seller's skill and judgment, the seller is obliged to ensure that the goods the purpose for which they were bought.

(e) **Existence of title of the seller**

Section 12 (1) provides as follows: An implied condition on the part of the seller is that in the case of a sale he has a right to sell the goods, and that in the case of an agreement to sell, he will have a right to sell the goods when the property is to pass. There is thus an implied condition on the part of the seller that he shall have a right to sell the goods. If therefore the seller has no title, as where the goods are stolen for

example, he is liable to the buyer, See ***Rowland* v *Divall***, the buyer of a car used it for three months, but then found that it was stolen and had to return it to the true owner. The Court held that the buyer was entitled to recover the full purchase price even though he had used it for sometime.

In *Akoshile v Ogidan*, the plaintiff bought a car from the defendant which turned out to be a stolen car, which was later taken away by the police. He recovered his full purchase price from the Defendant. The decisions in these cases show that the purchaser in both cases bought in order to become owners, but did not become owners because the sellers breached this implied condition of title, hence they were entitled to their full purchase price. These cases also help to bring out the distinction between conditions and warranties. They show that right to sell a good or title is a condition that goes to the root of the contract and the innocent party can truly cancel the contract and get his full money back as well as ask for damages.

Section 12 also implies certain warranties into a sale of goods contract. For the breach of a warranty we should remember that the injured party can only ask for damages and cannot cancel the contract but go on with it;

(ii) Section12 (2); An implied warranty that the buyer shall have and enjoy quiet possession of the goods i.e. the seller will be liable in damages if the buyer is disturbed in the enjoyment of the goods in consequence of the seller's defective title;

(iii) Section12 (3); An implied warranty that the goods shall be free from any charge or encumbrance in favour of a third party, not declared or known to the buyer before or at the time when the contract is made. A failure to disclose that are pair man's fees (which entitle him to alien to retain the car) are still outstanding in respect of a sale concerning a second-handcar amounts to a charge or an encumbrance which entitles the buyer to seek damage for this breach of warranty.

6.6 C*aveat emptor* doctrine

The Act also implies various terms into the contract, which the parties in the exercise of their freedom to bargain and contract may exclude from their contract. A consideration of these implied terms, which we are about to undertake shows that these terms are implied by statute to mitigate the harshness of the common law principles of *caveat emptor* ("Let the buyer beware"). Under this principle, it was for the parties to make their own bargain i.e. it was up to the buyer to decide whether the goods were merchantable and fit, before he agreed to buy them. If he finds they were not fit for purpose, after the sale, there was nothing he could do, thus he becomes saddled with useless goods, hence the intervention by statute to avoid the supply of useless goods by the seller to the buyer.

6.7 Transfer of property between seller and buyer

The object of a sale of goods contract is to transfer property in goods from the seller to the buyer. It is thus important to know the precise moment of time at which the property in the goods passes from the seller to the buyer because in case of the destruction of the goods by fire or other accidental cause, it is necessary to know which party has to bear the loss since risk is an incidence of where property lies (See section 20). It is however important to appreciate the difference which we had drawn earlier between specific goods and unascertained goods and to properly understands when property (i.e. ownership in the goods) passes to the buyer from the seller.

(a) Specific goods

In a sale of specific or ascertained goods, the property passes to the buyer at the time when the parties intend it to pass. Thus, intention can be gathered from the terms of the contract, the conduct of the parties and the circumstances of the case (section17). Unless a contrary intention appears, however the following rules are applicable for ascertaining the parties 'intention (section18).

Rule1: Where there is an unconditional contract for the sale of specific goods in a deliverable state, the property passes to the buyer when the contract is made and it is immaterial whether the time of payment or the time of delivery, or both be postponed.

The Rule provided above is self-explanatory, how bet it is to the effect that unless the contract states otherwise, the buyer becomes the owner of the goods of a sale of goods contract when the contract is made as long as the goods are ready for delivery even where the seller agrees to deliver the goods later and the buyer agrees to pay later. Thus, if anything happens to such goods, generally it is the buyer that will bear the risk.

Rule2: Where there is a contract for the sale of specific goods not in a deliverable state, i.e. the seller has to do something to the goods to put them in a deliverable state, the property does not pass until that thing is done and the buyer has notice of it.

The only difference between this Rule and Rule1 above lies in the fact that the goods in Rule1 are ready for delivery while those under this Rule are not yet ready for delivery. Once they become ready for delivery however the seller must inform the buyer, it is upon such notice that ownership in the goods passes to the buyer.

Rule3: Where there is a contract for the sale of specific goods in a deliverable state but the seller is bound to weigh, measure, test or do something with reference to the goods for the purpose of ascertaining the price, the property does not pass until that thing is done and the buyer has notice of it. See *Turley v. Bates;* 'S' sold to 'B' a heap of clay at a price of $x per ton, and it was agreed that the buyer would load the clay and weigh it to ascertain the price. The Court held that property passed to the buyer when the contract was made.

Rule4: When goods are delivered to the buyer on approval or "on sale or return basis" the property therein passes to the buyer: -

(a) When he signifies his approval or acceptance to the seller or does any other act adopting the transaction. In *Kirkham v. Attenborough*, K delivered jewelry to W on sale or return. W pledged it with A. It was

held that the pledge was an act by W adopting the transaction, and therefore, the property in the jewelry passed to him so that K could not recover from A.

Another example is where someone delivers a pair of shoes to you, and you are undecided whether to buy them but promise to return them within two weeks. If you put them on and wear them on the third day, this rule comes into play to show that you become the owner of them when you wear them.

(b) If he retains the goods without giving notice of rejection, beyond the time fixed for the return of goods, or if no time is fixed beyond a reasonable time.

This is self-explanatory as what this subsection simply says that when you hold on to goods for an agreed period or for a long time you become the owner of it.

(b) Unascertained goods

Section16- Where there is a contract for the sale of unascertained goods, no property in the goods is transferred to the buyer unless and until the goods are ascertained. This section states the obvious as one cannot become the owner of 50 bags of rice in a warehouse containing 1000 bags without my 50 bags being ascertained. By the provisions of Rule 5, ascertainment does not make them one's until certain acts listed under the Rule are carried out.

Rule 5: Where there is a contract for the sale of unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods then passes to the buyer; and the assent maybe express or implied and maybe given either before or after the appropriation is made. The understated are some of the ways in which unascertained goods maybe come ascertained

(a) if the seller separates the sold goods from the consignment and informs the buyer.

(b) by measuring the sold portion from the whole and informing the buyer.

(c) by a process of exhaustion. An example is where Linda wants to buy 5 bowls (bongos) of gari from a seller who has about 30 bowls in her basin. The process of continual and continuous selling of relatively small bowls of gari until 5 bowls is left is an illustration of exhaustion.

6.8 Passing of risk

Risk covers a wide range of misfortunes that may befall goods from slight damage through theft to loss or total destruction. Who bears such loss is thus the basic question that arises for consideration herein. The applicable Section 20, which helps in determining this issue, provides thus:

"Unless otherwise agreed, the goods remain at the seller's risk until the property in them is transferred to the buyer, but when the property in them is transferred to the buyer, the goods are at the buyer's risk whether delivery has been made or not: Provided that where delivery has been delayed through the fault of either buyer or seller the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault: Provided also that nothing in this section shall affect the duties or liabilities of either seller or buyer as bailee of the goods of the other party."

Loss may arise in these possible ways

(a) **Loss occurring before the contract is made**:

A reading of the applicable section 20 shows that the seller bears this loss. He is however protected from liability to the buyer by section 6 of the Act where the contract concerns specific goods. Section 6 provides as follows: "Where there is a contract for the sale of specific goods, and the goods without the knowledge of the seller have perished at the time when the contract is made, the contract is void. The seller of course still bears the loss but it should be noted that he has no liability to the buyer as the contract is void."- ***Barrow,***

***Lane & Ballard Ltd.* v *Phillips & Co. Ltd*.** where 109 bags out of 700 bags of specific goods which formed the subject matter of the contract of a sale of goods had been stolen before the contract was made, and this was unknown to the sellers. The Court held that the specific 700 bags had perished thus rendering the contract void.

(b) **Loss occurring between the contract and the passing of property:**

This will also be borne by the seller since property has not passed by the provisions of section 20. The buyer may also recover damages for non-delivery where the seller fails to find other supplies. Section 7 however protects the seller from liability to the buyer although he still bears the loss. It provides thus: "Where there is an agreement to sell specific goods and subsequently the goods, without any fault on the part of the seller or buyer, perish before the risk passes to the buyer, the agreement is avoided."

(c) Loss occurring after the passing of property:

By the provisions of section 20 this is borne by the buyer even where the goods are still in the custody of the seller. In *Tarling v. Baxter* (1827) 18, S sold to B a hay stack which was to remain on the seller's premises until the following May. Before May arrived, the hay stack was destroyed in an accidental fire. It was held that property and risk had passed to the buyer who remained liable to pay the price. It is important to note here that if the fire that destroyed hay stack had not been caused by accident but by the negligence of the seller he could well have been liable for the loss, although not as seller but as bailee of the good having regard to the second proviso of section 20 relating to duties and liabilities of either of the parties as such.

Where a party also delays delivery as provided under the first proviso to section 20 he bears the risk. In *Demb y Hamilton & Co Ltd. v. Barden*, the contract concerned the supply of 30 tons of apple juice by weekly consignments to the buyer. The buyer delayed in taking delivery of some of the juice, which went bad. The Court held him responsible to pay for the loss occasioned by his delay.

The provisions of the Act can however be varied by agreement or by trade custom. In some cases, the parties may agree that the risk passes before property; see *Sterns Ltd. v. Vickers Ltd.* Sale of 120,000 gallons of white spirit out of 200,000 gallons in a tank on wharf. No appropriation to the contract is made, but a delivery warrant is issued to the buyer. The warrant is not acted on for sometime and the spirit deteriorates. The loss falls on the buyer.

At other times the property may pass before the risk as where the seller agrees to send specific goods to the buyer at the seller's risk. If the seller does agree to deliver goods at his risk, his liability is governed by section 33 which provides as follows:

"Where the seller of goods agrees to deliver them at his own risk at a place other than that, where they are when sold, the buyer must nevertheless, unless otherwise agreed, take any risk, of deterioration in the goods necessarily incidental to the course of transit".

The seller must, however, take the risk of extraordinary or unusual deterioration of loss.

6.8.1 Transfer of title by a non-owner (The *nemo dat non habet* rule)

Generally, only the owner of goods can validly transfer property or ownership in them to a third party. The law however allows his agent to do so too. But there are other instances where property in goods is transferred to a third party by a person who is not the owner or his agent. It is this troublesome area that we will consider now, for a buyer may not be getting what he bargained for or indeed anything at all. In this area of the law there is a simple basic rule which, however, has so many exceptions. The basic rule favours the original owner while the exceptions favour the innocent purchaser from a seller who had no right to sell or title to transfer to him. This basic rule is expressed in the Latin phrase *nemo dat quod non habet* and it literally means "nobody can give what he has not got. "The courts have tried to explain why this basic rule must have so many legally recognised exceptions. The best and finest

expression of this rationale is found in the under-mentioned dictum of Denning L.J (as he then was) in *Bishopsgate Motor Finance Corporation v. Transport Brakes Ltd".*

It goes thus: "In the development of our law, two principles have striven for mastery. The first is for the protection of property: no one can give a better title than he himself possesses. The second is for the protection of commercial transactions: The person who takes in good faith and for value without notice should get a better title. The first principle has held sway for a long time, but it has been modified by the common law itself and by statute so as to meet the needs of our times"

The said basic rule is also the basis of section 21 (1) of the *Sale of Goods Act* which reads thus: "... where goods are sold by a person who is not the owner thereof and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell."

6.8.2 The exceptions are as follows:

a) Estoppel

If the true owner stands by and allows an innocent buyer to pay over money to a third party, who professes to have the right to sell an article in the belief that he is becoming the owner of it, the true owner will be estopped from denying the third party's right to sell. This exception is provided by the underlined part of section 21 quoted above.

(b) Sales by mercantile agent or factor

A mercantile agent is a person who sells or otherwise deals with goods as business and on behalf of other people. He deals in his own name, independently of his employer, (his Principal). Anyone dealing with a mercantile agent obtains good title even if the agent was not authorised to sell. A mercantile agent is also known as a factor.

(c) Sale in market overt

This is provided for under Section 22 which provides as follows: “Where goods are sold in market overt, according to the usage of the market, the buyer acquires a good title to the goods provided he buys them in good faith and without notice of any defect or want of title on the part of the seller. This is the most ancient of the exceptions and was incorporated in the Act upon its enactment. If a person's property was stolen, and such person was reasonably diligent, such property could be found if it went on display at the local market. The concept is one of an open public market selling openly to customers who buy in good faith. The doctrine covers any open, public, legally constituted market. The sale must take place on the customary market day, during the usual hours of business. The goods must be on open, public display. In *Bishopsgate Motor Finance Corporation v. Transport Brakes Ltd*., A car was sold in Maidstone Market, the seller was not the owner, and the car was the subject of a Hire-Purchase agreement. Nevertheless, Maidstone was held to be a legally constituted market for the purpose of the market overt rules. Cars were commonly sold there and the buyer took in good faith and obtained a good title.

It is important to however note that if the goods are stolen goods and the thief is afterwards convicted, property in the goods reverts to the true owner of them not withstanding any intermediate dealing with them either by sale in market overt or otherwise (See Section 24 of the Act), this means that if “A ”steals “B's” watch and sells it in market overt to “C”, “C” acquires a good title to it. But if “A” is thereafter convicted of theft “C's” title ceases and “B's ”title revives.

(c) Sale under voidable title

If the seller has avoidable title to goods and his title has not been voided at the time of the sale, the buyer acquires a good title to the goods, provided that he did not know of the seller's defect of title and bought in good faith. This exception is provided by Section 23. For example, if A by duress obtains

goods from B, A has only a voidable title to the goods, and B can rescind the contract. If A, before B rescinds the contract sells to C, who buys in good faith and in ignorance of the vitiating element of duress, C will get a good title.

(d) Sale by seller in possession

Section 25 (1) of the Act provides this exception. It states: "Where a person having sold goods continues or is in possession of the goods or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge or disposition thereof, to any person receiving the same in good faith and without notice of the previous sale, has the same effect as if the person taking the delivery or transfer were expressly authorised by the owner of the goods to make the same.

If Alex sells to Bob but retains physical possession of the goods or documents of the title, then Alex can sell them again to Chris as long as Chris does not know of the previous transaction, Bob will however be able to recover his money back from Alex.

(e) Sale by buyer in possession

This exception is provided by Section 25(2) "Where a person having bought or agreed to buy goods obtains with the consent of the seller possession of the goods or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge or disposition.

There of, or under any agreement for sale pledge or disposition hereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods shall have the same effect as if the person making the delivery or transfer were mercantile agent in possession of the goods or documents of title with the consent of the owner.

This is the converse position of Section 25(1) and it generally arises where the buyer has possession but does not have title in the goods. e.g. where Bob agrees to buy goods from a seller who gives possession of the goods to him, where he sells to an innocent third party of his defective title such third party acquires title.

(g) **Disposition of goods under common law and statutory powers**

Examples are:-

i. The right of a pawnbroker to sell unredeemed goods pledged with him.
ii. The right of a hotel to sell the property of guests to satisfy debts.
iii. The right of landlords in certain circumstances to sell tenant's goods for arrears of rent
iv. The rights of repairers such as watch repairers, cobblers, or those of electronic items to sell uncollected goods.

The exercises of the power of sale by these categories of non-owners are subject to restrictions such as the need to give notice and time. The Courts also of course can exercise the rights to dispose perishable goods or unperishable goods in execution of a judgment debt.

6.9 Breach of contract and remedies of the parties

Where either of the parties to the sale of goods contract breaches its terms, the following are the remedies that the law provides:

6.9.1 Buyer's rights

(a) The right to reject the goods-

The buyer can reject the goods if the seller is in breach of condition, e.g. one of the implied conditions noted above. If he does so, he needs not pay the price and if he has paid it, he can recover it. The right to reject is lost, if the goods have been accepted.

(b) Action for damages-

He can sue for damages for non-delivery of the goods.

(c) Action for specific performance.

The buyer can only exercise this right compelling the seller to deliver the goods when the goods are specific or ascertained. This remedy is only also exercisable where damages will not be an adequate remedy.

(d) Recovery of purchase price.

In this situation, where seller fails to deliver the goods, the subject matter of the contract, the buyer can sue to recover his purchase price already paid by him.

6.9.2 Seller's rights

They are of two kinds. He has right over the goods, which are called real rights as against his rights against the buyer himself, which are regarded as personal rights. Real Rights: An unpaid seller of goods, even though the property in the goods has passed to the buyer has the following rights.

(a) A Lien: A lien is the right to retain possession of the goods, until payment of the price. It arises by the provision of section 41 of the Act when:

i. the goods, subject matter of the transaction, have been sold without any stipulation as to credit;

ii. the goods have been sold on credit but the term of credit has expired; or

iii. the buyer of the goods becomes insolvent.

By the provisions of section 43 this right is lost:

a. when the goods are delivered to a carrier for the purpose of transmission to the buyer, without reserving the right of disposal;

b. when the buyer or his agent lawfully obtains his possession of the goods; or

c. by waiver.

(b) Right of stoppage in transit, i.e. the right of stopping the goods while they are in transit and resuming possession of them until payment of the price. This is provided by section 44 of the Act. It is available when:-

i. the buyer becomes insolvent; and ii.
the goods are in transit.

(c) Right of Resale. There is no general right to resell. The right of alien or that of stoppage in transit does not also entitle the seller to resell. The seller, even though unpaid, who resells is generally in breach. He must deliver the goods in return. However, in the following instances he has
a right to resell:

i. where the goods are of a perishable nature;

ii. where he gives notice to the buyer of his intention to resell, and the buyer does not within a reasonable time pay or tender the price; and

iii. where the seller expressly reserves a right of resale in case the buyer should default.

If the seller however suffers loss from the resale he can claim such from the buyer as damages.

(d) Right of withholding delivery: This right arises where property in the goods has not passed to the buyer and possession is also with the seller.
Personal Rights: A seller is also entitled to these personal rights against the buyer where the buyer breaches the contract:

(a) To sue for the price by section 49 of the Act, this right avails the seller, when the property in the goods have passed to the buyer and the buyer wrong fully neglects or refuses to pay for the goods.

(b) To sue for non-acceptance. This action for damages lies when the buyer refuses or neglects to accept the goods.

6.10 VAT on supplies under the Nigeria Tax Act (NTA), 2025

According to sections 144 and 145 of the NTA, subject to the exemptions in Part IV of Chapter Eight as listed below, VAT shall be paid on all taxable supplies in Nigeria. The taxable supplies include goods:

a. that are physically present, imported into, and assembled or installed in Nigeria at the time of supply; or

b. the beneficial owner of which is a taxable person in Nigeria, and goods which are situated in Nigeria, or the right over which is exercisable in Nigeria.

However, according to section 186 of the NTA, the following supplies shall attract no (0%) VAT:

i. Basic food items;

ii. All medical and pharmaceutical products including medicinal herbal products;

iii. Educational books and materials;
iv. Fertilisers;
v. Locally produced agricultural chemicals;
vi. Locally produced veterinary medicine;
vii. Locally produced animal feeds;
viii. Live cattle, goats, sheep and poultry;
ix. Agricultural seeds and seedlings;
x. Exported goods excluding oil and gas;
xi. Exported services;
xii. Exported incorporeal property; and
xiii. Medical equipment.

6.11 Summary

This chapter has explained what a contract for sale of goods means and the laws that govern such contract. Also, it shows the classifications of goods, differentiating between specific goods and unascertained goods and the difference between a contract for sale of goods and other transactions that seem similar to it. Further, it shows the form and terms of the contract, differentiating between a condition and a warranty; and explains the implied terms in a contract such as title, description, merchantable quality etc. It discusses and explains other terms like time and price. It further explains transfer of title by non-owner, passing of risks, and breach of the contract and remedies available to the parties.

It is important to remember that a contract for sale of goods is in its basic form, a contract, which is an agreement between the two parties, which is binding on them, and enforceable by the Courts.

6.12 REVISION QUESTIONS

MULTIPLE CHOICE QUESTIONS

1. The following essential elements are required for the contract of sale of goods **EXCEPT ONE**

   A. Offer and acceptance
   B. Consideration
   C. Intention to create legal relationship
   D. Capacity
   *E. Insurance policy

2. Contract of sale of good is basically governed by

   *A. The Sales of goods Act 1893
   B. The 1999 Constitution of the Federal Republic of Nigeria (as amended).
   C. The Companies and Allied Matters Act (CAMA), 2020
   D. The Banks and other Financial Institution Act (BOFIA), LFN 2004
   E. E. The Land Use Act of 1978 now codified in LFN 2004

3. The following are the exceptions to the *nemo dat quod non habet* rule **EXCEPT**

   A. Estoppel
   B. Sales by Mercantile Agent or factor
   C. Sale in market overt
   D. Sale by seller in possession
   E. Sale by owner of the supermarket on behalf of any licensed agent

4. A buyer's right in sale of goods contract include the following **EXCEPT**

   A. The right to reject the goods
   B. Action for damages
   *C. Pre action notice
   D. Recovery of purchase price
   E. Recovery of damages

5. Sellers' rights in the sale of goods contract include the following **EXCEPT**

A. Right of lien
B. Right of stoppage in transit
C. Right of resale
D. Right of withholding delivery
*E. Right of preliminary objection

SHORT ANSWER QUESTIONS

1. Where goods are to be manufactured or acquired by the seller after the contract for sale has been concluded, the goods are _____***** future goods.
2. Goods owned and in possession of seller at the time of the contract of sale of goods are known as _____***** existing goods.
3. Goods not identified and agreed upon at the time of the contract of sale of goods are called _____***** unascertained goods.

ESSAY QUESTIONS

1(a) Define 'goods' under section 62 of the Sale of Goods Act.

Answer

Goods is defined under section 62 of the Sale of Goods Act as all chattels personal other than choses in action and money, and goods also include things attached to land or forming part of the land but which it has been agreed will be severed before sale or under contract of sale.

(c) State the classes of goods under Sale of Goods Act.

Answer

The classes of goods available under the Sale of Goods Act are as follows:

(a) Existing goods;

(b) Future goods;

(c) Ascertained/Specific goods; and

(d) Unascertained goods.

2. How does a contract for sale of goods differ from

(a) Hire purchase agreement; and

(b) Sale and bailment

Answer

(a) A contract of sale and hire purchase resemble each other only to the extent that the end result is the transfer of goods. However, while property is transferred upon the sale of goods, in a hire purchase relationship, there is no transfer of property until the last instalment is paid and the hirer exercises his option to purchase. Also, where there is default in any instalmental payment by the purchaser in a hire purchase transaction, the whole property reverts to the seller.

(b) Bailment is a mere transfer of possession whilst sale is a transfer of possession and property (ownership). A bailment is a transaction under which possession of goods is delivered by a bailor to a bailee on terms requesting the bailee to hold on to the goods and later redelivers them as the bailor may direct.

3. State and explain the rights of a buyer in a breach of sale of goods contract.

Where there is a breach by the seller of goods in a sale of goods contract, the following are the rights of the buyer:

(a) The right to reject the goods: The buyer can reject the goods if the seller is in breach of condition. If he does so, he needs not pay the price and if he has paid it, he can recover it. The right to reject is lost if the goods have been accepted;

(b) Action for damages; He can sue for damages for non-delivery of the goods;

(c) Action for specific performance: The buyer can only exercise his right to compel the seller to deliver the goods when the goods are specific and ascertained. This remedy is only also exercisable where the damages will not be an adequate remedy;

(d) Recovery of purchase price: In this situation, where seller fails to deliver the goods, the subject matter of the contract, the buyer can sue to recover his purchase already paid by him.

CHAPTER SEVEN

Hire purchase and equipment leasing

7.0 Chapter contents

- Learning objectives
- Introduction
- Definition of hire purchase
- Distinction between hire purchase and other transactions
- Parties to hire purchase transactions
- Duties of parties to hire purchase contract
- Termination of hire purchase contract
- Finance lease
- Features of operating lease
- Summary
- Revision questions
-

7.0.1 Learning objectives

At the end of this chapter, readers should be able to:

- define a hire purchase contract
- differentiate hire purchase agreement from other secured credit transactions
- understand the obligations and rights of parties at Common Law and under the Hire Purchase Act
- have an understanding of the purpose and contents of the Hire Purchase Act
- explain termination of hire purchase contract
- understand the basic principles of operating and finance leasing

7.1 Introduction

Simply put, a hire-purchase contract is an agreement whereby the possession of goods is delivered to a person, who agrees to make payments periodically, and with an option of buying the goods after the agreed installments have all been paid. The chapter also introduces readers to the distinction between operating and finance leases.

7.2 Definition of hire purchase

A hire-purchase agreement is an agreement under which the owner of good shires them to another person called the hirer, the agreement also providing that the hirer shall have the option to buy the goods if and when the number of installments specified in the agreement had been paid.

The above definition clearly shows:

a. There is no obligation on the hirer to pay all the installments;
b. Until the option is exercised there is no agreement to buy the goods. We can then safely say that a hire-purchase contract consists of 3 parts:
    i. a contract of bailment under which the hirer obtains possession of the goods while ownership remains in the owner and so uses them before they are fully paid up;
    ii. an option in favour of the hirer entitling him after payment of the periodical instalments and usually for a nominal consideration to purchase the goods; and
    iii. if the hirer exercises the option, a contract of sale making him the owner of the goods already in his possession.

We are thus very clear as to the nature of a hire purchase agreement as that which is a contract of hire and not sale, although there is a general misconception that since the hirer has possession of the goods he has ownership in them. It can be seen clearly that a hire purchase contract does not come under the *Sale of Goods Act* by which property (or ownership), which is the essence of a sale of goods contract, may not pass to the hirer if he fails to pay all the stipulated installments.

7.3 Distinction between hire purchase and other credit transactions

7.3.1 Credit sale agreement

This is an agreement by which the seller sells and transfers ownership in goods (i.e. property) to the buyer and agrees to accept payment by installments. The buyer is the owner of the goods and not merely a hirer of them. If he defaults in

paying the installments, the seller's remedy is an action for the accrued installments but not for recovery of possession of the goods.

7.3.2 Conditional sale agreement

This is an agreement for the sale of goods under which the purchase price is payable by installments, until the last installment is paid and the property in the goods is to remain in the seller (not withstanding that the buyer is to be in possession of the goods) until such conditions as to the payment of installments or otherwise as may be specified in the agreement are fulfilled. The difference between a hire purchase contract and a conditional sale agreement this is that there is an obligation, in the latter and not merely an option to purchase the goods as it obtains in the former.

7.4 Parties to hire purchase agreement

There are usually two parties to a hire purchase agreement, that is, the Owner-who undertakes to let out the goods on hire with an option to purchase when all payments have been made, and the hirer-who undertakes to pay the hire purchase charges that are involved.

7.5 Duties of parties to hire purchase contract

The parties to a hire purchase contract have duties and rights as follows:

7.5.1 Duties of owner

The duties of the owner under hire purchase contract are:

(a) Duty to disclose the cash price of the goods to the hirer at the inception of the contract;

(b) That he has valid title in the goods, subject matter of the contract;

(c) Duty to give the hirer quiet possession of the goods;

(d) Duty to deliver the goods to the hirer

(e) Duty to accept installment payment from the hirer;

(f) Duty to deliver exact quantity of the goods agreed upon; and

(g) Duty not to repossess the goods, subject matter of the contract, except a motor vehicle.

7.5.2 Rights of the owner

The owner has the following rights under a contract of hire purchase:

(a) The right to information from the hirer about the goods;

(b) The right to re-possess the goods where the agreement is determined by the hirer or the court; and

(c) The right to repossess the goods if it is a motor vehicle, for safety, even when a relevant portion of the installments has been paid, without recourse to the court.

7.5.3 Duties of the hirer

The hirer has the following duties to:

(a) Accept the goods subject to the contract;

(b) Pay the installments as and when due; and

(c) Disclose information about the goods to the owner as and when required by the owner.

7.5.4 Rights of the hirer

The hirer has the right to:

(a) Use the goods;

(b) Quiet possession and enjoyment of the goods;

(c) Know the exact installments to be paid and the cash price of the goods; and

(d) Choose the insurer and garage to maintain the goods or motor vehicle.

7.6 Termination of hire purchase agreement

A hire purchase agreement may be terminated by any of the following circumstances:

(a) Mutual agreement of the parties to rescind the agreement;

(b) Performance of all the obligations under the agreement;

(c) Provisions in the agreement which allows the hirer to terminate the contract at any stage of the agreement without prejudice his option to purchase the goods;

(d) Supervening circumstances such as fire, destruction, act of God, and other events beyond the control of the parties;

(e) Repudiation by the aggrieved party who may sue for a breach of terms of the contract; and

(f) An order or judgment of court for conversion or *detinue*.

7.7 Operating and finance lease

The acquisition of assets, particularly expensive capital equipment, is a major occurrence in many businesses. How that acquisition is funded requires careful planning. Hire purchase and leasing represent the most common sources for financing acquisition of assets. Both leasing and hire purchase are similar in that they are means through which an individual may use an asset over a fixed period, in return for regular payment. The customer chooses the equipment and the finance company buys it on behalf of the customer.

A lease is an agreement between two parties, the "lessor" and the "lessee". In a lease arrangement, ownership never passes to the customer, but as with hire purchase, the hirer shall have the option to buy the goods if and when the number of installments specified in the agreement had been paid.

Operating leasing and finance leasing are common types of equipment leasing arrangements. Others are sales and lease back, and leveraged leasing. However, it is with the first and second types of leasing that we are concerned here.

7.7.1 Operating lease

Under this type of lease the lessee acquires the right to use the assets for a short period, e.g., a week or month, instead of buying them outright. The business that lets the asset out is the lessor, and the business that takes it for use is the lessee. Operating lease does not confer ownership right on the lessee. The lease may be renewed after the expiry of the period. This arrangement is adopted in case of assets, which are subject to rapid technological advancements, e.g., computers. Operating lease is relatively more expensive than finance lease.

The lease agreement specifies the obligations of each of the parties, but importantly the lessee must keep the assets in operational condition, reasonable allowance being made for normal wear and tear.

7.7.2 Features of operating lease

Operating leases are rental agreements between the lessor and the lessee whereby:

a) The lessor supplies the equipment to the lessee

b) The lessor is responsible for servicing and maintaining the leased equipment

c) The period of the lease is fairly short and less than the economic life of the asset, so that at the end of the lease agreement, the lessor could either

i) Lease the equipment to someone else, and obtain a good rent for it, or
ii) sell the equipment second hand.

If a customer needs equipment for a short period, then an operating leasing could be the appropriate. The leasing company leases the equipment, expecting to sell it second-hand at the end of the lease, or to lease it again to someone else. By that not need to recover the full cost of the equipment through the lease rentals.

This type of lease is common for equipment that has a well-established second hand market (e.g. cars and construction equipment). The lease period usually would be two to three years, although it could be much longer, but it is always less than the working life of the asset.

7.7.3 Finance lease

Finance lease (capital lease or sales lease) is a commercial agreement or contract that enables the lessee (customer or borrower) to have the use or operating control of an asset with usual outcome that the lessee will become the owner of the assets at the end of the lease period by paying the last rental on it or negotiating its option purchase price.

The transaction comprises the lessee (customer or borrower selecting an asset for use; the lessor (finance company) buys and owns the asset for the duration of the lease; and the lessee has the use or operating control of the assets for the lease period, paying a series or rentals or installments for the use while sharing the risks as well as returns of the assets from the change in its valuation.

The arrangement allows the lessor to recover most or all of the cost of the assets while at the same time earning interests from the rentals that the lessee pays. The lessee then has the option to acquire ownership of the assets at the end of the lease if he has paid the last rental, or bargain option purchase price.

A finance lease is then similar to a hire purchase because of bailment of the assets, payment installments, and the option to purchase but the accounting treatment and tax implications of each differ. For instance, leasing of assets instead of purchashing it could be of tax advantage to a lessee.

This lease is for a specified duration during which the agreement cannot be cancelled. The length of this basic term depends on the economic life of the asset, which is usually shorter than the expected life of the asset.

Final lease lease permits the lessee to use the asset after the expiry of the basic period or, in the alternative, buy the asset at a negotiated price at the end of the lease.

Although the lessee does not own the equipment, the lessee bears as well as realises most of the 'risks and rewards' associated with ownership. The lessee is responsible for maintaining and insuring the asset. When the lease period ends, the leasing company would usually agree to a secondary lease period at significantly reduced lease payments. Alternatively, the lessee could sell the equipment in second **hand form to an unrelated third party on behalf of the leasing company for a bulk of the sale proceeds pursuant to the parties' agreement.**

7.7.4 Features of finance lease

(a) Finance leases are lease agreements between the user of the leased asset (the lessee) and a provider of finance (the lessor) for most, or all, of the assets' expected useful life;

(b) The lessee is responsible for the upkeep, servicing and maintenance of the asset, and the lessor is not so responsible at all;

(c) The lease has a primary period, which covers all or most of the economic life of the asset. At the end of the lease, the lessor would not be able to lease the

asset to someone else, as the asset would be worn out. The lessor would, therefore, ensure that the full cost of the asset as well as a suitable return on his investment are realised during the duration of the lease; and

(d) It is usual at the end of the primary lease period to allow the lessee to continue to lease the asset for an indefinite secondary period in return for a very low nominal rent. Alternatively, the lessee might be allowed to sell the asset on the lessor's behalf (since the lessor is the owner) and to keep most of the sale proceeds, paying only a small percentage (perhaps 10%) to the lessor.

7.8 Summary

This chapter has given a detailed explanation of the hire-purchase agreement, showing the difference between the hire-purchase agreement and other secured credit transactions. It further shows the obligations of the parties under the hire purchase agreement; stating the obligations and rights of the parties at common law, as well as the rights and obligations of the parties under the *Hire Purchase Act*. A further study would reveal the rationale behind the adoption of the hire- purchase agreement. The *Hire Purchase Act*, its contents and purposes have also been discussed. The general requirements of the Act such as notification of cash price, written agreement and so on, provisions and implied terms under the Hire Purchase Act e.g. quiet possession, right to sell the goods and so on, including exclusion of term provided by the Act, the hirer's right to terminate the agreement and recovery of goods have been extensively discussed.

The *Hire Purchase Act* has radically altered the common law principles, as it has been discussed in this chapter. The hire-purchase agreement is distinctive in nature, as it is a contract of hire, and not of sale, thereby making it different from a contract for sales of goods.

7.9 REVISION QUESTIONS

1. The *Hire Purchase Act* has radically altered the common law principles of hire purchase. How true is this assertion?

2. What are the reasons for the adoption of the hire-purchase system?

3. A hire purchase agreement consists of three parts. Name them.

4. Distinguish between a hire purchase contract and a conditional sale agreement.

5. State the duties of an owner in hire purchase agreement at common law.

6. State the duties of the hirer at common law.

7. State three injustices or malpractices that the *Hire Purchase Act* was enacted to check.

8. State four terms that must be contained in a hire-purchase agreement as stipulated by statute.

9. What is the effect of non-compliance with the general requirements of the *Hire Purchase Act*?

10. When may a hire-purchase agreement which does not conform with the general requirements of the *Hire Purchase Act* been forceable?

11. State three provisions, which if, contained in a Hire purchase agreement are void.

12. When may a hirer exercise his right to terminate a hire-purchase agreement under the relevant statute?

13. State four terms which are implied in a hire-purchase agreement.

14. Is it in all instances that the terms implied in a hire-purchase agreement by statute may not be excluded?

15. Explain the term "relevant proportion" in a hire-purchase agreement and explain its relevance.

16. What is the effect of the exclusion of the terms implied by the *Hire Purchase Act* by a party to the hire-purchase contract?

MULTIPLE CHOICE QUESTIONS

1. The hire purchase contract is basically governed by

*(a) The Hire Purchase Act, 1965

(b) The Hire Purchase Act, 1900

(c) The Companies and Allied Matters Act, 2020

(d) The Constitution of the Federal Republic of Nigeria,

(e) The Third Party Act, 1978

2. The rights of the hirer under a hire purchase contract include the following EXCEPT

(a) Right to use the goods

(b) Right to quiet possession and enjoyment of the goods

(c) Right to know the exact installments to be paid and the cash price of the goods

*(d) Right to take reasonable care of the hire purchase goods.

(e) Right to choose the insurance and to the garage to maintain the goods or motor vehicle

3. The rights of the owner under a contract of hire purchase include the following EXCEPT

*(a) The right to choose the insurance and to stipulate the premium to be paid Right to information about the goods from the hirer

(b) Right to re-possess the goods where the agreement is determined by the hirer by court action

(c) Right to re-possess the goods if it is a motor vehicle, for safety even when a relevant portion has been paid without recourse to a court of law

SHORT ANSWER QUESTIONS

1. The Hire Purchase Act was enacted in _____ ***** 1965
2. By section 3 of the Act, any term of the hire purchase agreement that entitles the owner to enter the premises of the hirer to repossess the goods is _____ ***** void.
3. The *Hire Purchase Act* seeks to correct the inadequacies in the _____ *****Factors Act/Sale of Goods Act ***** concerning contracts of hire.

ESSAY QUESTIONS

1. List the duties of the owner under the *Hire Purchase Act.*

Answer

The duties of the owner under the Hire Purchase Act are as follows:

(a) The owner owes the duty to disclose the cash price (value) of the goods to the hirer at the inception of the contract;

(b) She must have valid title in the goods;

(c) She must give the hirer quiet possession of the goods;

(d) The owner must deliver the goods to the hirer;

(e) She must accept instalmental payment;

(f) She must deliver the exact quantity of goods stipulated; and

(g) She cannot repossess goods subject of hire purchase except a Motor vehicle.

2. List the duties of the hirer under the Hire Purchase Act.

Answer

The duties of the hirer under the hire purchase contract include the following:

(a) Accepting the goods subject of the contract;

(b) Taking reasonable care of the hire purchase goods;

(c) Paying the installments as and when due; and

(d) Disclosing information about the goods to the owner as and when required by the owner.

3. What are the remedies available to the owner where there is a breach of the hire purchase contract?

Answer

The following are some of the remedies available to an owner for breach of the hire purchase contract:

(a) Where the hirer determines the contract after taking delivery of the goods, the owner can sue for damages. Section 8 of the Hire Purchase Act provides that the hirer will be liable to pay what will bring his total payment to one half of the price;

(b) The owner shall be entitled to the true arrears of rental if he retakes the goods due to the breach of the agreement by the hirer; and

(c) Where the hirer fails to take possession of goods after the agreement, the owner can sue and get remedy under common law for damages.

CHAPTER EIGHT

Contract of employment

8.0 Chapter contents

- Learning objectives
- Introduction
- The nature and formation of contract of employment
- Formation of contract of employment
- Rights of employer and worker
- Duties of employer and worker
- Termination of contract of employment
- Remidies
- Redundancy
- Summary
- Revision question

8.0.1 Learning objectives

Upon completion of this chapter, readers should be able to:

- explain the nature and formation of a contract of employment;
- discuss the rights of the employers and the employees;
- describe the duties of the employers and the employees;
- distinguish between termination and dismissal;
- explain the remedies for breach of employment contract; and
- understand redundancy.

8.1 Introduction

The right to work is one of the fundamental rights to which a human being is entitled. It is the main means of sustenance for man. This is especially so in economies like ours where unemployment benefits are non-existent. Whatever form the employment takes, it is important to have an understanding of how it is

contracted. The legal basis of employment remains the contract of employment between the employer and the employee. In most employment situations, both the employer and the employee (worker) have rights and also obligations. Since whatever has a beginning must necessarily have an end, then the various ways by which a contract of employment is brought are considered, and this leads us to consider the terminologies of termination, dismissal and redundancy. The remedies that are available for breach of the contract of employment are also discussed.

8.2 Nature and formation of contract of employment

8.2.1 Nature of contract of employment

The contract of employment is the focus of attention of labour law. At common law, it is assumed that the terms of the contract are freely established by parties who are equal. This is the concept of the so-called freedom of contract, which is said to exist between the employer and the employee. However, this is not always the situation and is not always so. Except for the rare employees who can match the bargaining power of the employer, for the majority of employees, the major terms of the contract are fixed by the employer and are offered to the employee on the basis of "take it or leave it." For such employees, the employment relationship implies a relation of undefined authority on the side of the employer, and undefined subordination on the side of the workman. It is a relationship that inevitably gives rise to the needs for guarantees against abuse, and a relationship, which the trade union constantly seeks to improve.

8.2.2 Formation of contract of employment

The capacity to enter into contract of employment applies generally in all contracts. However, the Labour Act provided that infants and young persons may be engaged on daily basis for wages but not at night or on public holidays, or in underground operations, or on machines or shipping vessels, or against the wishes of their parents or guardians communicated to the employer.

Although women have capacity to enter into employment contract, they have some protection under the Labour Act by which the following are implied in their favour:

(a) They are entitled to maternity leave of six weeks before and six weeks after delivery;

(b) They shall not be given notice of dismissal during their absence on maternity leave, even if they remain longer than necessary due to illness;

(c) They shall not be employed on night duty nor shall they be employed on underground work in a mine, except they are holding positions of management and do not perform manual labour and women employed in health and welfare services.

8.3 Rights of the employer and employee

8.3.1 Rights of the employer

The rights of an employer under a contract of employment include the right to employ a worker, discipline, transfer, promote and terminate the employment of the worker. The employer's discretion in the exercise of his right under a contract of employment is likened to the discretion of an entrepreneur to set target for his business, takes decision to modify, extend or cease operations. He also determines the type of products to make or sell and the prices of its goods and services.

8.3.2 Rights of the employee

The rights of the employee include -

- right to work under satisfactory, safe and healthy conditions;
- right not to be discriminated against at the workplace;
- right to the receipt of equal pay for equal work without distinction of any kind;
- right to rest, leisure and reasonable limitation of working hours and period of holidays;
- right to form or join a trade union of his choice; and
- right to be trained and retrained for the development of his or her skills and receive information relevant to his or her work.

8.4 Duties of the employer and employee

There are duties imposed on the employer and the employee (worker) by virtue of their contractual relationship.

8.4.1 Duties of the employer

(a) An employer is duty bound to provide work for his employee, especially the opportunity for work is contained in the contract of service;

(b) An employer must pay wages and remuneration regularly weekly, forth-nightly, or monthly, but not longer than monthly;

(c) Duty to provide a written statement of the terms of employment within three months after the employee has assumed duty;

(d) The duty to provide a safe system of work, which include proper appliances and plants, supportive competent staff; proper work system and effective supervision, payment of expenses reasonably incurred by the employee in the course of his duties as well as compensation to injured employee or the relatives of deceased employees who have suffered mishap in the course of duty, as well as grant agreed leaves and one work-free day per week, and pay redundancy.

8.4.2 Duties of the employee

Under a contract of employment the duties of an employee to his employer include the following:

(a) Duty to exercise his professed skill and diligence. Note however, that an employee is not expected to demonstrate more commitment than he has disclosed to his employer;

(b) He is obliged to perform the duty for which he is employed and other related duties;

(c) The employee has a duty to obey lawful and reasonable orders of his employer where those orders are with the terms of the contract and are not illegal nor contrary to public policy;

(d) The employee must render his services personally and not delegate his duties without the consent of the employer;

(e) An employee must keep secret his employer's confidential information And trade secret; and

(f) An employee is bound to serve his employer faithfully and not put himself in a situation where his interest will conflict with that of his employer.

8.5 Termination of contract of employment

Contract of employment may be terminated for the following reasons:

(a) Natural events such as death and frustration as well as operation of law;

(b) Compulsory winding up of the employer's company;

(c) Dissolution of partnership in a case of personal service;

(d) Compulsory conscription of the employee during hostility or war;

(e) Prolonged illness of the employee;

(f) Mutual agreement as when ad-hoc job is completed and on happening of some event, or contingency, or by effluxion of a term certain; and

(g) Termination of the employment by the employer or employee after due notice.

8.6 Remedies

Damages are the normal remedy available for breach of a contract of employment. This is usually monetary compensation to the injured party. Reinstatement may be another option. It means appointing the employee back to the position he occupied before and therefore the enjoyment of all the benefits that go with the position. Reinstatement is often impracticable and the courts are reluctant to make such orders since positions may have been filled already and may also create a hostile working environment. However, in situations where a public officer may have been removed without just cause then the remedy of reinstatement may be granted. Re-employment of the worker either in the work for which he was employed before the termination or in other reasonably suitable work on the same terms and conditions enjoyed by the worker before the termination is the other alternative.

8.7 Redundancy

When an employer contemplates that the introduction of major changes in production programme, organisation, structure or technology of an undertaking are likely to entail terminations of employment of workers in the undertaking, the employer will be expected to provide in writing to the Chief Labour Officer and the trade union concerned, not later than three months before the contemplated changes all relevant information including the reasons for the termination, the number and categories of workers likely to be affected and the period within which any termination is to be carried out. He is also to consult the trade union concerned on measures to be taken to avert or minimize the termination as well as measures to mitigate the adverse effects of any termination on the workers concerned such as finding alternative employment. Redundancy implies the severance of the legal relationship of worker and employer due to the close down, arrangement or amalgamation and the worker becoming unemployed or suffering a diminution in the terms and conditions of employment. This situation called for the payment of redundancy pay. Payment to the worker by the undertaking at which he was immediately employed before the close down, arrangement or amalgamation as a form of compensation is what is known as redundancy pay. The amount of redundancy pay and the terms and conditions of payment are subject to negotiations between the employer and the worker or their representatives.

8.8 Summary

Employment plays a critical role in human survival. It is the main source of sustenance. The very essence of the contract of employment relates to the rights and duties of the employer and the employee. Contracts of employment may come to an end one way or the other. It may be through termination with or without loss of benefits or through redundancy. Termination with loss of benefits (dismissal) maybe the other way. Any wrongful termination will amount to a breach of the contract of employment for which there are remedies.

8.9 REVISION QUESTIONS

MULTIPLE CHOICE QUESTIONS

1. The duties of an employer under a contract of employment include the following EXCEPT

   (a) To provide work

   (b) To pay wages or salaries

   (c) To provide a safe system of work

   (d) To treat employee with respect

   *(e) To obey the employee whenever duty demands

   (e) The duty of the employer to provide a safe system of work means ALL BUT ONE of the following: To provide competent supportive staff

   (f) To provide proper tools and plants for the use of the employee

   (g) To grant at least one work-free day per week

   (h) To indemnify the employee for losses lawfully and reasonably incurred

   *(e) To sue the servant in order to enforce reasonable restraint of trade

2. The technical term for the period of trial of a new employee during which the employer takes the opportunity to study the employee, test his skill and suitability, is known as

   (a) Duration period

   (b) Testing period

   (c) Assessment period

   *(d) Probation period

   (e) Observation period

SHORT ANSWER QUESTIONS

1. _____**** interdiction**** is the suspension of the employee from the workplace pending the determination of a criminal charge against him.
2. When the employer removes an employee without formalities, the employee is said to be _____*****dismissed.
3. Where servants have to be discharged for reasons owing to excess manpower, employer is liable to pay _____****redundancy**** allowance to the employee.

ESSAY QUESTIONS

1. What are the duties of the employer under a contract of employment?

   Answer

   The duties of an employer under a contract of employment include the following:

   (a) Duty to pay wages or salaries;
   (b) Duty to provide work;
   (c) Duty to provide a safe system of work;
   (d) Duty to provide written statement of the terms of employment within three months after the servant has assumed duties.

2. Distinguish between a contract of service and a contract for services and list the tests that the courts have applied to distinguish between the two.

   Answer

   (a) Even though in both case of contract of service and contract for services, the contract to do work is present, yet the incidents attaching to the two contracts are different. For instance, a person engaged in a contract of service is called an and the employer may be vicariously liable for the tort of the employee, whereas a person engaged in a contract for services is known as an independent contractor and the employer may not be liable for the tort committed by the independent contractor unless the act is expressly authorised.

(b) The courts, in distinguishing between a contract of service and a contract for services have, over time, applied certain tests, some of which are:
(i) Control test;
(ii) Organisation test; and
(iii) Circumstances of the case test.

3. Highlight the peculiar provisions relating to the employment of young persons and women under the Labour Act.

Answer

Young persons: Even though the Labour Act provides in section 9 that a person below the age of sixteen years cannot validly enter into a contract of employment but that of apprenticeship, however, the Act provides that whereas a young person may be engaged on daily basis for wages, this engagement shall not be in the night, or on public holidays, or in underground operations or on machines or shipping vessels or against the wishes of their parents or guardian notified orally or in writing to the employer.

Women: There are also some protection for women under the Act. Among the terms in their favour are the following:

(a) Women are entitled to maternity leave of six weeks before and six weeks after their condiment on the production of a medical certificate, given by a qualified medical practitioner.

(b) They shall not be given notice of dismissal during their absence on maternity leave even if they remain longer than necessary due to illness.

(c) They shall not be employed on night work nor shall they be employed on underground work in a mine except those women holding position of management who do not perform manual labour and women employed on health and welfare services and those who are not otherwise engaged in manual labour.

CHAPTER NINE

Insurance

9.0 Chapter contents

- Learning objectives
- Introduction
- Meaning and classification of insurance
- Share capital of insurer
- Meaning and features of certain concepts and principles of insurance
- Summary
- Revisions questions

9.0.1 Learning objectives

At the end of this chapter, readers should understand the:

- meaning of insurance
- classification of the contract of insurance, into life and non-life
- share capital required by an insurer for registration of insurance business
- meaning of some concepts and principles of insurance, including insurable interest, premium, indemnity

9.1 Introduction

Insurance is a contractual relationship in which a party known as the insurer undertakes to indemnify the other party known as the insured for a loss upon a consideration known as premium furnished by the insured. The principal statute on insurance business in Nigeria is the Nigerian Insurance Industry Reform Act, 2025 (NIIRA).

Insurance contract is aleatory in that the occasion for indemnity may or may never occur. This is because it depends on the happening of some specified but uncertain event or contingency.

9.2 Meaning and classification of insurance

Meaning of insurance

The Black's Law dictionary, ninth edition, defines insurance as: "A contract by which one party (the insurer) undertakes to indemnify another party (the insured) against risk of loss, damage, or liability arising from the occurrence of some specified contingency, and usually to defend the insured or to pay for a defence regardless of whether the insured is ultimately found liable.

Thus, a contract of Insurance is one whereby a person or company (the insurer)

agrees in consideration of a single or periodical payment (called the premium) to pay a sum of money to another person or company (the insured) on the happening of a certain event or to indemnify against loss caused by the risk insured against. It is important to note that the benefits accruing to the insured must be of a monetary nature.

'Insurance' is different from 'assurance' even though there is a tendency to use both terms as synonyms. Whereas insurance contract is intended to indemnify the insured against an uncertain loss or damage which may or may not occur, e.g. damage to property by fire, a contract of assurance is one in which the assured or his representatives are to receive a sum of money on the occurrence of an event which is bound to happen at some time, although the time of occurrence is uncertain, e.g. the death of the assured.

9.3 Classification of insurance business

The NIIRA (section 3) categorises insurance business into two, namely:

a. life insurance business; and
b. non-life insurance business.

Life insurance business

This category has four classes:

i. Individual life assurance business;
ii. Group life assurance business;
iii. Annuity; and
iv. Health insurance business.

Non-life insurance business

This comprises eight classes:

i Fire insurance business;
ii General accident insurance business;
iii Motor vehicle insurance business;
iv Marine and aviation insurance business;
v Energy (oil, gas, and power) insurance business;
vi Engineering insurance business;
vii Bonds credit guarantee and suretyship insurance business; and
viii Agricultural insurance business, other than schemes covered by the Nigerian Agricultural Insurance Corporation Act.

In addition are miscellaneous insurance business, which includes financial inclusion insurance business.

9.4 Share capital of insurer

The minimum capital requirements for insurance businesses are:

a. Non-life insurance business – the higher of ₦15,000,000,000, or risk-based capital determined by the National Insurance Commission;

b. Life assurance business - the higher of ₦10,000,000,000, or risk-based capital determined by the National Insurance Commission;

c. Reinsurance business - the higher of ₦35,000,000,000, or risk-based capital determined by the

National Insurance Commission;

The National Insurance Commission shall, in determining the risk-based capital, take into consideration the capital for insurance risk, market risk, credit risk, and operational risk. It shall apply, in the process, such charges on assets and liabilities as it may determine. (Section 15, NIIRA)

Section 16 of the NIIRA mandates that an insurer that is about to commence insurance business in Nigeria must deposit to the Central Bank of Nigeria (CBN) an equivalent of 50% of the minimum capital stated above. The CBN must return 80% of the deposit to the insurer within 60 days of its registration.

Existing insurance companies must deposit with the CBN an equivalent of 10% of the minimum capital stated above.

Failure to make the statutory deposit is a ground for cancellation of the insurer's licence.

9.4.1 Insurance intermediaries and duty of insurance agent in relation to premiums

No matter the provisions of any other law, section 37(1) of the NIIRA prohibits a person from carrying on business as an insurance agent without licence under the provisions of the Act.

Eligibility criteria for licence as an insurance agent under section 37(2) of NIIRA are:

a. possession of a minimum of certificate of proficiency issued by the Chartered Insurance Institute of Nigeria (CIIN);
b. if the person is a corporate entity, possession by at least one of the principal officers of a certificate of proficiency issued by the CIIN;
c. possession of at least 10 years of experience in an underwriting firm;
d. non-conviction previously by a court or tribunal for an offence involving dishonesty of fraud; and
e. not having become bankrupt or "applied to take the benefit of the law for the relief of bankruptcy within five years preceding the date of application."

Once licensed, the following duties are imposed on an insurance agent:

a. The agent must not collect premium on behalf of the insurer because any premium must be paid directly to the insurer.
b. If an agent collects a premium and fails to pay it over to the insurer, he commits an offence and is liable to a penalty of not more than 5% of the premium involved and additional ₦100,000 for each day the offence continues. In addition, he is disqualified for further engagement as an insurance agent or employee by an insurance operator for 12 months. In addition to the foregoing, the National Insurance commission may impose any other penalty on the agent as it deems fit.

9.4.2 Records to be kept by an insurer

Section 19 of the NIIRA requires an insurer to keep and maintain at its principal office –

a. its memorandum and articles of association;
b. a record of the owners (shareholders or otherwise) of the insurance business;
c. a register of every policy issued by it;
d. a register of the particulars of claims made on the insurer;
e. a register of investment that shows those that are attributable to the insurance funds;
f. a register of ceded reinsurance, including clearly those ceded in Nigeria;
g. a register of its assets;
h. a cash book;
i. a current account book;
j. a register of open policies in respect of marine insurance transactions; and
k. its management accounts.

In addition, an insurer that carries on business through insurance agents shall maintain a register that shows the name and address of every insurance agent as well as the date of the contract of the agency services, and where relevant, termination thereof (section 38(1), NIIRA).

9.5 Meaning and features of certain concepts and principles of insurance

9.5.1 Insurable interest:

This is a prerequisite for any contract of insurance. The precondition nature of insurable interest for every kind of insurance has been given judicial stamp in the case of *C.C.B. Ltd. v. Nwokocha*, where Nsofor JCA said: "…. It is in my opinion, rather settled principle that in the law of insurance, be it marine or fire etc., the insured ought to have an insurable interest, in the subject matter of the insurance.

In *Lucena v. Craufurd*, insurable interest is defined as an interest that a man has in a thing in respect of which an advantage may arise or prejudice happen from the circumstances which may attend it, and the man is therefore interested in the preservation of that thing in order to derive benefit from its existence, and to avoid loss or damage from its destruction.

Features/Examples of insurable interest:

1. A creditor has an insurable interest in the life of his debtor to the extent of the debt and the policy money is recovered even though the debt is paid before the maturity of the policy. However, he generally, has no insurable interest in the property of his debtor.

2. A surety has an insurable interest in the principal debtor's life.
3. An employee engaged for a term of years has an insurable interest in his employer's life.

9.5.2 Premium

As with every other contract, a contract of insurance is not valid unless consideration is furnished, and premium is the consideration upon which the validity of insurance contract is based. It may be paid in bulk or instalmentally according to the policy or the agreement for the contract of insurance. The payment of the first premium is an indication that a binding contract has been formed.

Where premium is not paid, the insurer has a right of action against the assured. The insurer may also waive the rules or conditions relating to the payment of premium if they like, but cannot waive the actual payment of premium as section 50 of the *Insurance Act* has made payment of premium mandatory in Nigeria when it provides that: “The receipt of an insurance premium shall be a condition precedent to a valid contract of insurance and there shall be no cover in respect of an insurance risk, unless the premium is paid in advance.” Hence, the position of the law in Nigeria as regards premium is the “no premium, no cover” rule.

9.5.3 Indemnity

Indemnity is one of the most fundamental principles underlying the contract of insurance. The principle of indemnity operates to prevent an insured from taking a gain from insurance like a lucky gambler would have done. It means that if the loss for which protection had been sought ultimately comes, the

insurer undertakes to indemnify or restore the insured to the normal position he was before the incident and loss.

The insured is not allowed to recover more than his actual financial loss. If insured persons were allowed to recover more than an indemnity, this would be against the national interest as persons would then be tempted to take out insurances, and stage loss in order to claim on their insurers."

9.5.4 Utmost good faith

The principle of utmost good faith lies at the root of the contract of insurance. Contracts of insurance are an example of contracts in which by their nature, only one party possesses knowledge of all the material facts. In such a situation, the law expects such a one to disclose all such material facts in utmost good faith. The principle of utmost good faith stipulates that due to the peculiar nature of the contract of insurance by which the special circumstance upon which the contingency of the transaction can be computed lay peculiarly in the knowledge of the insured only, the need for him to be honest and truthful about those circumstances becomes substantial to the validity of the contract.

9.5.5 Materiality of information (The principle of disclosure)

Generally, what is material fact depends on the kind of risk involved in the insurance contract, but it is beyond argument that a fact will be material if it would affect the decision of the insurer in his consideration of the acceptance of the risk and the terms for so doing. Where, for instance, a life assurance policy is involved the fact that the person whose life is to be insured suffers from some serious or terminal illness will be material to the risk and worthy of disclosure.

Where the insurer issues a proposal form, the form must contain and elicit every piece of information that the insurer considers to be material and that any information not sought in the form is deemed not to be material.

Section 64(4) of the NIIRA provides that, "the provision of the Bank Verification (BVN) and National Identification Number (NIN) shall form part of the material information required for submission to the insurer in the case of an individual insured

and corresponding Corporate Affairs commission documents in the case of a corporate entity."

The fact of a person having had previous vehicular accidents while driving would be material fact in a motor insurance policy while the fact of previous fire incidents on a premise or neighbouring building and the fact that a neighbouring premise is a factory handling highly inflammable substances would be material to a fire insurance policy.

Facts known to or presumed known to the insured in the ordinary course of dealing and those which diminish the risk to be insured against may not disclosed unless specifically requested by the insured, and non-disclosure, in the absence of specific requests, would not amount to a breach of utmost good faith.

The duty of disclosure generally continues throughout the life of the policy, and changes in original circumstances are to be disclosed.

The consequence of non-disclosure by either party where the duty exists is that the insurance contract is voidable.

9.5.6 Conditions and warranties

Under law of general contract, conditions are terms that are fundamental to or go to the roots of a contract. Any breach of condition renders the transaction void and rescission can follow. Warranties, on the other hand, are terms that are not fundamental as such but are only supplementary to the main terms of the contract. A breach of warranties merely entitles the claimant to payment of damages only and cannot out-rightly avoid the contract. However, under the contract of insurance, the application of these terms is quite different as both words are used simultaneously and interchangeably. Any breach of either term by one of the parties, entitles the other party to repudiate the contract.

9.5.7 Subrogation

Subrogation is a fundamental doctrine of insurance whereby no one is allowed to profit from his loss. The principle enables the insurer to receive the benefits of all the rights of the insured against third parties, which if satisfied, will extinguish or diminish the ultimate loss sustained. In *Castellain v. Preston*, it was the view of the judge that, "Any person who wishes to recover for and is paid by the insurers as for a total loss cannot take with both hands. If he has a means of diminishing the loss, the result of the use of those means belongs to the underwriters. Generally, subrogation guides against a situation where the insured would renounce or compromise his right of action against a third party especially where the exercise of such right will likely reduce his loss. Subrogation is applicable to marine insurance, fire insurance and property insurance. It does not apply, however, to personal accident insurance.

9.5.8 Contribution

This is the right of the insurer who has paid under a policy to call upon other insurers equally or otherwise liable for the same loss to contribute to the payment. It occurs where there has been a double insurance and in addition, the following conditions must be satisfied:

(a) The policies in issue must cover the same peril that caused the loss;

(b) The policies in issue must insure the same subject matter and the same interest;

(c) The insurance policies concerned must be contracts of indemnity; and

(d) There may be more than one insurance policy enforceable at the date of the loss.

9.6 Summary

This chapter has provided a brief introduction to the law of insurance. It contains an explanation of the meaning and classification of contract of insurance, as well as a consideration of the share capital stipulation which an organisation must meet to carry on the business of insurance. Providing different examples of insurance. The chapter ends by explaining certain basic

concepts and principles of insurance such as insurable interest, premium, indemnity, materiality of information, utmost good faith, conditions and warranties, subrogation and contribution.

9.7 REVISION QUESTIONS

MULTIPLE CHOICE QUESTIONS

1. The statutory provision for the doctrine of subrogation in Marine Insurance is contained in:

   A. The proposal form
   B. Section 80 *Marine Insurance Act*
   C. Section 158 Constitution of the Federal Republic of Nigeria, 1999 (as amended)
   D. Section 60, *Insurance Act*
   E. Section 58, *Insurance Act*

2. What section of the Insurance Act places the burden on the insurer of requesting all information he considers material in the proposal form?

   A. Section 55, *Insurance Act*
   B. Section 80, *Marine Insurance Act*
   C. Section 158, Constitution of the Federal Republic of Nigeria, 1999 (as amended).
   D. Section 60, *Insurance Act*.
   *E. Section 58, *Insurance Act*

3. When an insured contracts for more than one insurance policy in respect of the same subject matter of risk, he is said to have made

   A. Compound Insurance
   B. Complex Insurance
   C. Complete Insurance
   *D. Double Insurance
   E. Invalid Insurance

SHORT ANSWER QUESTIONS

1. The principle whereby the insured is to be compensated to the actual extent of his loss and not more, is known as principle of _____***** indemnity.

2. Whenever any person will be prejudiced by the loss of a thing, or will benefit by the continued existence of it, he is said to have _____****insurable interest**** in the thing.

3. The means through which an insurer elicits all material information from the insured is the ____**** proposal form.

ESSAY QUESTIONS

1. Define the doctrine of subrogation in a contract of insurance and illustrate it.

Answer

Subrogation is a fundamental doctrine of insurance whereby no one is allowed to profit from his loss. Illustration: For example, where there is an insured who suffers loss as result of the negligent acts of a third party from whom the insured receives compensation for the loss against which he has an insurance policy. If the insurer pays him for the loss, the law will not permit him to retain both the compensation from the negligent third party and the payment by the insurer because to do so will mean that the insured has been put in a stronger position than he was before the loss occurred.

2. Examine briefly the meaning of the following insurance terms:

(a) Utmost good faith; and

(b) Indemnity.

Answer

(a) Utmost good faith is a fundamental principle of insurance contracts which require that by the nature of insurance contracts which depend on

information within the peculiar or special knowledge of only one of the parties, the law requires that party to disclose all such material facts to the other party so as to enable that other party to make informed decisions as to whether he should enter into the contract or not.

The requirement of utmost good faith in contracts of insurance stipulates that because of the peculiar nature of the contract whereby the special circumstances upon which the contingency of the transaction can be computed lay peculiarly in the knowledge of the insured only, the need for him to be honest and truthful about those circumstances becomes material to the validity of the contract.

It is a common law position requiring that all material facts which would guide a prudent insurer whether he will take the risk and, if so, at what premium and on what conditions. The Insurance Act requires that where a proposal form is employed by the insurer in the processes leading to the formation of the insurance contract, the form must contain and elicit every piece of information which the insurer considers to be material and that any information not sought in the form is deemed not to be material.

(b) The doctrine of indemnity in the law of insurance contract is that upon the risk insured against occurring, the insured is to be financially compensated by the insurer to the actual extent of the loss so that the insured is restored to his actual financial position before the occurrence of the loss. The doctrine applies to policies where actual compensation can take the place but does not apply to contingency insurance contracts like life insurance policies or personal accident insurance policies since no amount of money can compensate for the loss of life or the loss of a limb.

3. Distinguish between conditions and warranties and the effect of their breach under a contract of insurance.

Answer

Under law of general contract, **conditions are fundamental** terms to the validity of the

contract. Any breach of condition renders the transaction void and rescission follows. **Warranties** on the other hand, are terms that are not fundamental as such but merely supplementary to the main terms of the contract. A breach of warranties under general contract does not entitle claimant to avoid the contract but merely to claim damages. However, under the contract of insurance, the application of these terms is quite different as both words are used interchangeably and any breach of either term by one of the parties, entitles the other party to repudiate the contract.

CHAPTER TEN

Law of business associations: Partnership

10.0 Chapter contents

- Learning objectives
- Introduction
- Partnership and its elements
- The essential elements of a partnership
- Relationships that are similar to partnership
- Types of partnership
- General partnership
- Limited partnership
- Limited liability partnership
- Determination of existence of partnership
- Rights and duties of partners *inter se*
- Relations of partners and third parties
- Dissolution of partnership
- Summary
- Revision questions

10.0.1 Learning objectives

After studying this chapter, readers should have an understanding of:

- partnership and its formation;
- types of partnership and rules which determine their existence;
- authority of partners and rights as well as duties of partners;
- relationship of partners *inter se* and with third parties; and
- dissolution of partnership as well as the consequences

10.1 Introduction

The partnership is an important form of business association and is defined in various law treatises as "an association of two or more people formed for the purpose of carrying on a business with a view to profit". The subject of partnership is divided into three major types as follows: general partnership, limited partnership and limited liability partnership. All

these major divisions of partnership are governed by different statutes in Nigeria as well as in the United Kingdom and in other international jurisdictions where they exist.

In Nigeria, general partnership principles (excluding limited partnership and limited liability partnership) are governed by the Partnership Act of 1890, a statute of general application which was operative in the whole of Nigeria except the old Western Region of Nigeria. However, in the geographical area known as Western Region of Nigeria, the statutory provisions governing the subject matter of partnership cover both general and limited partnerships within its territorial jurisdiction.

The former Western Region, out of which were created Ekiti, Lagos, Ogun, Ondo, Osun and Oyo states of Nigeria, have all replaced the partnership law of the defunct Western Region - CAP 86, Laws of the Western Region of Nigeria, 1959 - with their respective states laws also covering both general and limited partnerships.

In 2009, the Partnership Law of Lagos State *(with Limited Liability Partnership Amendments), 2009*, which made provisions for limited liability partnership.

10.2 Partnership and its elements

Definition of partnership

In both **Section 1 of the Partnership Act and Section 3 of the Partnership Law of Ogun State**, the word partnership is defined as: "the relation which subsists between persons carrying on business in common with a view to profit". This relationship should arise from a contract, whether express or implied. A partnership could arise from a mere agreement to agree which is subsequently implemented by all the parties concerned as evinced from their conduct. This was the decision of the Lagos High Court in *Sterios Thomopoulos & Another v John Mandilas* (1946) 10 W.A.C.A 269.

10.3 The essential elements of partnership

From the statutory definition of partnership, it is obvious that a partnership depends on certain elements. Note that notwithstanding the type of partnership a business is (general, limited or, limited liability partnership) the essential elements are the same.

(a) The first in the three elements is "carrying on a business": Applicable statutes define 'business' to include "every trade, occupation, or profession"**(Section 45**

Partnership Act/Section 2 Partnership Law).

While what constitutes a trade or occupation could easily be agreed upon, the latter, **Underhill's Law of Partnership** defines 'profession' as,

"What are recognised among business men as commercial and professional business, that is, callings, in which men hold selves out as willing to serve to all comers, goods, or skilled assistance or other services."

(b) The business must subsist between persons: The second element of partnership is that the partnership must be carried on by or on behalf of at least two persons. This means that the In the English case of **Re Fisher & Sons (1912) 2 KB 419**, the court held that the executors of the estate of a deceased, who carried on the business of the dead owner in accordance with the provisions of the late testator's Will, were not partners. They could however be regarded as partners if the business was given to them as beneficiaries under the will, because by then they would then have to carry out the business stated in the Will as partners and strive to make the best of it.

Also, in the case of **Lyons v Knowles (1863) 3 B&S 556** the court held that mere participating in the sharing of gross returns of a business without more, and without the business being carried out by or on behalf of the partners as it was the situation in the instant case, was not partnership.

In the Nigerian case of **Ikpeazu v A.C.B. (1965) N.M.L.R. 374**, the Supreme Court held that for a person to merely take part in the running of a firm (for instance as the Administrative Manager thereof) is not a conclusive proof of the person's membership of the partnership. The Supreme Court added that it was not proved of the balance of evidence (probability) on which the Court can rely, that the person running the firm was a partner in fact or by representation.

(c) The business must be carried on for profit making (and profit sharing): The third essential element of partnership is that the business that is carried on by or on behalf of the partners must for profit making and profit sharing. In the context of the definition of partnership, the word 'profit' has been said to be the dissimilarity between 'gross returns' and the 'outgoings' of a business. In the English case of **Re Spanish Prospecting Company Ltd. (1922) 1 Ch. 92, Fletcher Milton L. J.**

made the following comments:

> "Profit implies a comparison between states of the business at two specific dates usually separated by an interval of one year. The fundamental meaning is the amount of gain made by the business during the year. This can only be ascertained by a comparison of the assets of the business at those two dates. If the assets at the two dates be compared, the increase which they show at the latter date as compared with the earlier date (due allowance being made for any capital introduced or taken out of the business) during the period in question."

In determining whether or not the parties are partners, the court must consider all circumstances surrounding the transaction. This was the verdict of the Supreme Court of Nigeria in the case of **Ugoji v Uzoukwu (1972) 4 SC 21; (1975) 1 All NLR 289**, where the apex court emphasised the point that persons who agreed to share the profit of a business transaction to which they all are engaged are presumed to be partners. The court was however unable to find an agreement between the parties to share the profit of the business.

In that case, two persons had an agreement pursuant to which they contributed ₦500 (five hundred naira) each as deposits for the purchase of books from the Oxford University Press (OUP) publishers. The agreement provided for the equal sharing of the books purchased. Thereafter, the defendant went to the OUP and brought back books worth ₦3,200 (Three thousand, two hundred naira). The plaintiff wanted the books to be shared equally on the ground that a partnership existed between them. Plaintiff also demanded an account from the defendant on the sales by him of the books that he brought back.

The Supreme Court held that the agreement between the parties was to share books and **not profits**. Therefore, in the peculiar circumstances of the case, no partnership existed between the parties.

It is worthy of note that in every partnership, sharing of profits by the members will be deemed to be sharing of profits equally equally unless they have an express agreement to the contrary.

10.4 Relationships that are similar to a partnership but which are not a partnership

The law recognises that some relationships are similar to a partnership but they are not partnerships. Thus, it provides other statutory criteria that could be applied in order to

determine the existence of partnership as contained in **Section 2(1), (2) and (3a-e)** of the Partnership Act. These statutory rules are as follows:

(a) Joint tenancy, tenancy-in-common, joint property, common property or part ownership does not of itself create a partnership as to anything so held or owned, whether the tenants or owners do or do not share any profits accruing from the use of such property. The intention to create a partnership must be explicitly expressed and not left to implication. **Section 2 (1) PA**.

(b) The sharing of gross returns (from a business transaction) does not of itself create a partnership. This is so, notwithstanding that the person partaking in the sharing of such returns have or have not a joint or common right or interest in any property from which or from the use of which the returns are derived. **Section 2 (2) PA**. Thus in the case of **Lyons and Knowles (supra),** it was held that letting a theatre upon the terms that the owner shall receive half of gate taking (without more) was not partnership. Though the emphasis on partnership is on sharing of profit, yet, it must also be noted that business must be carried out by or on behalf of the partners which was not the situation in the instant case.

(c) The receipt by a person of a share of profits of a business is *prima facie* evidence that he is a partner in the business, but the receipt of such a share, or of a payment contingent on or varying with the profits of a business does not of itself make him a partner in the business. **Section 2 (3) PA.** The presumption raised by the opening part of Section 2 (3) Partnership Act may be rebutted by showing that payment made out of the profits of the business was for any of the following:

i. Payment of a debt or liquidated amount. In **Cox v Hickman (1860) 8 HL 268**, the court held that mere participation in profit (sharing) is not sufficient to constitute a party, a partner in the business. **Section 2 (3) (a), Partnership Act.** In that case, two partners whose business ran into financial difficulties made formal arrangement with their Creditors to transfer the business to Trustees to continue to trade on behalf of the Creditors who were to be paid out of any profit realised. When the debt was discharged, the business was to be transferred back to the original partners. This scheme was carried through but the business continued to run at a loss.

The number of new Creditors of the business sought to recover from some of the original Creditors on the ground that they had become partners by reason both of their share in the profit and their power of control over the business through the trustees. It was held that no partnership had been created. The business was being carried on for the ultimate benefits of the original partners and that the interest of creditors in profit had been limited to repayment of what was due to them from the business.

ii. An agreement to pay remuneration of a servant or agent of a person engaged in business by a share of the profits of the business does not of itself make the servant or agent a partner in the business or liable to such - **Section 2 (3)(b), Partnership Act.** In **Ross v Parkynes (1875) LR 20 Exchequer 331**, the owner of a business conducted the business on the term that an employee who was the manager of the business was to receive the salary and a percentage of the profit. It was held that the employee was not a partner, although he secured a share of the profit of the business.

iii. Receipt of payment of annuity by a person being the widow or child of a deceased partner from a portion of the profits made in the business in which the deceased person was a partner is not by reason only of such receipt a partner in the business or liable as such a partner - **Section 2 (3)(c), Partnership Act**.

iv. A loan advance to a person engaged or about to engage in any business on the agreement that the lender will recoup his exposure through a rate of interest varying with the profits or shall receive a share of the profits arising from carrying on the business does not *ipso facto* make the lender a partner with the person or persons carrying on the business or liable as such. The lender may however be a partner if the (loan) agreement is in writing and signed by or on behalf of all the parties thereto - **Section 2 (3)(d), Partnership Act**.

v. The receipt of annuity or otherwise a portion of the profits as consideration offered to a person for the sale by him of the goodwill of the business does not become a partner only by reason of such a receipt, nor will such a person be liable as such a partner *ipso facto* - **Section 2 (3) (e) PA.**

10.5 Types of partnership

Partnership as a form of business association in Nigeria is of three types - general partnership, limited partnership, and limited liability partnership. All the three types are governed respectively by state partnership laws and the Companies and Allied Matters Act, 2020.

Keep in mind that a partnership must be registered under the Registration of Business Names (Part E) of the Companies and Allied Matters Act, 2020 (CAMA) if the partnership business is not carried on in the true surname of all the partners and the individual without any addition other than their true forenames of the individual partners or the initials of such forenames - **Section 814 (1) (a), (b) CAMA, 2020**. The same goes for a sole proprietorship that is carried on similarly.

10.6 General partnership

A general partnership is one where all members are legally entitled by law to take part in the management of the firm's business. In this situation, there is no distinction for all purposes between the partners and the business. Also, members of a general partnership are subject to unlimited liability for the debts and other obligations of the partnership. The necessity for registration or of drawing up partnership articles in a partnership deed is not obligatory for a general partnership.

The general partnership is regulated in Nigeria by both the Partnership Act, 1890, which applies as a statute of general application in states of Nigeria that have not enacted local laws on partnership. It is also regulated by the Partnership Law of each of the states that have enacted local laws, particularly Lagos State and the states of the defunct Western Region of Nigeria, comprising Edo, Delta, Ogun, Oyo, Ondo, Ekiti, and Osun State. The laws of the latter states have similar contents to the repealed Partnership Law of Western Region of Nigeria, 1959.

10.6.1 Rights and duties of partners *inter se*

The Partnership Act contains rules which will apply subject to any agreement, express or implied, between the partners (Section 24) as follows:

(a) Equal Share: All partners are entitled to share equally in the capital and profits of the business and must contribute equally towards the losses whether of capital or otherwise sustained by the firm;

(b) Management: Every partner may take part in the management of the partnership business;

(c) Remuneration: No partner shall be entitled to remuneration for acting in the partnership business;

(d) Introduction of Partners: No person shall be introduced as a partner without the consent of all existing partners;

(e) Internal disputes: Any difference arising out of the ordinary matters connected with the partnership business may be decided by a majority of the partners but no change may be made in the nature of the partnership business without the consent of all existing partners;

(f) Indemnity: The firm must indemnify every partner in respect of payments made and personal liabilities incurred by him in the ordinary and proper conduct of the business of the firm;

(g) Interest on Capital: A partner is not entitled, before the ascertainment of profit, to interest on capital subscribed by him;

(h) Books: The Partnership books are to be kept at the place of business of the partnership and every partner may when he thinks fit, have access to and inspect any copy of them;

(i) Assignment of a Share in a Partnership: An assignment by any partner of his share in the partnership either absolutely or by way of mortgage or redeemable charge does not entitle the assignee to interfere in the management, require accounts or inspect the partnership books. He is only entitled to receive a share of the profits which the assigning partner would otherwise be entitled to; and

(j) Transmission of Shares in the Partnership: When a partner dies or becomes bankrupt, his property vests by operation of law in his personal representatives or trustee in bankruptcy as the case maybe. They do not become partners in the firm, indeed the firm will have been dissolved by the death or bankruptcy unless the partnership agreement otherwise provides.

10.6.2 Relations of partners and third parties

Every partner is an agent of the firm and his other partners for the purpose of the business of the partnership and every partner's act done for carrying on the business in the usual way will bind the firm and his partners. However, the firm and the co-partners will not be bound;

(i) Where the partner who acts has no authority to bind the firm in the particular matter, and;

(ii) Where the person who deals with him knows that he has no authority or does not believe him to be partner (Section 5).

10.6.3 Extent of Power:

Decided cases indicate that the implied authority of a partner envisaged above is as follows:

- In a general partnership, partners have implied authority to buy, pledge and sell goods of the type in which the firm deals; give valid receipts; sign cheques; engage and dismiss employees; and sue on behalf of firm or defend an action against it.

- In a non-trading partnership, such as a firm of solicitors, accountants, quarry workers, and cinema proprietors a partner cannot.

- In trading Partnerships, partnerships where business consists in the buying and selling of goods, the partners have additional powers to borrow money and give security over the firm's land or chattels; and draw, accept or in dose bills of exchange and promissory notes; accept, make or issue negotiable instruments other than ordinary

cheques; and borrow or pledge the partnership property.

There are however certain acts that are not within the usual authority of a partner whether it is a trading partnership or a non-trading partnership, thus a partner does not have the usual authority to:

(a) execute a deed, unless his authority is expressly conferred by deed;

(b) give a guarantee in the firm's name unless a trade custom in that regard is proved;

(c) submit a dispute to arbitration;

(d) accept property in lieu of money to satisfy a debt owed to the firm;

(e) make his partners into partners with other persons in another firm; and

(f) authorise a third person to make use of the firm's name in legal proceedings

10.7 Limited partnership

A limited partnership is a partnership with at least one general partner and at least one limited partner. Unlike a general partner, a member who opts for limited partnership could only invest in the partnership without taking part in its management. By opting to be a limited partner, such a member will have his liability limited to the quantum of his investment in the partnership. If a limited partner decides to participate in the management of the business, he will thereby become a general partner without any limit to his liability. A limited partnership under the limited partnership provisions of the law of states that have it as well as under the CAMA, 2020 must be registered and also created formally by drawing up a partnership deed or agreement that contains the terms of the partnership.

Importantly, the provisions of the limited partnership laws of states of former Western Region, including Lagos State, seem to have been superseded by the Companies and Allied Matters Act, 2020, being an Act of the National Assembly *covering the field* of limited partnership in Nigeria.

10.7.1 Nature and attributes of a Limited Partnership (LP) (Section 795 – 810 CAMA, 2020)

A limited partnership has the following attributes under the CAMA, 2020:

(a) It may be formed with not more than 20 (twenty) persons who shall consist of one or more persons called general partners, and the latter shall be liable for all the debts and other obligations of the firm. In addition, it must have one or more members called the limited partners whose liability for the debts and obligations of the firm shall be limited to their investments in it;

(b) When the limited partnership is formed or when a person joins a limited partnership, he is expected to contribute or enter into an agreement to contribute a fixed sum of or sums in money or money's worth and apart from this. It must be noted that unless there is an agreement to the contrary, the limited partner shall not be liable for the debts and other obligations of the firm beyond the amount earlier contributed or agreed to be contributed;

(c) During the subsistence of a limited partnership, a limited partner shall not draw or receive back any part of his contribution unless there is a contrary agreement in writing permitting this. Where a limited partner draws out or receive back any part of his contribution without a contrary agreement permitting this, the limited partner shall be liable for the debts and obligations of the partnership up to the amount so drawn out or received back;

(d) Membership in a limited partnership is open to both a natural or an artificial person. Where a natural person has been adjudged by a court in Nigeria - or elsewhere - to be of unsound mind or to be an undischarged bankrupt, such a person will be forbidden from being a limited partner -**Section 796, CAMA**;

(e) A limited partnership must be registered under the CAMA, and where there is a default to register, the limited partnership shall be deemed to be a general partnership and every limited partner in the partnership shall also be deemed to be a general partner - **Section 797**;

(f) A limited partner cannot bind the firm;

(g) The death, bankruptcy, or insanity of a limited partner will not dissolve the partnership; and

(h) A limited partner cannot dissolve the partnership by notice

10.7.2 Procedure for registration and running of limited partnership

(a) Before a limited partnership could be registered under the Act, the application for its registration shall be made in the prescribed form issued by the Corporate Affairs Commission (CAC);

(b) The application form must be signed or otherwise authenticated by or on behalf of each partner.

(c) Apart from the duly filled and signed application form, the application for registration of a limited partnership shall also include a statement signed by all the partners, including the limited and general, containing the following:

i. The name of the limited partnership;

ii. The general nature of the business of the limited partnership;

iii. The principal place of business of the limited partnership;

iv. The full name and address of each general partner;

v. The full name and address of each limited partner;

vi. The term if any, for which the limited partnership is entered into and the date of its commencement;

vii. A statement that the partnership is limited and the description of every limited partner as such; and

viii. The sum contributed, or agreed to be contributed by each limited partner and whether paid, or to be paid in cash or in another specified form.

(d) Upon the fulfillment of the requirements above, the CAC shall register the limited partnership and issue a certificate of registration signed by its officer and duly authenticated by the official seal of the CAC.

(e) The certificate of registration issued as evidence of registration of a limited partnership shall contain the registered name of the limited partnership, its registration number, the date of registration and the fact that the limited partnership is registered as a limited partnership.

(i) The certificate of registration is *prima facie* evidence that the limited partnership is in existence as at the date of registration.

(j) The name of a limited partnership written on the certificate of registration or on any of the firm's business documents must end with the words "limited partnership" or the abbreviation "LP".

(h) Where changes are made to or occurring in a limited partnership firm in relation to general nature of the business; principal place of business; partners or the name of any partner; terms or character of the partnership; sum contributed or to be contributed by any limited partner; and or, the liability of any partner by reason of his becoming a limited partner instead of a general partner, *vice versa*, such changes shall be communicated to the CAC within seven days of the making or occurrence of the change - **Section 800 (1) (a-g)**.

(i) In the event of a where the firm defaults in notifying the Commission of any changes made by or occurring in a limited partnership in accordance with the instances itemised in Section 800 CAMA 2020, each of the general partner in the firm shall be liable to a fine as shall be prescribed in the regulations to be published by the Commission - **Section 800 (2)**.

(j) Where a general partner in a firm decide to change his status to that of a limited partner in the same firm, or the shareholding of a limited partner in a firm is to be assigned to any person whereby the latter recipient will become a limited partner, the notice of such an arrangement or transaction shall be filed with the Commission within a period of five days of such change. **Section 801 (1).**

(k) Until the requisite notice as mentioned in subsection (1) of section 801 is filed with the Commission, any such purported arrangement or transaction for the purposes of **Section 801 (1)** shall be deemed a nullity under the Act (**Section 801 (2)),** and each of the general partners of the firm shall be liable to payment of a fine as prescribed by the Commission in its regulations, **Section 801 (3).**

(l) The provisions of Section 30 of the Act in respect of change of name of an incorporated company and that of Section 31 of the Act in respect of reservation of name of a company proposed to be registered, shall apply *mutatis mutandis* to a limited partnership in similar circumstances. **Section 803.**

(m) Where there is any improper use of the words "limited partnership" or the word "LP" by person or persons carrying on business under any name or title which falsely suggest that a limited partnership business is being carried, such persons in default, shall be liable to payment of a fine as prescribed by the Commission in its regulations (**Section 804).**

(n) The Commission shall maintain at its registry, proper books of register and index of all the limited partnerships registered together with all statements registered in relation to such partnership. **Section 805**.

(o) Inspection of document: Upon payment of such fees as a prescribed by the Commission, a person may apply to conduct searches in the registry of the Commission for the purposes of inspecting the statement filed by the Commission; or for the purposes of requesting a certificate of registration of a limited partnership; or for obtaining a certified true copy of an extract from any registered statement and for no other purpose - **Section 809 (1)**.

(p) Presumption of regularity of secondary documents certified by the Registrar: Where a certificate of registration of a limited partnership is obtained under subsection (1) of Section 809, or a certified true copy of an extract from any registered statement is presumably made under the hand of the Registrar, it shall not be necessary to prove due execution by the Registrar for the purposes of receiving such documents in evidence in all legal proceedings, whether civil or criminal - **Section 809 (2)**.

(q) Liability for false statements: Where any statement required to be furnished under the Part D of the Act is found to contain any matter which is knowingly false in any material particular by the person signing such statement, the latter is deemed to have committed an offence under the Act and is liable upon conviction to imprisonment for a term not exceeding one year or to the payment of a fine as the Court shall deem fit which shall be in addition to such fines as may be specified by the Commission in its Regulations - **Section 810**.

Note that before the enactment of the CAMA 2020, the laws governing limited partnership coul only be found in the partnership laws of states of the former Western Region and some other states that have adopted the partnership law of the former Western Region. The Partnership Act, 1890 does not contain provisions on limited partnership thereby rendering the limited partnership principles non-applicable to those states of the northern region and some states of the federation that have adopted the Partnership Act of 1890 as their respective partnership laws.

10.8 Limited liability partnership

A limited liability partnership (LLP) has the following attributes under (Sections 746-769 of the CAMA, 2020:

(a) Upon registration under the CAMA, the LLP becomes a body corporate and a legal entity separate from the partners of the LLP;

(b) It has perpetual succession so that like an incorporated company, any changes in the partners of a limited liability partnership will not adversely terminate its existence, rights or liabilities (**Section 746)**;

(c) With the exception of an insane person who has been so adjudged by a court of law and an undischarged bankrupt, any individual or body corporate may be a partner in an LLP(**Section 747)**;

(d) A LLP is duly formed by at least two and more partners and whenever this number is reduced below two in a limited liability partnership and the LLP continues to carry on business for more than six months after the reduction, the only partner left during the six months period will be personally liable for the obligations of the LLP during the period as long as it can be proved that the partner has knowledge of the reduction (**Section 748)**;

(e) There shall be at least two designated partners of the LLP who are natural persons with at least one of them resident in Nigeria. If, however all the partners of the LLP are bodies corporate or one or more of them are individuals and bodies corporate, the individual partners of the LLP or the nominees of the body corporate partners shall act as designated partners;

(f) The name of the partnership must end with 'LLP' or 'Llp'.

10.8.1 Designated partners

(a) The status of designated partners may be specified in the incorporation documents and persons so named shall become known as designated partners of the LLP on incorporation. Alternatively, the LLP may state in the incorporation documents that each of the partners in the LLP is to be designated partner and every such partner is taken as a designated partner.

(b) A partner may be made a designated partner in the LLP agreement and the same agreement may contain circumstances where he will be relieved of the status.

(c) No individual can become a designated partner in an LLP except a written consent of the individual is obtained prior to the appointment and within 30 days of appointment, an LLP shall file returns with the CAC of particulars of every individual who has given consent to act as designated partners.

(d) A person automatically loses a designated partner status if he ceases to be a partner in the LLP.

(e) In the absence of any express provisions to the contrary in the Act, a designated partner has the responsibility to do the following:

i. Perform all the things that are required to be carried out by the LLP in the area of complying with the provisions of the CAMA. Such acts referred to include the filing of any document, returns, statement and any other report under the Act and as may be specified in the LLP agreement; and

ii. Be liable to pay all penalties that are imposed on the LLP for contravening any of the provisions of the CAMA. **Section 750 (1) & (2)**.

(f) Where there is a vacancy in the position of a designated partner in an LLP, the vacancy shall be filled within 30 days of its occurrence and the Commission shall be duly notified of the filling of the vacancy as well as the consent of the newly appointed designated partner; and

(g) Where the LLP defaults in complying with the provisions of sections 749 – 751 (on designated partners; their liabilities; communication of changes in designated partners to the Commission), both the LLP and each of its partners is liable to pay a penalty as determined and specified in the CAC's regulation.

10.8.2 Incorporation of limited liability partnership

Before an LLP can be registered under the Act, at least two or more persons must combine to carry on lawful business with a view to profit and shall subscribe their name to incorporation documents which shall be filed with the Commission upon the payment of the fee prescribed by the Commission from time to time.

At the incorporation of the LLP the documents of incorporation shall contain detailed information on the proposed name of the LLP, the proposed business of the LLP; the address of the registered office of the LLP; name and address of each of the partners of the LLP on incorporation; name and address of each of the partners of the LLP on incorporation; name and address of the persons who are to be called designated partners of the LLP; and information concerning the proposed LLP as the CAC may prescribe.

Where information in respect of the statement referred to above are deliberately made falsely, the maker will be deemed to have committed an offence and if convicted will be punished by a term of imprisonment for not more than three months or to the payment of a fine or to both imprisonment and fine as the court may decide.

Upon receipt of incorporation documents by the CAC, the latter shall, within a period of 14 days, register the LLP and issue a certificate of incorporation in the name specified in the certificate to the LLP.

The certificate of registration shall contain the name of the LLP, its registration number, the date of registration and the fact that the LLP has been registered as an LLP. The certificate constitutes *prima facie* evidence that the LLP is in existence as at the date of the registration. **Section 754.**

The name of an LLP written on the certificate shall end with either the words "limited liability partnership" or the acronym "LLP" and just like limited liability company under Part B of CAMA 2020, where in the opinion of the Commission, the proposed name by which an LLP is to be registered is undesirable, or identical or too nearly resembling that of any other partnership, business name, limited liability partnership, body corporate, or a registered trade mark, the Commission shall decline to register the LLP by that name - **Section 757 (2)**.

The provisions of sections 30 and 31 of the Act in respect of reservation of name of companies registrable under Part B of the Act are also applicable to the reservation of name or change of name of an LLP. Section 758.

Improper use of the words limited liability partnership or 'LLP' is prohibited. This happens where a person carries on business under a name or title with the words "limited liability partnership" or "LLP" without being duly incorporated as a LLP. The offender shall be liable to a penalty in the amount specified by the CAC in its regulation - **Section 759**.

10.8.3 Effect of registration of LLP – Section 756

As from the date of registration of an LLP, the LLP may sue and be sued in its name, acquire, own, hold and develop or dispose of property, whether movable or immovable, tangible or intangible, and may if it decides, have a common seal and be entitled to do or permit the doing of any other acts and things as bodies corporate may lawfully do and permit to be done.

Every LLP duly registered under the Act shall ensure that its registered name, address of registered office, and registration number of the LLP together with a statement that it is registered with limited liability shall be published on all its invoices, official correspondence and publication.

Where any LLP defaults in complying with the obligation to publish, both the LLP and every partner shall be liable to a penalty for every day the default continues in the amount as the Commission shall specify in the regulation.

10.8.4 Registered office of LLP and change therein

It is imperative that every limited liability partnership should have a registered office to which all communications and notices may be addressed to and received by the LLP. And any document may be served on the LLP or on any of its partners or designated partners at the registered office or any other address specifically declared by the LP for that purpose, by post, registered post or any other manner as may be prescribed.

A LLP may by resolution change the place of its registered office and the resolution must be delivered to the Commission within 14 days of its passing otherwise, the change will be of no effect. Where an LLP defaults in complying with the provisions of the section on registered office and change therein, each partner and the LLP shall be liable for every day that the default continues and the penalty payable shall be in the amount specified by the Commission in the regulations.

10.8.5 Limited liability partners and their relations *inter se*

Upon the incorporation of a limited liability partnership, the subscribers to the incorporation documents shall be the partners of the LLP and any other person who desires to become a partner of the LLP shall be so regarded upon compliance with and in accordance with an LLP agreement - **Section 761**.

The mutual rights and duties of the partners of an LLP and the mutual rights and duties of the LLP and its partners shall be regulated by the LLP agreement entered into between the partners or between the LLP and its partners except contrary provisions exist in the Act.

Where there is any change in the affairs of the LLP, such changes shall be filed with the CAC in the required form or manner and accompanied with the prescribed fees - **Section 762 (2)**.

Where there is an agreement in writing made before the incorporation of an LLP between the persons who subscribed their names to the incorporation documents and the agreement imposes obligations on the LLP subsequent to its incorporation, the LLP may have no choice than to carry out the obligations, where all the partners ratified the agreement after the incorporation of the LLP - **Section 762 (3)**.

The mutual rights and duties of the partners and the mutual rights and duties of the LLP and the partners shall be determined in accordance with the "provisions regarding matters relating to mutual rights and duties of partners and limited liability partnership and its partners applicable in the absence of any agreement on such matters" as contained in the fifteenth schedule of the CAMA and these are as follows:

(a) That mutual rights and duties of the partners and that of the LLP and its partners shall be determined first in accordance with the LLP agreement (where such an agreement exists) or otherwise by the provision of the fifteenth schedule;

(b) All partners of the LLP are entitled to share equally in the capital profits and losses of the LLP;

(c) The limited liability partnership shall indemnify each partner in respect of payments made and personal liability incurred by him (a) in the ordinary and proper conduct of the limited liability partnership; or (b) in or about anything necessarily done for the preservation of business or property of the limited liability partnership;

(d) Every partner shall indemnify the limited liability partnership for any loss caused to it by his fraud in the conduct of the business of the limited liability partnership;

(e) Every partner may take part in the management of the limited liability partnership;

(f) No partner shall be entitled to remuneration for acting in the business or management of the limited liability partnership;

(g) No person may be introduced as a partner without the consent of all the existing partners;

(h) Any matter or issue relating to the limited liability partnership shall be decided by a resolution passed by a majority in number of the partners, and for this purpose, each partner shall have one vote. However, no change may be made in the nature of the business of the limited liability partnership without the consent of all the partners;

(i) Every limited liability partnership shall ensure that decisions taken by it are recorded in the minutes within 30 days of taking such decisions and the minute books are kept and maintained in the registered office of the limited liability partnership;

(j) Each partner shall render true accounts and full information of all things affecting the limited liability partnership to any partner or his legal representative;

(k) If a partner, without the consent of the limited liability partnership, carries on business of the same nature as and competing with the limited liability partnership, he must account for and pay over to the limited liability partnership all profits made by him in that business;

(l) Every partner shall account to the limited liability partnership for any benefit derived by him without the consent of the limited liability partnership from any transaction concerning the limited liability partnership, or from any use by him of the property, name or any business connection of the limited liability partnership;

(m) No majority of the partners can expel any partner unless a power to do so has been conferred by express agreement between the partners;

(n) All disputes between the partners arising out of the limited liability partnership agreement which cannot be resolved in terms of such agreement shall be referred for arbitration as per the provisions of the Arbitration and Conciliation Act;

(o) The limited liability partnership shall not, without the consent of all partners, sell assets having a value of more than 50% of the total value of assets of the limited liability partnership;

(p) A partner shall not sell or agree to sell his interest in the partnership to a non-partner without first offering his interest to existing partners; and

(q) A partner or group of partners acting together, shall not sell or agree to sell more than 50% of interest or combined interest in the partnership unless that non-partner has offered to buy all of the partners' interests and on the same terms.

10.8.6 Cessation of partnership interest in the LLP – Section 763

A person may withdraw his membership of a limited liability partnership in accordance with a prior agreement with the other partners and in the absence of such a prior agreement, a person withdrawing is expected to give a notice in writing of not less than 30 days to the other partners.

Apart from cessation of membership through intention of parties, a person shall cease to be a partner of a limited liability partnership upon his death, or dissolution of the partnership; or if he is of unsound mind and declared so by a competent court, or if he has applied to be adjudged as and insolvent and or bankrupt and a competent court has pronounced him as such. Section 763 (2). Where a person has ceased from being a partner, he is still regarded as a partner in the limited liability partnership for all purposes and in relation to any person dealing with the limited liability partnership, unless the latter has notice that the former partner has ceased to be a partner of the limited liability partnership or that the person dealing with the partnership has notice that the fact of cessation of former partner in the limited liability partnership has been communicated to the Commission - **Section 763 (3)**.

Cessation of a partner from a limited liability partnership does not operate *ipso facto* to discharge him from any obligation to the limited liability partnership, or discharge him from his liability to other partners and to any other person, incurred while he was still a partner in the limited liability partnership - **Section 763 (4)**.

In the case of a former partner, unless there is a contrary provision in the limited liability partnership agreement, his cessation of membership of the does not adversely affect his own - right or that of a person entitled to his hare due to death or insolvency - to preclude him from receiving from the limited liability partnership, an amount equal to the capital contribution the former partner actually made to the partnership, his right to participate both in the accumulated profits of the partnership after the deduction of accumulated losses of the partnership, determined as at the date the former partner ceased to be a partner.

However, a former partner's personal representatives or beneficiaries of his estate shall not be entitled to interfere or participate in the management of the limited liability partnership - **Section 763 (6)**.

10.8.7 Registration of change in particulars of partners – Section 764

If any changes occur in the name and address of a partner during the subsistence of his membership of the partnership, the partner shall inform the limited liability partnership within a period of 15 days of the change.

On the part of the limited liability partnership, where a member joins or a member leaves the partnership, or there is a change in the name and or address of a partner, the limited liability partnership has 30 days within which it must communicate the development to the

Commission.

The notice of changes in the status of a partner or of any changes in his name and address shall be filed in the form and accompanied by such fees as prescribed by the Commission and duly signed by all designated partners of the partnership. If the filing relates to the status of an incoming partner, the statement of consent signed by the incoming partner shall also be filed with the Commission.

Where there is a default on the part of the limited liability partnership to transmit the requisite notices under this section on an incoming partner to the Commission, both the limited liability partnership and every designated partner of the partnership, shall be liable to a penalty as fixed by the Commission, for each day of the default.

Where the default is on the part of a partner to communicate changes in his name and address to the limited liability partnership within 15 days of such changes, such a defaulting partner is liable to a penalty as fixed by the Commission.

Any partner who withdraws his partnership from a limited liability partnership, and acting upon the belief that the limited liability partnership may not take steps to inform the Commission or without waiting for limited liability partnership to take any steps may file a notice of his circumstance with the Commission. The Commission shall confirm the veracity of the information from the limited liability partnership unless the limited liability partnership has in the meantime filed such notice. Where the limited liability partnership fails to give the information requested to the Commission within 15 days, the Commission shall register the notice made by the partner withdrawing his membership from the limited liability partnership.

10.8.8 Extent of limitation of liability of the LLP and its partners - Sections 765 – 769

(a) For the purposes of the business of the limited liability partnership, a partner of a limited liability partnership **is an agent of** the limited liability partnership, **but not** of other partners.

(b) A limited liability partnership is not bound by anything done by a partner, in the partner's relationship with a third party, if the partner does not possess in fact, any authority to act for the limited liability partnership in respect of any particular act, and the third party with whom the partner is dealing is aware that the partner has no such authority in fact, or the third party does not know or believe the partner to be a

member of the partnership.

(c) The limited liability partnership will be liable to a third party for the wrongful act or omission made by a partner and incurred to a third party, if such wrongful act or omission were done by the partner in the course of the business of the limited liability partnership or with the latter's authority.

(d) Where any obligation of the limited liability partnership arises in contract or otherwise, such obligation shall be regarded as that of the limited liability partnership solely.

(e) The liabilities of the limited liability partnership shall be defrayed out of the property of the limited liability partnership.

(f) A partner in a limited liability partnership is not personally liable directly or indirectly for an obligation of the limited liability partnership **only by reason** that he is a partner of the limited liability partnership.

(g) The fact that the obligation of a limited liability partnership shall be borne solely by it, does not absolve a partner therein of personal liability for his own wrongful act or omission; and a partner shall not be personally liable for the wrongful act or omission of any other partner of the partnership.

(h) A person who through his spoken or written words, or by his conduct hold out himself or knowingly allows himself to be represented as a partner in a limited liability partnership, will be liable to another person who relies on the representation to give credit to the limited liability partnership, notwithstanding that the person representing himself or represented to be a partner does or does not know that the representation has reached the person giving the credit. Section 768 (1).

And where any credit is received by the limited liability partnership as a result of the representation in subsection (1), the limited liability partnership shall, in addition to the liability of the person holding out, be liable to the extent of the credit received by it or any financial benefit derived from the false representation.

(i) Where, subsequent to the demise of a partner in a limited liability partnership, his name continues to feature as part of the partnership of the business in continued in the partnership's name, this fact shall not of itself make the deceased personal

representatives or his estate responsible for any act of the limited liability partnership done subsequent to the partner's death.

(j) Where a limited liability partnership or any of its partners carries out an act with the intent to defraud creditors of the limited liability partnership or any other person, or the act is carried out for any fraudulent purpose, the liability of both the limited liability partnership and its partners who acted with intent to defraud shall be unlimited for all or any of the debts or other liability of the partnership.

(k) If any business is carried on by the limited liability partnership with such intent to defraud or for any fraudulent purpose, every person who knowingly participate in the business in the manner of carrying it out will be deemed an offender and liable on conviction to a term of imprisonment not exceeding two years or a fine or to both imprisonment and fine as the court may deem fit.

(l) Where the limited liability partnership or any partner or designated partner or employee of the limited liability partnership has conducted the business or affairs of the partnership in a fraudulent manner, such a delinquent party shall, notwithstanding his subjection to criminal proceedings which may arise under any law for the time being in force, still be liable to pay compensation to any person who has suffered any loss or damage by reason of the conduct, provided that the limited liability partnership shall not be liable if it can prove that any such partner or designated partner or employee acted without the knowledge of the limited liability partnership.

10.8.9 Accounts, audit, annual returns and assignability of partners' interest in limited partnership and limited liability partnership

In all cases where there are no special provisions in respect of the limited partnership under the Companies and Allied Matters Act 2020, Section 807 of the Act has expressly extended the application of Part C on limited liability partnership to Part D, on the limited partnership. Therefore, the provisions of the CAMA in respect of the subject-matter of this subhead, which are made applicable to limited liability partnership will also apply *mutatis mutandis* to limited partnership also by virtue of the provisions of Section 807.

Accounts: Financial disclosures under the CAMA are imperative for the LLP which has the statutory responsibility to maintain such prior books of account from year to year in relation to its affairs, throughout of its existence. The books of account which shall be maintained in the registered office of the LLP, shall be kept in two major accounting models; being cash or accrual basis in accordance to the double entry system of accounting. **Section 772 (1).**

Within a period of six months from the end of each financial year, every registered LLP is mandated to prepare and file with Commission, a **statement of account and solvency** which shall be duly signed by the designated partners of the LLP (**section 772 (2).**

Audit: The book of account of every registered LLP shall be audited in line with the rules of audit prescribed by the Minister of Trade and the Minister may publish in any regulation, an exemption of any class or classes of LLP from the requirement of the subsection on audit.

Where an LLP defaults in complying with the provisions of the law relating to audit – and such an LLP has not been exempted from complying with the subsection – such defaulting LLP and each designated partner therein, shall be liable to a penalty in such amount as the Commission shall specify in its regulations.

Annual returns: At a period not later than 60 days after its financial year, an LLP shall file an annual return in the form and manner prescribed by the Commission accompanied by the payment of the prescribed fee.

In the event of a default in the filing of the annual returns, both the LLP and each designated officer shall be liable to a penalty in such amount as the Commission may by its regulations specify.

10.8.10 Assignment and transfer of partnership rights

Except there is a contrary provision in the partnership articles of an LLP, the right of a partner to participate in the sharing of the profits and losses of an LLP and to receive distributions therein in accordance with the partnership agreement are transferrable either wholly or in part - **Section 774(1)**.

The transfer of any such rights under subsection (1) does not *ipso facto* results in the dissociation of the partner or a dissolution and winding up of the LLP. And the transfer of such rights does not confer the right of management or conduct of the LLP activities or grant access to information concerning the transactions of the LLP on the transferee or assignee.

10.8.11 Investigations and litigation in limited liability partnership and criminal proceedings initiated by the Attorney General of the Federation

(a) **Investigation ordered by Court**

The affairs of an LLP can be a subject of investigation pursuant to an order or declaration by the Federal High Court. The investigation shall be carried out by one or more competent persons appointed by the CAC as inspectors for the purposes of such investigation - **Section 775(1)**.

(b) Investigation carried out by the CAC

Apart from the Court, the Commission can *suo motu* appoint one or more competent persons as inspectors to investigate the affairs of any LLP in such manner that the Commission directs.

Investigation carried out by the Commission of its own volition can be made only under the circumstances that:

i. At least one-fifth (that is, 20%) of the total number of numbers of partners in the LLP have applied formally to the Commission for investigation of the LLP. The applicants must be ready to furnish the Commission with security for cost and the application must be supported by enough evidence to show good reasons by the members for requesting the investigation;

ii. The LLP itself has applied to the Commission for self-investigation on grounds justifying the application;

iii. The Commission itself has decided without the influence of members of or the LLP itself that the LLP ought to be investigated on the existence of the following grounds:

- The LLP business is being conducted with the intent to defraud its creditors, partner or any other person, or otherwise for an unlawful or fraudulent purpose;

- The LLP was formed for the advancement of any fraudulent purpose or that its business is being or has been conducted in an oppressive or prejudicial manner to some or any of its partners;
- The LLP has deviated from the provisions of the CAMA in the conduct of its affairs; or
- There is sufficient reason contained in a report of the Commission or any other investigating or regulatory agency which justify the conduct of an investigation into the affairs of the LLP.

For the purposes of investigation of an LLP under the CAMA, the Commission can only appoint natural persons as inspectors - **Section 777.**

In the course of an investigation carried out by an Inspector appointed by the Commission, the Inspector has power to extend his investigation - with the prior approval of the Commission - into the affairs of another entity which has had dealings with the LLP, whether in the past or currently or with any present or former partner or designated partner of the LLP - **Section 778(2).**

An inspector appointed by the Commission to carry out investigations into the affairs of an LLP may submit interim reports if so required by the Commission. Otherwise, he is expected to give a final report in writing to the Commission upon the conclusion of the investigation - **Section 781 (1)**.

Upon receipt of the final report, the Commission shall forward the report to the LLP at its registered office and as well to any other entity or person concerned with or related to the report. Any person or entity related to the report can also apply for and be given a certified true copy of the report by the Commission subject to payment of prescribed fee to the Commission.

Criminal proceedings by the Attorney General of the Federation - AGF

Civil proceedings can be instituted on the basis of the report and in the interest of justice by the CAC itself, or any other corporate entity in the name and on behalf of the LLP or the body corporate instituting the action.

Where the final report indicts any person for a criminal liability, the report shall be referred to the Attorney General of the Federation (AGF) and where the latter is of the opinion that a prosecution ought to be instituted against the indicted persons, all past and present officers and agents of the LLP or other body corporate save the defendants in the criminal proceedings are expected to give reasonable assistance within their capabilities to the AGF in connection with the prosecution.

Where the final report contains grounds for the recovery of damages for fraud, misfeasance and other misconduct in connection with the promotion or formation of that body corporate or the management of its affairs or grounds for the recovery of any property of the corporate body which has been misapplied or wrongfully retained, are contained in any report made by the Inspector, such may be referred to the AGF for his opinion as to whether or not it is appropriate to institute proceedings for that in the name of the body corporate. And where proceedings are deemed appropriate to be initiated, all past and present officers and agents of the LLP or other body corporate except the defendants in the proceedings are expected to give their reasonable assistance within their capabilities in connection with the proceedings.

Where a body corporate has incurred any costs while taking any steps or participating in the proceedings brought about as a result of the final report, all such costs and expenses shall be recoverable in the first instance from the Commission and where this is impossible, such shall be defrayed out of the consolidated revenue fund

10.8.12 Statutory requirements for foreign operation of a foreign limited liability partnership

A foreign LLP as defined under the CAMA is an LLP incorporated in another country apart from Nigeria, before or after the commencement of the CAMA 2020. (Note that the commencement date of the Act was 7th August, 2020, the day the Act was given assent by the President of the Federal Republic of Nigeria).

Where such a foreign entity has the intention to carry on business in Nigeria, it must take certain steps outlined in the Act as follows:

(a) It must be registered as a separate entity in Nigeria for the purposes of carrying on business in Nigeria;

(b) It cannot exercise in Nigeria any powers of a corporate entity, until registered;

(c) It cannot have a place of business or an address for service in Nigeria, until registered, provided that a temporary address for the sole purpose of service of processes or documents or notices for the purposes of the registration of the entity under the Act may be granted it.

Note also that the Minister of Trade is empowered to exempt a foreign LLP from the requirement of mandatory registration under the Act by the issuance of a regulation for the purpose.

10.8.13 Chargeability of a partnership of individuals to tax under the Nigeria Tax Act, 2025

Section 15 of the Nigeria Tax Act (NTA) makes the following provisions for determining the taxable gains or profits of a partner from a partnership as follows:

a. Any remuneration, interest on capital, cost of passages wholly or mainly undertaken for the purpose of leave or recreation, or any other perquisite or benefits-in-kind which is charged to the partnership accounts in respect of that partner; and

b. The partner's share in the profits of the partnership, computed in accordance with chapter two of this Act, after the deduction of charges to which paragraph (a) of this subsection applies in respect of all the partners:

   Provided that in arriving at the gains or profits of a partnership, private or domestic expense of a partner shall not be deducted.

c. Where the computed income of the partner results in a loss for the partnership, the partner's share of the loss shall be deducted from the gains or profits ascertained under the provisions of paragraph (a), and the partner shall be deemed to have incurred a loss in the trade or business of the partnership to the extent, if any, by which the deductible share of loss exceeds those gains or profits.

d. A partner's share of the partnership's profits or losses shall be determined in the proportion specified in the partnership agreement as if the entire profits or losses were distributed among the partners, and where there is no partnership agreement, the profits or loss of the partnership shall be distributed equally among the partners:

Provided that any person, whether resident or non-resident, who directly or indirectly, shares in the profits of a Nigerian partnership shall file returns in his name and pay the applicable tax.

e. The gains, profits or losses of a partner for any period, ascertained under this section, shall be deemed to be the partner's income or loss from a trade, business, profession or vocation carried on during that period, and the provisions of section 20 of the NTA shall not apply.

f. The determination of the profits or losses that are attributable to a partner from a partnership shall be made by the relevant tax authority in relation to that partnership.

g. Where any partner is taxable for a year of assessment in the territory of another relevant tax authority, the relevant tax authority in relation to that partnership shall make available to that other tax authority, particulars of the determination of profits or losses.

h. The income of a partner from a partnership in Nigeria shall be attributable to relevant territories in Nigeria in accordance with the Twelfth Schedule to the NTA.

i. The partner, employee, or agent in charge of the principal office or place of business of a partnership in Nigeria shall, without notice or demand, register or cause to be registered with the relevant tax authority, a certified copy of the partnership deed or, where no written deed is in existence, particulars of any written or oral agreement under which the partnership exists.

j. Where the particulars of a partnership have been registered under the provisions of the Act, the relevant tax authority may make the computation of the gains or profits of a partner on the basis of those particulars as they apply at any relevant time.

k. Where the particulars of a partnership are not registered, the relevant tax authority may assess and charge the tax as though the whole gains or profits of such partnership accrued to any individual partner or were divisible between the partners, as may appear just and reasonable to that tax authority.

10.8.14 Winding-up and dissolution of partnerships (general, limited, and limited liability partnerships)

10.8.15 Winding-up and dissolution of general partnership

A general partnership may be dissolved by the order of the court notwithstanding that many other situations for dissolution of the partnership may occur outside the purview of a court order.

Dissolution may occur without an order of the court in three major ways as follows:

i. By expiration or notice;

ii. Subject to any contrary agreement between the partners, a general partnership is dissolved in the following situations:

- If entered into for a fixed term, by the expiration of that term;
- If entered into for a single adventure or undertaking, and that single adventure or undertaking is terminated; or
- If entered into for an undefined term, by any partner giving notice the dissolution to the other partner(s);

iii By Bankruptcy or Death: Subject to any contrary agreement between the partners, a general partnership is dissolved by the death or bankruptcy of any partner;

iv. Charge: If one of the partners suffers his share to be charged for his separate debt, the others have the option of dissolving the general partnership;

a. Illegality: Also, a general partnership is dissolved in the event of the occurrence of a situation which makes it unlawful for the partnership to be carried on by the members;

b. Application by a partner, petitioning the court for a decree of dissolution: On an application by a partner, the court may decree dissolution in the following circumstances:

- When a general partner becomes a lunatic by inquisition;
- When a partner other than the one suing, becomes in any other way permanently incapable of performing his duties under the contract of general partnership;

- When a partner other than the one suing, has been guilty of a conduct calculated to prejudice the carrying on of the general partnership business;
- When a partner other than the one suing, willfully or\ persistently commits a breach of the partnership agreementor otherwise so conduct himself that it is not reasonably practicable for the other partners to carry on the business in partnership with him;
- Where the general partnership business can only be caried on at a loss; or
- Whenever the court thinks it just and equitable to dissolve the general partnership.

Effect of dissolution

Basically, dissolution revokes the power of each partner to bind the farm. However, the partners may complete the transactions, which they have commenced but not completed at the time of the dissolution and also do whatever may be necessary to wind up the general partnership business.

Application of general partnership property on dissolution

On dissolution, each partner is entitled to have the partnership property, including its goodwill, sold and the proceeds applied in payment of the debts and liabilities of the firm.

The Partnership Act of 1890 and the Partnership Laws of some states provide that in settling accounts, if the general partnership assets are insufficient to discharge the debts and liabilities of the firm, subject to agreement, the partners must bear the deficiency in the proportion in which they were entitled to share profits but in this order:

(a) Out of profits;

(b) Out of capital; and

(c) By the partner individually, in the proportion in which they were entitled to share profits.

Apart from this, the assets of the general partnership, including any sums contributed by the partners to make up the losses or deficiencies of capital, are applied in the following ways:

(a) Paying the debts and liabilities of the firm to persons who are not partners;
(b) Paying the debts and liabilities of the firm to persons who are partners;
(c) Paying each partner proportionately what is due to him in respect of capital; and
(d) The ultimate residue, if any is to be divided among the general partners in the proportion in which profits are divisible.

10.8.16 Winding-up and dissolution of limited partnership

Provisions relating to the limited partnership are contained in Part D, Chapters 1 and 2) of the Companies and Allied Matters Act, 2020, and nowhere in the provisions was the winding up and dissolution of the limited partnership provided for.

In all cases where there are no special provisions in respect of the limited partnership under the Companies and Allied Matters Act 2020, Section 807 of the Act has expressly extended the application of Part C on limited liability partnership to Part D, on the limited partnership. Therefore, the provisions of the CAMA in respect of the winding up and dissolution of the limited liability partnership can be undertaken as they are contained in Sections 789 – 790 (both sections inclusive) will also apply *mutatis mutandis* to limited partnership also by virtue of the provisions of Section 807.

10.8.15 Winding up and dissolution of Limited Liability Partnership

A limited liability partnership may be dissolved in two ways: voluntarily, that is without any order of court or by the order of court. Dissolution may occur by order of court in the following situations:

i. Where all the members of the LLP are unanimously agreed that it be wound up;

ii. Where the number of the LLP falls below two (2) and the situation persists for more than six months;

iii. Where the LLP is unable to pay its debts owed to its creditors;

iv. Where the LLP constituted a security risk to the sovereignty and or integrity of Nigeria or has generally acted against the interests of her security and or public order;

v. Where there has been a default on the part of the LLP to file with the Commission, the Statement of Account and Solvency and or annual returns for any 10 (ten) consecutive financial year; or

vi. In the opinion of the court, it is just and equitable that the LLP be wound up.

10.9 Summary

This chapter has attempted to give an in-depth study of the formation of partnership, and how to determine the existence of partnership as well as types of partnership, and the relation between partners and third parties exemplifying the authority of partners to bind the firm. The rights and duties of partners among themselves was also considered and in the end, the dissolution of partnership in its full ramification embracing the modes of dissolution, the legal effects thereof and the application of partnership property on dissolution.

10.10 REVISION QUESTIONS

MULTIPLE CHOICE QUESTIONS

1. The Partnership legislation applicable in States that have not enacted their own Partnership Law is

   A. Partnership Law, 1959

   B. Limited Liability Partnership Act (UK), 2000

   C. *Partnership Act, 1890

   D. Companies and Partnership Law, 1990

   E. Registration of Partnership Law, LFN, 2004

2. Which of the following statement is TRUE in respect of a limited partnership?

A. There is a limited partner whose liability for the partnership debt in unlimited

*B. The limited partner cannot participate in the management of the partnership business

C. The limited partner's death will bring an end to the partnership business.

D. The limited partner can bind the firm

E. The limited partner is the Managing Director of the partnership business

3. Which of the following is FALSE in respect of a general partner?

A. She can decide to take part in the management of the partnership business

B. She has implied authority to buy, pledge and sell goods the type in which the firm deals

C. She can sue on behalf of the firm or defend an action against it

D. She can accept property in lieu of money to satisfy a debt owed to the Firm

E. She can engage and dismiss employees

SHORT ANSWER QUESTIONS

1. Another name for the limited partner is a _____***** dormant partner. In the event of a winding up of a partnership, the limited partner is liable only to the extent of his _____***** contribution.

2. Where a partnership agreement is in writing, the document is referred to as_____ ****articles of partnership.

ESSAY QUESTIONS

1(a) When does a situation of partnership by estoppel arise?

(b) Ade is a friend to Bola and Wale, partners in the Firm of Goldsmiths operating in Iyanfoworogi. Ade is fond of visiting his two friends in their place of work and will stay with them till close of work. On a certain day, Abike visited the Firm with the intention of patronising the Firm whereby she met Ade who pretended to be one of the partners and discussed with Abike on how to fix the very expensive gold choker, which Abike brought for repairs. None of the partners was around except Ade, who informed the Abike that he was one of the partners and took the choker from Abike and issued her a receipt which he from the firm's receipt booklet which he signed. Ade informed Abike that he will personally deliver the choker to Abike in her house and that Abike should not bother to come back to the Firm for her repaired choker. Ade fulfilled her promise and took the choker to Abike whereby Abike discovered that the choker had been badly handled and demanded a replacement from the Firm. It was then that Ade told her he was not a member of the Firm. Advise the parties.

Answer

(a) A partnership by estoppel will arise in all situations where a person will be prevented from denying his membership of a partnership after he has held himself out as a partner and thereby induces another person to act upon that representation. Even though he is not a partner, but yet he will be liable to a third party as if he really were a partner.

(b) The issue here is the liability of Ade for holding himself out as a partner in the Firm of Goldsmiths. If he had disclosed that he was not one of the partners, Abike might not have given the choker to him to repair. Ade, issuing and signing a receipt for Abike would have also represented by conduct to Abike that he was one of the partners. Ade will be liable to Abike to the extent of being responsible to replace the choker or compensate Abike to the full extent of a replacement.

2. Explain the duties of a designated partner in a limited liability partnership.

Answer

In the absence of any express provisions to the contrary in the Companies and Allied Matters Act (CAMA), a designated partner has the responsibility to do the following:

i. Perform all the things that are required to be carried out by the LLP in the area of complying with the provisions of the CAMA. Such acts referred to include the filing of any document, returns, statement and any other report under the Act and as may be specified in the LLP agreement; and

ii. Be liable to pay all penalties that are imposed on the LLP for contravening any of the provisions of the CAMA. **Section 750 (1) & (2)**.

3. Examine a Partner's rights in a general partnership in relation to (a) Management; (b) Indemnity; and (c) Remuneration.

Answer

Where there are no partnership agreements in existence or where they exist, and do not contain enough provisions, the Partnership Act/Law will apply to make provisions to fill any vacuum thus created. The Act contain provisions in respect of the following in lieu of partnership agreement:

(a) **Management**: Every partner may take part in the management of the partnership business except, a limited partner, who turns himself into a general partner who will have unlimited liability for the partnership debts.

(b) **Indemnity:** The firm must indemnify every partner in respect of payments made and personal liabilities incurred by him in the ordinary and proper conduct of the business of the firm.

(c) **Remuneration:** No partner shall be entitled to remuneration for acting in the partnership business, except partners have provided for it in their agreement.

CHAPTER ELEVEN
Law of business associations: Companies

11.0 Chapter contents

- Learning objectives
- Introduction
- Establishment, nature, and functions of the Corporate Affairs Commission
- Composition and functions of the Administrative Committee
- Types of company
- Status and duties of promoters
- Process and consequences of incorporation
- Appointment, qualifications, and duties of auditors
- Company securities – shares and debentures
- Power, status and duties of directors
- Company secretary
- Company meetings
- Majority rule and minority protection
- Company administration
- Winding up
- Mergers compromise, arrangement, and netting
- Registration of business names
- Incorporation of trustees
- Collective investment schemes

11.0.1 Learning objectives

Upon completion of this chapter, readers should be able to:

- explain the establishment and functions of the Corporate Affairs Commission;
- explain the composition and functions of the Administrative Committee;
- classify companies

- explain the duties of promoters and auditors;
- describe the process and consequences of incorporation;
- explain what company securities are;
- appraise the powers and duties of directors;
- explain the qualifications, status and duties of companies' secretaries;
- have an understanding of company meetings;
- explain majority rule and minority protection;
- explain company administration;
- explain mergers, compromise, arrangement, and netting;
- discuss winding-up and liquidation of companies;
- explain registration of business names and incorporation of trustees; and
- explain collective investments schemes

11.1 Introduction

A company is a major type of business associations. Every person's life is touched in one way or the other by the activities of companies. A study of companies is therefore important in understanding the functioning of business associations. This chapter defines a company and explains its types. It also explains the formation and incorporation of a company as well as raising and maintenance of capital for it. It proceeds to explain corporate management, including the organs of the company – the general meeting and the board of directors, the appointment, qualifications, status, and duties of directors as well as the company secretary. In addition, it explains the meetings of the company and the decision-making process, including the majority rule and minority protection. It also explains the role and duties of auditors and the processes of winding up or liquidating the company

11.2 Establishment, nature and functions of Corporate Affairs Commission

The Corporate Affairs Commission – CAC - is established under section 1 of the Companies and Allied Matters Act (CAMA). It is established as a body corporate with perpetual succession and a common seal, capable of suing and being sued in its corporate name and of acquiring, holding or disposing of all types of property for the purpose of its functions. The headquarters of the Commission is situated in Abuja, the Federal Capital Territory. A branch office is expected to be established in each State of the Federation.

11.3 Functions of the Corporate Affairs Commission

(a) Administer the CAMA, regulate and supervise the formation, incorporation, management and striking off and winding up of companies including business names, management and removal of names from the register and formation, incorporation, management and dissolution of incorporated trustees.

(b) Establish and maintain companies' registry and offices in all the states of the federation, suitably and adequately equipped to perform its statutory functions;

(c) Arrange and conduct an investigation into the affairs of any company, incorporated trustees or business names (and even though not expressly mentioned, into the affairs of a limited partnership entity and a limited liability partnership entity) where the interests of the shareholders and partners as well as the public so demand;

(d) Ensure compliance by companies' business names and incorporated trustees and limited partnership entity and a limited liability partnership entity (even though not expressly stated), with the provisions of the CAMA and such other regulations as may be made by the Commission;

(e) Perform such other functions as may be specified by the CAMA or any other enactment; and

(f) Undertake such other activities as are necessary or expedient for giving full effect to the provisions of the CAMA.

11.3.1 Administrative Proceedings Committee (Administrative Committee)

Section 851 of the CAMA mandates the CAC to establish an Administrative Hearing Committee, referred to as the Administrative Committee in the Act. The Registrar-General of the CAC shall chair the Administrative Committee and its members shall comprise –

(a) "five representatives from the operational departments of the Commission" of at least the grade of director, one of whom shall be from the Department; and

(b) a representative of the Federal Ministry of Industry, Trade and Investment of at least the grade of director.

11.3.2 Functions of the Administrative Committee

The Administrative Committee has the functions to –

(a) hear persons alleged to have violated the provisions of the CAMA or its regulations;

(b) resolve disputes and grievances that arise from the implementation of the CAMA or its regulations; and

(c) impose administrative penalties for the violation of the provisions of the CAMA or its regulations in the process of settling matters that are before it.

The chairman, and in his absence any member chosen by the members, presided over the proceedings of the Administrative Committee. Four members shall form the quorum and the decisions of the Committee shall be by a simple majority. Parties shall attend the proceedings in person or be represented by a legal practitioner.

11.4 Types of company

In Nigeria, an incorporated company registered under the CAMA could be a public or private company both of which could be any of the following categories as provided for Section 21 of the Act:

(a) Company limited by shares

This a company that has the liability of its shareholders, that is members of the company, limited by the memorandum of association to the amount of money, if any, that is unpaid on the shares each member respectively holds. If such a company is a private company, it must end its name with the word "Limited" or the abbreviation "Ltd", and if it is a public company, it must end its name with the words "Public limited company" or the abbreviation "Plc".

(b) Company limited by guarantee

This company has the liability of its members limited in the memorandum of association of the company, to the amount of money that the members have undertaken (guaranteed) to contribute (in the future) to its assets whenever the company is being wound up. This type is company is usually preferred if the company is not set up to make profit and if any profit is made in the course of its business, such profit is to be applied to the furtherance of its objects. Such a company must end its name with the abbreviation "Ltd./Gte" or the words "Limited by Guarantee".

(c) Unlimited company

An unlimited company is a company that has members with unlimited liability Such a company is referred to as "an Unlimited company" and the name of an unlimited company shall end with the word "Unlimited".

Note that any of the foregoing types of companies may either be a private or a public company.

11.5 Private company

According to Section 22 of CAMA, a private company is one which is stated in its memorandum of association to be a private company and such a company has the following attributes:

(a) A statutory minimum membership of either 1 or 2 and a maximum membership of 50 (excluding employees and member-employees). **Provided** that where two or more persons jointly hold one or more shares in a private company, they shall, for the purposes of this subsection (calculating the maximum membership of the company), be treated as a single member. (SS. 18 (2), 22 (3) & (4) CAMA);

(b) Its name ending with "Limited" or "Ltd", indicating that it is a company limited by shares, (Section 29 (1), (5));

(c) Its articles of association restrict the transfer of the shares and also provides as follows in the articles:

i sell assets of the company having a value of more than 50% of the total value of the company's assets without the consent of all its members, (Section 22 (2) (a) CAMA);

ii. a member cannot sell his/her/its own shares to a non-member without first offering those shares to existing members (Section 22 (2) (B) CAMA);

iii. a member acting alone or in concert with other members shall not sell or agree to sell – alone or jointly – more than 50% of shares in the company to a person who is not then a member as at the time of sale, unless that non-member has offered to buy the shares/interests of all existing members on the same terms. (Section 22 (2) (c), CAMA).

(d) Prohibition from inviting members of the public to subscribe for any share or debenture of the company, or deposit money for fixed periods or payable at call, whether or not bearing interest unless authorised otherwise by law (Section 22 (5) CAMA);

(e) A minimum **issued** share capital requirement of not less than ₦100,000 shall be stated in its memorandum of association and each subscriber thereto shall write opposite his name the number of shares taken. (SS. 27(2) (a) & (b) CAMA).

11.6 Public company

Any company other than a private company shall be a public company and shall so state that fact in its memorandum of association. (Section 24 CAMA) a public company has the following attributes:

(a) A minimum **issued** share capital requirement of not less than ₦2,000,000 shall be stated in its memorandum of association and each subscriber thereto shall write opposite his name the number of shares taken. (SS. 27(2) (a) & (b) CAMA);

(b) A minimum membership of 2 and an unlimited maximum membership, (Section 18 (1) CAMA);

(c) A name ending with "Public Limited Company" or "Plc", indicating that it is a public company limited by shares, (Section 29 (2), (5));

(d) The capacity to invite members of the public to subscribe for its shares; (Section 24 CAMA);

(e) It must hold a statutory meeting within a period six months from the date of its incorporation (Section 235 (1) CAMA).

11.7 Single shareholder and small company

One of the new changes introduced into the business environment in Nigeria by the Companies and Allied Matters Act, 2020 is the provision permitting the incorporation of small companies with single director and single shareholder.

Under Section 18 (2) CAMA, it is now possible for one person to form and incorporate a private company by complying with the requirements of the Act in respect of private companies.

Such companies will, for instance be exempted from compliance with the provisions of the Act in relation to quorum for meetings (Section 256 (1) CAMA). It is no longer impossible for entrepreneurs who hitherto have been operating as proprietors under the business name registration platform, to transit to a limited liability under the Act with all the attendant advantages of limited liability company.

11.8 Procedure for incorporation of a company

The Corporate Affairs Commission (CAC) is Nigeria's corporate registry established under Section 1 of CAMA, 2020 to perform the functions outlined in Section 18 of the Act. In carrying out its functions for the registration, regulation, and supervision of the formation, incorporation etc. of companies, business names, incorporated trustees, limited partnerships and limited liability partnerships, the Commission has established online cyberspace (Internet) electronic communication processes which professionals engaged by promoters for the incorporation and or registration of their desired corporate entity are to access and activate. Kindly note that while the medium of interacting with the CAC is currently online, the various steps and procedures enumerated below must still be undertaken by the retained professional.

(a) Any two or more persons may form a company by complying with the provisions of CAMA (S. 18 (1) CAMA). In some other circumstance, one person only is allowed to form a private company by complying with the provisions of CAMA in respect of private companies (Ss. 18 (2) CAMA).

(b) Section 20 disqualifies from joining in the formation of a company, a person under 18 years of age, a person of unsound mind, an undischarged bankrupt, a corporate body in liquidation and a person who has acted fraudulently in managing a company. Keep in mind however, that a person under the age of 18 may join in the formation of a company if there are at least two other persons of at least 18 years in the venture.

(c) The promoters have to engage the services of a certified professional (a legal practitioner or chartered accountant) to incorporate the company.

(d) The professional must first file with the CAC in the appropriate form (CAC–1) two alternative proposed names of the proposed company for approval (if available for use) and reservation. The application must be delivered in hard copy through electronic communication. (Section 31 (1) CAMA).

(e) If the proposed name is available and approved by the CAC, the latter reserves the proposed name(s) for 60 days, after which the approval lapses.

Note that except with the permission of the Commission, no company, limited liability partnership, limited partnership, business name or incorporate trustees shall be registered by a name which includes the word "Federal", "National", "Regional", "State", "Government" or any other words which in the opinion of the Commission suggests or is calculated to suggest that it enjoys the patronage of the Government of the Federation, the Government of a State in Nigeria, and Ministry or Department of Government, or contains the word "Municipal" or "Chartered" or in the opinion of the Commission, suggests or is calculated to suggest connection with any municipality or other local authority; or contains the word "Cooperative" or its equivalent in any other language or any abbreviation; or of the words "Building Society" or contains the word "Group" of "Holding". (Section 852 (2) (a-d)).

(f) The professional engaged for the incorporation then prepares the memorandum and articles of association together with the other documents of incorporation/registration by way of prescribed forms purchased at the nearest CAC office.

(g) The professional must present two copies of the memorandum and articles of association as well as two copies of the proposed company's statement of nominal share capital and return on allotment of shares for assessment for stamping at the Stamp Duty Office where fees as assessed will be paid and the documents presented, stamped accordingly.

(h) The memorandum and articles of association, including all other documents already stamped will then be delivered to the Commission together with an application for registration of the company together with a statement of compliance. The delivery to the Commission will be done online through electronic transmission to the Commission's electronic portal with the payment of the prescribed filing fees, online.

11.9 Documents of incorporation

The documents of incorporation are:

(a) The memorandum and articles of association duly stamped by the Commission. The memorandum and articles will be accompanied by an application for registration of the company, together with other documents of registration and a statement of compliance. (S. 31(1) CAMA).

(b) The application for registration presented by the professional retained for the incorporation, stating the company's proposed name, the registered office address and head office address if different from registered office address, whether liability of members is to be limited, and if so, whether it is to be limited by shares, or by guarantee, and whether the company is a private or a public company. (S. 31(2) (a-d) CAMA).

(c) A statement of the authorised capital of the company (minimum of ₦100,000.00 for a private company and ₦2,000,000.00 for a public company) signed by at least one director.

(d) A statement of initial issued share capital and initial shareholding in the case of a company that has a share capital. (S. 31(4) (a), CAMA). Note that the statement of initial issued capital and initial shareholding, shall contain a statement in respect of the requisite information stated in Section 37 CAMA, in respect the number, nominal value (of each

share) and class of shares to be taken by each subscriber to the memorandum of association, as well as the amount to be paid and the amount (if any) to be unpaid on each share (whether by nominal value of the share or by way of premium.

Note that if the company is one that is limited by guarantee, what should be delivered to the Commission is, a statement of guarantee. (S. 31(4) (b) CAMA). The statement of guarantee shall also contain the information stated as required in S. 38 CAMA.

(e) A statement of the company's proposed directors with the required particulars of person(s) who are to be first director(s) of the company, person(s) who are to be first secretary or joint secretaries of the company, with the consent of the director(s) and secretary/joint secretaries to so act in their respective capacities in the company. The statement of proposed directors shall also contain the information stated as required in S. 39 CAMA.

(f) A statement of compliance by the applicant (promoter, if acting in person) or his agent (certified professional acting on a Promoter's behalf) to be delivered to the Commission stating that the requirements of the CAMA as to registration have been complied with.

According to Section 41 (6) CAMA, upon being satisfied with the filed documents, the CAC shall register the memorandum and articles of association and issue a certificate of incorporation which is prima facie evidence of compliance with the registration requirements of CAMA.

11.10 Statement of compliance with requirements for incorporation under Section 40 CAMA as r e p l a c e m e n t for the statutory declaration by a legal practitioner under the repealed CAMA, 2004

Under CAMA, 2004 (a statute that has been repealed by the CAMA 2020) a legal practitioner engaged in the incorporation of compliance with the requirements of the CAMA and other applicable laws, is expected to file with the CAC, along with the documents of incorporation, a statutory declaration of compliance.

Under CAMA 2004, only a legal practitioner could make the statutory declaration on oath in the prescribed form CO-1 then. However, in the new statute governing incorporation of companies and similar entities - CAMA - 2020, provisions have been made for the filing of a statement of compliance along with documents of incorporation. However, the statement of compliance, which is to be made under oath before the Commissioner for Oaths, can be made by the applicant (that is, the promoter) or his agent. The implication of this is that unlike the CAMA, 2004 (repealed) that permitted only a legal practitioner to make and file the **statutory declaration**, the current statute - CAMA 2020 – has extended the categories of persons who could make and sign the **statement of compliance** thereunder. Also, where the statement of compliance has been signed by a legal practitioner, the Commission reserves the right to accept the oath if made before a Notary Public. In all situations, the statement of compliance may be taken by the Commission as sufficient evidence of compliance by the deponent with the requirements of the Act as to registration.

11.11 Grounds upon which CAC may refuse to register the documents of a proposed company – Section 41 CAMA

The CAC may refuse to register the documents of the proposed company if:

(a) they do not comply with the provisions of CAMA 2020;

(b) any of the businesses that the company is to carry on, or the objects for which it is formed, or any of them, is illegal;

(c) any of the subscribers to the memorandum is incompetent or disqualified from being a member of a company under the CAMA

(d) there is non-compliance with the requirements of any other law as to the registration and incorporation of the company; or

(e) the proposed name of the company conflicts or is likely to conflict with an existing trade mark or business name registered in Nigeria.

11.12 Effect of the registered documents – Section 46 CAMA

The registered memorandum and articles of association have the effect of a contract under seal between the company, its members and officers. (In Nigeria, officers include the directors, secretary and auditors) (S. 46(1) CAMA).

11.12.1 Effect of registration

As from the date of incorporation mentioned in on the certificate of incorporation, the subscriber(s) of the memorandum together with such other persons as may, from time to time, become members of the company, shall be a body corporate by the name contained in the memorandum, capable forthwith of exercising all the powers and functions of an incorporated company including the power to hold land, and having perpetual succession but with such liability on the part of the members to contribute to the assets of the company in the event of its being wound up as provided in the CAMA (Section 42, CAMA).

11.13 Promoters – Section 85, CAMA

A promoter is "any person who undertakes to take part in forming a company with reference to a given project and to set it going and who takes the necessary steps to accomplish that purpose, or who, with regard to a proposed or newly formed company, undertakes a part in raising capital for it …" (S. 85, CAMA). Keep in mind that any person that acts strictly in a professional capacity (as a solicitor, accountant or in any similar capacity) in forming a company is not a promoter.

11.13.1 Duties of a promoter – Section 86, CAMA

(a) A promoter is a fiduciary to the proposed company and must observe utmost good faith towards the company in all the transactions entered into with the company or undertaken for and on behalf of the company.

(b) A promoter must not make any secret profit in any transaction with or on behalf of

the company. Therefore, a promoter that acquires a property or information, in circumstances in which it was his duty as a fiduciary to acquire it on behalf of the company, shall account to the company for such property, or for the profit made from the transaction, or the use of the information.

(c) A promoter may freely sell his property to the proposed company. However, he must disclose his interest in the property to the company after incorporation.

(d) Any transaction between a promoter and the company may be rescinded by the company unless, after the disclosure of all the material facts known to the promoter, such transaction is entered into or ratified on behalf of the company by:

i. the company's board of directors independently of the promoter, even where the promoter is a member of the board;

ii. all the members of the company (where it is possible to do so without a meeting; or

iii. the company at a general meeting a which neither the promoter nor the holders of any share in which he/she is beneficially interested shall vote on the resolution to enter into or ratify the transaction (See section 86, CAMA).

11.14 Pre-incorporation contracts – Section 96, CAMA

This a contract entered into by a promoter on behalf of the proposed company. Such a contract is usually entered into by promoters to acquire a property or right for and on behalf of the company to be formed. A pre-incorporation contract is, as a general rule, not binding on the company when it is incorporated. The rationale being that since the company was non-existent before its incorporation, nobody could act on its behalf. Before the CAMA came into effect, the company could not even ratify such a contract after incorporation. The simple reason being that for an act of an agent to be ratifiable, the principal must have been in existence at the time the act was done.

The current law by which the company is permitted to ratify a pre-incorporation contract after incorporation is section 96 of the CAMA as follows:

(a) Any contract or other transaction purporting to be entered into by the company or by any person on behalf of the company prior to its formation may be ratified by the company after its formation and thereupon the company shall become bound by and entitled to the benefit thereof as if it had been in existence at the date of such contract or other transaction and had been a party thereto. Also as decided in *Continental Bank Plc. & Anor. v Emostrade* (2002).

(b) Prior to the ratification by the company, the person who purported to act in the name or on behalf of the company shall, in the absence of express agreement to the contrary, be personally bound by the contract or other transaction and entitled to the benefit thereof.

11.15 Contents of Memorandum of Association – Section 27, CAMA

The memorandum and articles of association are the Constitution of the company. They are major documents of incorporation.

The memorandum of association regulates the company's external relations. It contains the following:

(a) The name of the company;

(b) The registered office of the company;

(c) The businesses or objects for which the company is registered;

(d) The nature of the company, that is "private" or "public";

(e) The nature of the liability of the company (whether by shares, by guarantee or unlimited);

(f) The statement of the authorised share (or guaranteed) capital of the company; and

(g) The subscription clause and table (this is where each subscriber to the memorandum shall write opposite his name the number of shares he takes).

11.16 Articles of Association – Section 32

The articles (of association) regulate the company's internal relations. In other words, they are internal rules that govern the management of the company. The articles constitute a contract between the members *inter se* (amongst themselves), the members on one side and the company on the other side, and the members, company and its officers (directors, secretary, internal auditor, etc).

The articles of association constitute an important document of the company wherein its regulations are prescribed.

Every company registrable under the CAMA shall present articles of association as part of its incorporation documents and the articles of association so presented shall be:

(a) contained in a single document; and

(b) divided into paragraphs numbered consecutively.

11.16.1 Model articles of association – Section 33

The Minister (charged with responsibility for Trade in Nigeria) may issue regulations to prescribe different model articles of association for different description of companies, and a company is at liberty to adopt all or any of the provisions of the model articles that fits its own description. An amendment may be carried out from time to time on model articles of association without any prejudicial effect to a company registered with the model articles prior to its amendments.

11.16.2 Application of model articles – Section 34, CAMA

A limited company is expected to register articles of association during its formation. Where at incorporation a limited company omitted to register articles of association, or where it registered one, but the one registered does not exclude or modify the "relevant model articles", the relevant model articles will be deemed to form part of the company's articles in the same manner and to the same extent as if those articles registered, expressly included the relevant model articles in the form in which those articles had been duly registered.

Kindly note that "relevant model articles" are model articles prepared by the Commission for a company, and which as at the date that the company is to be registered, matches the particular description ascribed by the Commission to that company.

11.16.3 Amendment of memorandum and articles of Association

Sequel to the registration of the company, which is actually the registration of the memorandum and articles of association, both documents can be altered or amended in accordance with and to the extend provided for in the CAMA.

11.16.4 Amendment of the memorandum of association

All the clauses in a memorandum of association of a company registered at its formation can be altered or amended in accordance with the substantive and procedural provisions of sections 50-52, CAMA.

(b) Alteration of the name, business or objects, restriction on power, and share capital clauses in the memorandum of association can be made under the CAMA in the following ways:

The name clause in the memorandum can be altered only with the consent of the CAC.

The application for the alteration will be made by the company to the Commission,

through a special resolution of the company duly passed by at least three-fourths of the votes cast by members of the company at a meeting of which 21 days has been given to members of the company (S. 258, CAMA). The Commission will signify its approval for the change in the company's name, in writing and it shall enter the new name in the register of names in place of the former name. In addition, a certificate of incorporation reflecting the alteration in name, will be issued to the company (S. 30, CAMA).

Note that where the change in name of a company is occasioned only by the substitution of the words "Public Limited Company", for the word, "Limited" or vice versa on the conversion of a private company into a public company or a public company into a private in accordance with CAMA, no such approval of the Commission shall be required.

(c) The business or object clause may be altered in accordance with section 51, CAMA. A company may, at a meeting of which written notice had been given to all members, by special resolution, alter the provisions of the memorandum with respect to its business or objects.

(d) Section 50(3) provides that any restriction on the powers of the company may be altered in the same way as the business or object of the company in other words, in accordance with section 51.

(e) The share capital of the company may be altered in accordance with the provisions of section 128-130.

(f) Even though there are no specific provisions for the alteration of the statement of the registered office, which is a condition of the memorandum, it should follow that it may be altered in accordance with section 51 of the CAMA.

Section 50(5) deals with the alteration of any other provisions of the memorandum apart from the ones specifically provided for, subject to the same rules as contained in section 51.

11.16.5 Alteration of articles of association

On the authority of section 53(1) of the CAMA, subject to the provisions of the Act and the conditions or other provisions contained in its memorandum, a company may alter or add its articles by passing a special resolution by at least ¾ of the votes cast by the members of the company in a General Meeting of which not less than 21 says had been given to the members. In addition, it may delete or modify the provisions stated in section 27(1)(a)-(d) of the CAMA.

Importantly then, no alteration must contradict the CAMA and other provisions of the company's memorandum of association.

By virtue of section 53(2), "Any alteration or addition made in the articles shall, subject to the provisions of this Act, be as valid as if originally contained therein and be subject in like manner, to the alteration by special resolution."

Keep in mind that from this line of cases the usual condition for alteration is that it must be for the benefit of the company as a whole, but the CAMA is silent on that.

Importantly, section 54 of the CAMA provides that,

"Except to the extent to which a member of a company agrees in writing at any time to be bound thereby, and anything to the contrary in the memorandum or articles notwithstanding, the member shall not be bound by any alteration made in the memorandum or articles of the company requiring him on or after the date of the alteration to

(a) take or subscribe for more shares than he held at the date on which he became a member; or

(b) increase his liability to contribute to the share capital of the company; or

(c) pay money by any other means to the company."

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(e) increase his liability to contribute to the share capital of the company; or

(f) pay money by any other means to the company."

11.17 Securities

Securities are financial instruments by which a company raises capital. Section 357 of the Investments and Securities Act (ISA), 2025 defines 'securities' as,

(a) *debentures, stocks or bonds issued by a government;*
(b) *debentures, stocks, shares, bonds, notes issued by a body corporate, any right or option in respect of any such debentures, stocks, shares, bonds or notes;*
(c) *virtual and digital assets;*
(d) *investment contracts;*
(e) *commodities, futures, contracts, options and other derivatives; or*
(f) *any other instrument deemed as securities which may be transferred by means of any electronic mode or which may be deposited, kept or stored with any depository or custodian.*

Of the list of securities, investment contracts as well as virtual and digital assets call for further examination, being marked additions and innovations to the listings of the repealed ISA, 2007.

Virtual and digital assets

This class of securities include cryptocurrency, digital token, bitcoin, etc., the deployment of which in commercial activities is gaining global acceptance. The ISA, 2025 securitised those assets, thereby aligning Nigeria with the countries of the world that are adopting them, after the Central Bank of Nigeria (CBN) initially prohibited banks and other financial institutions within its regulatory reach from enabling or processing crypto transactions in Nigeria.

Investment contracts

These comprise investment of funds in a business or project in expectation of returns on the investment accruable from the efforts of the managers who are not necessarily the investors. In the arrangement there is separation of stake ownership from control. Examples include crowd funding, without prejudice to which the ISA defines the term in the Second Schedule, Part I of the ISA, 2025[1], which expatiates types securities by classifying them as investments, which include shares and stocks, debentures, government and public securities, virtual assets, instruments entitling the holders to shares or securities, certificates that represent securities, units or shares in collective investments scheme as well as derivatives such as options and futures.

11.18 Shares, procedures for issue and transmission of shares, and issue of debentures (corporate bonds

11.18.1 Definition of share

Section 868 of the Companies and Allied Matters Act, 2020 defines 'share' as "…the interests in a company's share capital of a member who is entitled to share in the capital or income of such company, and except where a distinction between stock and shares is expressed or implied, includes stock."

A share is not a sum of money… but an interest measured by a sum of money and made up of various rights contained in the contract, including the right to a sum of money of a more or less amount.

On the one hand, a share confers certain rights on the shareholder. These rights include membership of the company, the right to receive notices of the meetings of the company, the right to attend and vote at such meetings, the right to receive dividends when declared as well as the right to transfer the shares, except in a private company where transfer is restricted.

On the other hand, shareholding imposes a liability on the shareholder to pay calls on the shares – if not fully paid for at incorporation - until the nominal value is fully paid up.

11.18.2 Types or classes of shares

Section 141 of the CAMA provides that a company may, where so authorised by its articles, issue classes of shares, provided that the shares shall not be treated as being of the same class unless they rank equally for all purposes.

The following are the commonest classes of shares:

(a) Ordinary or equity shares

This class of shares bears the greatest risk of the enterprise. The shares do not have special rights attached to them. The shares of this class receive dividends last and rank last in the order of payment in the situation of winding up.

(b) Preference shares

These are issued to members who do not want to take much risk. A preference shareholder receives dividends of a fixed sum of money before then ordinary shareholders. If the money available for the payment of dividends is exhausted after paying the preference shareholders, the ordinary shareholders will go empty handed.

(c) Founders'/deferred shares

This class of shares is allotted or credited to those who had assisted in the promotion of the company. This must be done by way of a contract that expressly states the consideration for the shares. The shares are issued in payment for the services rendered in the course of promoting a company.

(d) Authorised share capital (nominal share capital)

The authorized share capital is sometimes called the nominal share capital and may be said to be the capital of the company at any given time. That is, it may be the share capital with which the company is registered, or the company's increased share capital because the CAMA authorizes a company to increase its share capital.

Section 127(1) of the CAMA (as amended by the Business Facilitation Miscellaneous Provisions) Act 2023) provides that company having a share capital may, in a general meeting or through a resolution of the board of directors, increase its issued share capital by the allotment of new shares of such amount as it considers expedient, subject to the condition or direction that the articles of association or the company in general meeting may impose.

Subsection (2) provides that, "Where a company increased its share capital, it shall, within 15 days after the passing of the resolution authorizing the increase, give the Commission notice of the increase and the Commission shall record the increase."

According to section 128 of the CAMA, "Where a company allots new shares, thereby increasing its issued share capital, the increase shall not take effect unless –

(a) at least 25% of the share capital including the increase has been paid up; and

(b) the directors have delivered to the Commission a statutory declaration verifying that fact.

By virtue of section 128(2) a company shall be liable to such fine as the Commission may prescribe by regulation for every day for which it has failed to comply with the requirements above.

The BFA amended section 154(1) of the CAMA to shorten the period within which a company shall make a return on allotment of shares to the CAC to 15 days after the allotment.

11.18.3 Issue of shares

Issuance of shares means that a company or entity owning the shares is willing to make the shares available for allotment to subscribers who will become members of the company or entity. Section 141 of the CAMA provides that subject to any limitation in the articles of a company with respect to the number of shares which may be issued, and any pre-emptive rights prescribed in the articles in relation to the shares, a company has the power at all times and for consideration as it shall determine to issue shares. Unless it has successfully increased its authorised share capital which is stated in the memorandum of association registered at incorporation, a company may not be able to issue shares beyond the total number authorised in the memorandum.

When a company decides to issue new shares of the same class as the existing one, section 142, accords the existing shareholders of the class being issued the pre-emptive right (right of first refusal) to buy the new shares in proportion as nearly as possible to their existing holdings. This mode of issuance of shares is called **rights issue**.

Where an existing shareholder declines the offer of a rights issue, or if the offer lapses, the board of directors may dispose of the shares. This is subject to the terms of any resolution of the company, at a price not less than that specified in the offer, and in such manner as it thinks most beneficial to the company.

11.18.4 Transfer of shares

The shares or other interest of a member in a company are personal property transferrable in the manner provided in the articles of association of the company (Section 139, CAMA).

11.18.5 Capacity to transfer

Any person that has the capacity to be a member of a company also has, as a general rule, the capacity to transfer his or her shares subject to the provisions of the company's articles of association.

Keep in mind that, a member may transfer his or her shares by a power-of-attorney, but the power-of-attorney must be authenticated with and left with the company together with the instrument of transfer.

11.18.6 Mode of transfer of shares

(a) A share must be transferred through the execution by the transferor of an instrument of transfer. Section 175 (1) of the CAMA provides that, "The transfer of a company's share shall be by instrument of transfer, and except as expressly provided in the articles, transfer of shares shall be without restrictions, and instruments of transfer shall include electronic instrument of transfer." Keep in mind that, as an example, the transfer of the shares of a private company is restricted by its articles of association (*See* section 22(2), CAMA).

(b) A company shall not register a transfer of shares unless the transferor has delivered to it a proper instrument of transfer, notwithstanding any provision in the company's articles.

Note, however, that the company has power to register as shareholder any person to whom shares have been transmitted by operation of law, for example personal representatives – section 175(2).

(c) The instrument of transfer shall be executed by or on behalf of the transferor and transferee, and the transferor shall be deemed to remain a holder of the share until the name of the transferee is entered in the register of the members of the company in respect of the share - 175(3) of the CAMA.

(d) Any member of a company is entitled to "transfer all or any of his shares by instrument in writing in any **usual or common form or any other form which the directors may approve**"**,** subject to any applicable restriction in the company's articles of association – section 174(5).

(e) "When the holder of any share of a company wishes to transfer to any persononly a part of the shares represented by one or more certificates [which may be in physical or electronic form], the instrument of the transfer together with the relevant certificate shall be delivered to the company with a request that the instrument of transfer be recognized and registered and the instrumentof transfershall include certificates issued in electronic form" – section 181(1) (as amended by section 8 of Part I to the Schedule to the Business Facilitation (Miscellaneous Provisions) Act, 2023).

(f) The transferor must apply to the company to register the transfer by entering the name of the transferee in the register of the shareholders or members of the company (*see* section 176 (1) of the CAMA).

(g) The transfer of share becomes effective only after the company has registered the transfer, and the company registers it by entering the name of the transferee in the register of the members. Keep in mind, that until the name is so entered in the register, the transferor shall be deemed to be the holder of the shares (S. 176 (2) of the CAMA).

(h) The company may refuse to register the transfer of its shares in the following situations (section 176(3):
   (i) Where the share is not fully paid up;
   (ii) Where the company does not approve of the transferee (usually in a private company); or
   (iii) Where the company has a lien on the shares, for example when the transferor had offered the shares as security for loan from the company **(Study section 164 of the CAMA for more provisions on lien on shares).**

Keep in mind that where the articles confer on directors a discretion to refuse a transfer of shares, the directors must exercise that power *bona fide*. It is significant that the court may make an order that the directors must accept or recognise the transfer where it is shown or proved that the directors had not exercised their power according to law.

In *Re Hackney Pavilion Ltd* (1924) 1 Ch. 2076, Astbury J, held that where the articles gave the directors the power of declining to register a transfer, the power, even where exercisable in the absolute and uncontrolled discretion of the directors, must be actively exercised by a vote of the board for that purpose, failure to pass a resolution was not a formal exercise of the right to decline the transfer.

(i) If a company refuses to register the transfer of any share, it shall within two months after the date on which the transfer was lodged with it, send notice of the refusal to the transferee, otherwise the company and every of its officer who is in default shall be liable to such a fine as the Commission may specify by regulation - section 177.

(j) The personal representative of a deceased member, even when he is not a member of the company, may validly transfer the shares or interest of the deceased member as if were a member at the time of execution of the instrument of transfer – section 178.

11.18.7 Transmission of shares – Section 179, CAMA

Section 179 of CAMA provides that "where a member of a company dies, his survivor or survivors or legal personal representatives of the deceased shall be the only persons to be recognised by the company as having any title to the deceased's shares". Keep in mind, however, that they shall equally be liable to pay for any of such shares that are unpaid.

However, the survivors or personal representatives may elect either to dispose of the shares, or in the alternative, have themselves registered by the company as the holders of these shares. See S. 179 (3) for the procedure to be followed.

11.19 Debentures

Section 191 CAMA provides:

"A company may borrow money for the purpose of its business or objects and may mortgage or charge its undertaking, property and uncalled capital, or any part thereof, and issue debentures, debenture stock and other securities whether outright or as security for

any debt, liability or obligation of the company or of any third party."

A debenture stands for the indebtedness as well as for the instrument that created the indebtedness. Therefore, the indenture must be under the common seal of the company and it must be delivered to the debenture holder within 60 days of its creation. See S. 192, CAMA.

"A debenture consists of a debt owed by the company to another secured by a deed which prescribed the condition of realisation of the debt. A debenture may be created over the fixed or floating assets of the company" see the Supreme Court of Nigeria case of *Inter- contractors Nigeria Ltd. v National Provident Fund Management Board* (1988).

In Section 868 (1), CAMA defines a debenture in much wider terms to mean:

"A written acknowledgement of indebtedness by the company, setting out terms and conditions of the indebtedness and includes debenture stock, bonds and any other securities of a company whether constituting a charge on the assets of the company or not".

11.19.1 Types of debentures – Section 196 -199, CAMA

Debentures could be of the following types:

(a) Perpetual debentures – S. 196, CAMA

This type of debenture is made irredeemable or redeemable only on the happening of a contingency, however remote, or on the expiration of a period of time, however, long. Redemption is the repayment of the loan secured by the debentures.

(b) Convertible debentures – Section 197, CAMA

These are debentures issued upon the terms that in lieu of redemption or repayment it may, at the option of the holder/creditor or the company, be converted into shares in the company upon such terms as may be stated in the debentures.

(c) Secured and unsecured/naked debentures – Section 198, CAMA

A secured debenture is that which is charged for repayment from a particular property of the company. Keep in mind that the debenture may be secured by a fixed charge on certain of the company's property, or a floating charge over the whole or a specified part of the company's undertaking and assets. The debenture may also be secured by both a fixed charge on certain property as well as a floating charge.

Keep in mind that the distinction that is drawn between a secured debenture and a naked/unsecured debenture is that secured debenture has a charge in its favour, and that charge could be either floating or fixed. On the other hand, no property is charged with the repayment or redemption of a naked debenture. There is only a solemn promise under seal by the company to repay the indebtedness. Remember that a secured debenture takes precedence over a naked debenture as the latter is unsecured. In the same vein, a fixed charge is superior to a floating charge.

(d) Redeemable debentures – Section 191, CAMA

As the name suggests, a redeemable debenture may be redeemed at the option of the company, that is, at any time that the company decides.

11.19.2 Creation of debentures – Section 193, CAMA

A debenture may be created by an instrument, or by such instrument covered by a trust deed in the case of a debenture stock. Section 193 of the CAMA requires that every debenture must include a statement on the following matters:

(a) The principal amount borrowed;

(b) The maximum discount that may be allowed on the issue or re-issue of the debentures, and the maximum premium at which the debentures may be made redeemable;

(c) The rate of and the date on which then interest on the debentures issued shall be
paid and the manner in which payment shall be made;

(d) The date on which the principal amount shall be repaid or the manner in which redemption shall be effected, whether by the payment of instalments or principal or otherwise;

(e) In the case of convertible debentures, the dates and terms on which the debentures may be converted into shares and the amounts which may be credited as paid on those shares as well as dates and terms on which the holders may exercise any right to subscribe for shares in respect of the debentures held by them; and

(f) The charges securing the debenture and the conditions subject to which the debenture shall take effect.

11.19.3 Enforcement of contract relating to debentures – Section 195, CAMA

A contract entered into with a company to take up and pay for any debenture of the company may be enforced by an order for specific performance.

11.20 Maintenance or preservation of capital, acquisition of own shares by company and distribution of profits

11.20.1 Maintenance of capital

The share capital of a company is creditors' guarantee fund. In other words, those who have given credit or lent money to the company are entitled to have the company's capital preserved and not dissipated.

In addition, the investors or shareholders who have invested money in the company are also entitled to have the money applied judiciously to the business of the company. Therefore, CAMA as well as judicial decisions have laid down specific rules for the preservation of the capital of the company. Three of those rules are discussed as follows:

(a) **Reduction of capital**

Section 130 CAMA places a general prohibition on the reduction of the company's capital. It provides in subsection (1) that "except as authorised by this Act, a company having share capital shall not reduce its issued share capital". This rule had been in existence for centuries as decided in the case of *Trevor v Whitworth & Whitworth* (1887).

Permitted cases of capital reduction – Section 131, CAMA

This is regulated by section 131-136 of the CAMA. Section 131 permits the company to reduce its share capital -

i. if authorised by its articles of association;

ii. by passing a special resolution; or

iii. by obtaining the approval of court.

Under CAMA, the instances or purposes for which a company may reduce its share capital under section 131 (2) are to:

i. extinguish or reduce the liability on any of its shares in respect of share capital not paid up;

ii. cancel any paid-up share capital, which is lost or unrepresented by available assets, and the company may do this with or without extinguishing or reducing liability on any of its shares; or

iii. cancel any paid-up share capital, which is in excess of the company's wants.

In any of the situations reducing the share capital of the company, the company must amend its memorandum of association to reflect the reduction.

(b) Acquisition of own share by the company – Section 183, CAMA

As a general rule, a company may not purchase or otherwise acquire shares issued by
it (Section 183 (1), CAMA. The rationale for this general rule is that it could reduce the company's capital. In addition, if the company paid a higher price for the shares than the price of the existing shares, it automatically enhanced the value of the existing shares. Conversely, if the company paid less than the value of the existing shares for the ones it acquires, it automatically diluted the value of the existing shares.

Over time, CAMA in S. 183 (2) and S. 184 allows the company to acquire its own shares in limited instances. However, the following procedures must be followed, and the following must be the goal of the acquisition:

The company may acquire its own shares by paying for those shares out of its profits only; and the reasons for which a company may acquire its own shares are limited to those under
S. 131 (2), namely to:

i. settle or compromise a debt or claim asserted by or against the company;

ii. eliminate fractional shares;

iii. honour the terms of an agreement by which the company has an option or is obliged to purchase shares owned by an officer or an employee of the company;

iv. satisfy the claim of a dissenting shareholder; or

v. comply with a court order.

To this extent, the purchase must be done out of profits and not out of capital. This rule could be treated as a third rule for the maintenance or preservation of the company's capital.

(c) Payment of dividends only out of profits and not capital

Section 433 of the CAMA provides that subject to certain exceptions contained in the Act, "dividends shall be payable to the shareholders only out of the distributable profits of the company", and the following are specified in section …as the profits out of which dividends may be paid:

i. Profits arising from the use of the company's property although it is a wasting asset;

ii. Revenue reserves; and

iii. Realised profit on a fixed asset sold, but where no more than one asset is sold, the net realised profit on the assets sold.

Section 433 (1) of the CAMA provides that, "All directors who knowingly pay, or are party to the payment of dividend out of capital or in contravention of this Part, are personally liable jointly and severally to refund to the company any amount so paid."

"Such Directors shall have the right to recover the dividend from shareholders who receive it with knowledge that the company had no power to pay it" - S.433(2).

In *Re Exchange Banking Company, Flitcroft's Case* (1882) LR 21 Ch D 519, the directors had, for several years, made it appear that the company had made profits when, in fact, it had not. The directors did that by laying before the shareholders reports and balance sheets in which debts known to be bad were entered as assets. On the faith of these reports, the shareholders had passed resolution, declaring dividends that the directors had paid. In the winding up of the company, the liquidator successfully applied to have the directors who had been responsible on each occasion made accountable to the company for the sums wrongly paid away.

Jessel MR, remarked as follows:

"A limited company by its memorandum of association declares that its capital exists in the manner and with the safeguards provided by statute, and looking at the Act, it clearly is against the intention of the legislature that any portion of the capital should be returned to the shareholders without the statutory conditions being complied with."

11.20.2 A fixed charge is created on one or more specific assets of the company. The assets must be clearly identifiable. The company cannot freely deal with the property so charged. A fixed charge on any property has priority over a floating charge affecting that property unless the earlier floating charge prohibited a further charge and the person granted the latter charge had actual knowledge of such prohibition.

A floating charge is an equitable charge over the whole or a specified part of the company's undertaking and assets both present and future. The charge shall not preclude a company from dealing with such assets. The charge is deemed to crystallise on the appointment of a receiver or manager or when the company goes into liquidation. All charges both fixed and floating have to be registered with the Registrar-General of the CAC. In *Cohen (WA) Ltd v. Comet Construction Co Ltd*; *Ghana Commercial Bank (Claimants)* [1966] GLR 777, it was held that if the charge was valid, it prevailed over the claim of an execution creditor. In that case Cohen obtained judgment against Comet Construction for a certain sum of money. A writ of *fifa* was subsequently issued against two vehicles of the judgment debtors.

11.21 Tax payable by small and other companies (businesses)

Company taxation is done under the Nigeria Tax Act, 2025 (NTA), which repealed the Companies Income Tax Act and the Industrial Development (Income Tax Relief) Act, amongst others.

By virtue of section 5 of the NTA, a company may be charged to tax —

a. in its own name;

b. in the name of any principal officer, attorney, factor, agent or representative of the company in Nigeria in the same manner or amount that the company would have been charged; or

c. in the name of its receiver, liquidator, or administrator, in the same manner or amount that the company would have been charged if no receiver, liquidator or administrator had been appointed.

According to section 56 of the Act, tax shall be levied, for each year of assessment in respect of total profits of every company as follows:

a. Small companies – 0% ("Small Business" is "… a business that earns gross turnover of ₦100,000,000.00 or less per annum with total fixed assets not more than ₦250,000,000.00 provided that any business providing professional services shall not be classified as a small business" – section 147 of the Nigeria Tax Administration Act, 2025);

b. Any other company – 30%, this rate being reducible to 25% effective from a date as may be determined in an order issued by the President of the Federal Republic of Nigeria on the advice of the National Economic Council.

According to section 27 of the NTA, the total profits of a company for any year of assessment, shall be the amount of its total assessable profits from all sources. The sources shall include chargeable gains computed in accordance with Part VIII of Chapter Two of the Act. However, it shall not include the amount of any loss ascertained in accordance with subsection (6) of this section, and capital allowance in accordance with the provisions of Part I of the First Schedule to this Act.

Section 59(1) of the NTA imposes a development levy of 4% on the assessable profits of all companies chargeable to tax under Chapters Two and Three of the Act, other than small companies and non-resident companies.

Companies in specialised trades and businesses, including insurance, gaming, lottery, mutual funds or collective investment schemes, and petroleum operations are taxed under distinct provisions of the NTA.

11.21.1 Economic development tax incentives

By virtue of section 165, the NTA allows economic tax incentives to companies classified as 'priority sectors' for the periods stated against them in the Tenth Schedule to the Act.

The President of the Federal Republic of Nigeria may make an order amending the list if:

a. any sector is not operating on a scale suitable to the economic requirements of Nigeria, or there are favourable prospects of further development;

b. it is expedient in the public interest to encourage the development or establishment of a sector in Nigeria for the purpose of -

(i) generating employment,

(ii) attracting foreign direct investment inflow,

(iii) economic diversification, or

(iv) simulating the growth of some sectors in certain localities;

c. any sector, product or service within a sector, is considered to have been sufficiently developed to necessitate its removal from the list contained in Tenth Schedule to NTA.

Among other things, section 162(1) of the NTA exempts from taxation –

a. income generated by companies engaged in agricultural businesses including crop production, livestock, aquaculture, forestry, dairy and such other businesses as are described in the Thirteenth Schedule to the Act, for the first five years upon commencement of business;

b. dividend received from investments in wholly export-oriented businesses;

c. profits of a company engaged in sporting activities;

d. dividend, interest, rent or royalty derived from outside Nigeria and brought into Nigeria through approved channels; and

e. gains accruing from the disposal of assets by an angel investor, venture capitalists, private equity fund, accelerators or incubators with respect to a labelled start-up, provided the assets have been held in Nigeria for a minimum of 24 months.

11.21.2 Duty of a company to keep books and accounts under the Nigeria Tax Administration Act, 2025 (NTAA)

Section 31 of the NTAA provides as follows:

1. Every company, including a company granted exemption from incorporation, shall, whether or not the company is liable to pay tax, maintain books or records of accounts.

2. The books or records of accounts must contain sufficient information or data of all relevant transactions by the company for the ascertainment of the company's tax liability.

3. The books and records required to be maintained under subsection shall be in English language and shall, for the purpose of tax, be consistent with the format that may be prescribed by the relevant tax

authority.

4. Where the record is maintained in a language other than the English language, the company shall, on demand by the tax authority, produce, at its own expense, a translation in English language, which shall be certified by a sworn translator.

5. The company shall keep the book for a period not less than six years after the year of assessment to which the particular income relates.

Penalty for non-compliance

As provided by section 102 of the NTAA, "A taxable person [including a company] who:

a. fails to keep accounts, books and records of business transactions and income, to allow for the correct ascertainment of tax and filing of returns to the relevant tax authority ; or

b. upon request by the relevant tax authority, fails to provide any record or book

prescribed in this Act shall be liable to pay an administrative penalty, in the case of:

(i) a person other than a company, ₦10,000.00, and

(ii) in the case of a company, ₦50,000.00."

11.21.3 Duty of companies to file tax returns and state the penalty for non-compliance

"Every company, including a company granted exemption from incorporation, whether or not it is liable to pay tax under Nigeria Tax Act or any other tax law, for a year of assessment, with or without notice from the Service, shall file a self-assessment return with the Nigeria Revenue Service in the prescribed form at least once a year and such return shall contain -

a. a duly completed self-assessment form as may be prescribed by the Service;

b. the audited financial statements, tax and capital allowances computation for the year of assessment in respect of the profit from each and every source computed:
Provided that the return of a small company may contain a statement of accounts attested to by the taxpayer in place of audited financial statements;

c. evidence of payment of the tax due;

d. computation of the effective tax rate and additional tax payable, where applicable;
and

e. an attestation of the information contained in the tax returns signed by a principal officer of the company" (Section 11(1) of the Nigeria Tax Administration Act, 2025 (NTAA). *See generally*, Part I of the Act).

Penalty for non-compliance with registration and filing provisions of the NTAA

Chapter 4 of the NTAA creates offences and penalties for non-compliancewith the provisions of the Act. However, our focus here is narrowed to the basics of non-registration for and non-filing of tax returns.

According to section 100 (1) of the NTAA, "a taxable person who fails or refuses to register for tax under section 4 of the Act, shall be liable to pay an administrative penalty of:

a. ₦50,000 in the first month in which the failure occurs ; and

b. ₦25,000 for each subsequent month in which the failure continues."

Subsection (2) provides that, "A statutory body or company who awards a contract to an unregistered person, shall be liable to pay an administrative penalty of ₦5,000,000."

Section 101 of the Act provides that, "A taxable person who fails or refuses to file returns or knowingly files incomplete or inaccurate returns to the relevant tax authority in accordance with the provisions of this Act,

shall be liable to pay an administrative penalty of —

(a) ₦100,000.00 in the first month in which the failure occurs ; and

(b) ₦50,000.00 for each subsequent month in which the failure continues."

11.21.4 Digital assets and returns for Virtual Asset Service Providers

The NTAA includes virtual or digital assets in its list of chargeable assets. They include cryptocurrencies and other tokenised assets. The taxability removes such assets from tax evasion and other illegal capital flows, including money laundering. It also aligns the Nigerian regulation with global practices.

A Virtual Asset Service Provider (VASP) offers to the investing public on behalf of issurs exchange, custody, transfer, or management services of digital assets.

Sections 25 of the NTAA provides that companies that are VASPs shall file returns as follows:

1. "A taxable person engaged in services related to the exchange, custody or management of virtual assets as a …VASP shall, with or without a notice, in addition to the returns provided in sections 11 and 13 of this Act, submit to the relevant tax authority… [monthly returns]

2. The returns shall contain —

   a. a description of the virtual asset service (exchange, sale, or transfer of virtual assets) provided during the month;

   b. the date of the transaction;

   c. the type and value of the virtual assets involved;

   d. the sales value of the virtual assets;

   e. the name, address, telephone number, email address and Tax ID of the customer including the national identification number of the customer if he is an individual;

   f. the name, address, telephone number and email address of any counterparty involved to the transaction; and

   g. such other particulars as may be prescribed by the relevant tax authority."

Penalty for non-compliance

By virtue of section 109, "Any VASP who fails to comply with the provisions of [the NTAA] shall be liable

to an administrative penalty of ₦10,000,000.00 in the first month of default, plus —

a. ₦1,000,000.00 for every subsequent month that the default continues; or

b. suspension or revocation of operating license by the Securities and Exchange Commission."

11.22 Appointment, power, duties, and removal of directors

11.22.1 Appointment of directors – Sections 271 – 276, CAMA

(a) Every company, except a small company, shall have at least two directors. Note that a small company has the meaning assigned to it under section 394 of CAMA.

(b) The subscribers to the memorandum and articles of association determine the number of the first directors and appoint them.

(c) The general meeting may re-elect or reject directors subsequently and appoint new ones (S. 273(1), CAMA).

(d) The board of directors shall have power to appoint new directors to fill casual vacancies on the board arising due to death, resignation, retirement, or removal of a director (S. 274, CAMA).

(e) The board of directors may add to the number of existing directors but not beyond the maximum stipulated by the articles of association (S. 274(3), CAMA).

(f) The board may appoint one of its members as the Managing Director (MD) and CEO. However, the Code of Governance for Public Companies provides that one person should not occupy the position of Chairman (of the board/company) and CEO at the same time.

(g) The board may delegate any of its powers to the Managing Director or a committee of the board (S. 289 (5), CAMA).

(h) The board of directors consists of executive directors and non-executive directors.

(i) The first directors of a company shall be appointed in writing by the subscribers to its memorandum of association or a majority of them. This is done by filling out the form prescribed by the CAC named "Particulars of directors and their consent to serve" and filing it together with the other documents of incorporation at the office of the CAC (S. 272, CAMA). Note that both the form and the filing thereof can now be filled online

(j) In addition, the first directors may be named in the articles of association.

(k) CAMA allows a company (other than a small company as described in section 394, CAMA) one month to appoint additional director(s) if the number drops below two or as the company may resolve to do. Additional directors are appointed by election at the annual General Meeting of the company.

(l) Keep in mind that if all the directors die, their personal representatives may apply to the Federal High Court for an order to convene a meeting of the personal representatives to appoint new directors. If they do not, the creditors of the company may meet and appoint new directors for the company.

(m) A director or a member of a company who knows that a company (not being a small company as described under s. 394, CAMA) carries on business after the number has fallen below two for more than 60 days shall be liable for all the debts and other liabilities that the company may incur during that period. (S. 271(3), CAMA).

11.22.2 Powers of Directors

A director is a trustee for the company but not for individual members. The board of directors is appointed under the articles of the company, and thus has power to bind the company. The board's power to bind the company is also deemed free of any restrictions in the company's memorandum and articles of association, in favour of a person who

deals with the company in good faith.

11.22.3 Duties of directors

As fiduciaries, the directors owe the company the duty to:

(a) observe utmost good faith towards the company in any transaction with or on its behalf (S. 305 (1), CAMA);

(b) act at all times in what she believes to be in the best interests of the company as a whole so as to preserve its assets, improve its business, and promote the purpose for which the company is formed, and in such manner as a faithful, diligent, careful and ordinarily skillful director would act in the circumstances (S. 305 (3), CAMA, *Re: Smith and Fawcett Ltd.* (1942) Ch. 304, 306);

(c) have regards to the interests of the company's employees and members in the performance of their duties (s. 305 (4), CAMA);

(d) exercise their powers for the purpose for which the company gave them and, not for any collateral purpose (*Piercy v. Mills and Co, Ltd*. (1920) 1 Ch. 77 –Power to issue shares is to raise capital and not merely to destabilise an existing majority). If the director exercises her power for the proper purpose, it is immaterial that the interest of the members is adversely affected (S. 305 (5), CAMA)

(e) not fetter their discretion to vote or act in a particular way (S. 305 (6), CAMA);

(f) not delegate their powers in such a way that amounts to abdication of duty but to supervise the delegate diligently (S. 305 (7), CAMA);

(g) not accept a bribe, gift or commission from outsiders in any transaction that involves the company (S. 313 (1), CAMA);

(h) not allow their personal interest to conflict with their duties. Therefore, they shall not make any secret profit or achieve any unnecessary benefits in managing the business of the company or in utilising the company's assets (including information) (S. 306 (1) & (2), CAMA);

(i) account to the company for any secret profit, or disclose a possible profit before they make it s o that the general meeting may approve it (S. 306 (3) & (6) CAMA);

(j) exercise the powers and discharge the duties of her office honestly, in good faith and the best interest of the company as well as to exercise that degree of care, diligence and skill that a reasonably prudent director would exercise in comparable circumstance (S. 308 (1) CAMA);

(k) pay attention to the affairs of the company and be responsible for the actions of the board in which she participated so that only justifiable absence from the board's deliberations shall relieve her from such responsibility (s. 308 (3), CAMA); and

(l) exercise care towards the company, noting that the CAMA prescribes the same standard of care for both executive and non-executive directors (s. 308 (4), CAMA).

(m) be mindful that the inability or unwillingness of a company to do any business shall not afford a director a defence for breach of duties (s. 306 (4), CAMA); In ***Canadian Aero Service Ltd.*** **v** ***O' Malley*** (1973), the directors that negotiated a large aerial surveying and mapping contract that their company could not execute subsequently resigned and formed a new company that executed the contract. The court held that they must account to their former company for the profit made);

(n) note the duty not to misuse corporate information and opportunities does not cease with a director's resignation from office (S. 306 (5), CAMA); and

(o) be responsible for the actions of the board in which they participated, and only justifiable absence from the board's deliberations shall relieve them from such responsibility (S. 308 (3), CAMA);

There are other ancillary duties of disclosure under the CAMA relating to property interest of directors, age, interest in a contract or proposed contract with the company. Where a person holds more than one directorship, she shall perform her fiduciary duties to all of them (S. 307, CAMA).

11.22.3.1 Removal of directors – Section 288, CAMA

Ordinarily, a director is required to vacate his office if he ceases to hold his qualification shares where that is required (S. 277, CAMA). A director must also vacate office under section 284 of CAMA, if he:

(a) becomes bankrupt or makes arrangement or composition with his creditors;

(b) is found guilty of fraud under section 280, CAMA;

(c) becomes of unsound mind;

(d) resigns his office by notice in writing to the company; or

(e) is removed by the company under section 288 by ordinary resolution before the expiration of his term of office. Notwithstanding anything in the articles or in any agreement between the company and the director, provided that a proper notice has been served on the director.

11.23 Appointment, qualifications, status, duties, and removal of Company Secretary

Sections 330-340 of the CAMA make provisions on the company secretary. The Act defines officers of the company to include directors, auditors and [company] secretary. The company's articles of association may provide for the term of office as well as the conditions for the appointment of the secretary, subject to the provisions of the Act.

11.23.1 Appointment of a secretary

Section 330(1) provides that all companies except a small company must have a secretary. Companies that have none at the commencement of the Act must appoint one not later than six months thereafter. The directors appoint a secretary for the company, and they must ensure, among other things, that the person to be appointed "appears to have the requisite knowledge and experience to discharge the functions of a secretary of a company" - S. 332.

Keep in mind that where there is no secretary, the assistant secretary or deputy secretary may validly exercise all the powers and authority of the secretary. Where there is no assistant or deputy secretary, any officer of the company authorized by the directors may act as secretary (S. 330(3)).

It is important to note that a public company that contravenes the provisions on appointment of secretary under section 330, is liable to a fine that the CAC shall decide

and a daily penalty for as long as the contravention continues (S. 330(4)).

Keep in mind also that a provision that requires something to be done by a director and the secretary shall not be satisfied by that thing being done by the same person acting as both the director and the secretary (S. 331)

11.23.2 Qualifications of a Company Secretary

Section 332 of the CAMA provides that the Directors must take reasonable care to ensure that the person to be appointed the secretary of a company is a person that appears to them to have the requisite knowledge and experience to discharge the functions of the secretary of the company. This is the only eligibility criterion for appointment as the secretary of a private company.

However in addition to the foregoing general qualification, a secretary of a public company must have any of the following professional qualifications:

(a) Membership of the Institute of Chartered Secretaries and Administrators (ICSAN); or

(b) A legal practitioner within the meaning of the Legal Practitioners Act, Cap L11, LFN, 2004; or Membership of any professional body of accountants established from time to time by an Act of the National Assembly; or

(c) Any person who has held the office of the secretary of a public company for at least three years of the five years immediately preceding his appointment in a public company; or

(d) A body corporate or firm consisting of the professionals in (a), (b), or (c).

11.23.3 Status and authority of a Company Secretary

The company secretary is an officer of the company with ostensible authority to bind the company to legal obligations. He is regarded as the head of administration in his company. In the case of *Panorama Developments (Guildford) Ltd* v *Fidelis Furnishing Fabrics* (1971) 2 Q.B. 911 as follows:

A company secretary is an officer of the company with extensive duties and

responsibilities… He is no longer a mere clerk… he is certainly entitled to sign contracts connected with administrative side of a company's affair, such as employing staff, and ordering cars and so on and so forth.

In that case, Bayne, the secretary of the defendant company, hired luxury cars from the plaintiff ostensibly for the company's business but, in fact, he used the cars fraudulently

for his own purposes. When the company tried to avoid liability for the payment of the hire charge, the court held that the company was bound by the contract to pay the hire charges as the company secretary had ostensible authority to bind the company.

11.23.4 Duties of Company Secretary

Section 335(1) of the CAMA provides that the duties of a secretary include the following:

(a) Attending the meeting of the company, the board of directors and its committees, rendering all necessary secretarial services in respect of the meeting and advising on compliance, by the meetings, with the applicable rules and regulations;

(b) Maintaining the registers and other records, required to be maintained by the company under the CAMA;

(c) Rendering proper returns and giving notification to the CAC as required by the CAMA, and

(d) Carrying out such administrative and other secretarial duties as directed by the directors or the company.

Keep in mind that by virtue of section 335(2), unless the board so authorizes, the secretary shall not exercise any powers vested in the directors.

Section 334 of the CAMA provides that, "A secretary does not owe fiduciary duties to the company, but where he is acting as its agent he owes fiduciary duties to it, and as such shall be liable to the company where he makes secret profits or lets his duties conflict with his personal interests, or uses confidential information he obtained from the company for his own benefit."

11.23.5 Removal of a secretary from office

Section 333(1) of the CAMA empowers the board, not only to appoint a secretary but to remove him from office. Where the board intends to remove the secretary of a public company from office, it must give the secretary a notice -

(a) Stating that it intends to remove the secretary from office;

(b) Setting out the grounds on which it is intended to remove him;

(c) Allowing him a period of at least seven working days to make his defence; and

(d) Offering him an option to resign his office within a period of seven working days.

By virtue of section 333 (3), the board may remove a secretary from office and report to the next general meeting where after notifying him of the intention to remove him, he does not resign or make his defence within the seven days given him. Where the directors consider the defence of the secretary to be insufficient and the ground for removal is fraud or serious misconduct, the board may remove him and shall report to the next annual general meeting. For removal of the secretary on other grounds, the board needs the

approval of the general meeting. Pending that time, it may suspend him and report to the next annual general meeting.

By virtue of section 333(4), the removal of a suspended secretary takes effect as approved by the general meeting.

11.23.6 Register of secretaries

Contrary to the provisions of the repealed CAMA of 2004, section 336 of CAMA, 2020 requires on public companies to maintain a register of secretaries which must contain the particulars stipulated in section 337 or 338 depending on whether the secretary is an individual or corporate body respectively, which particulars the Minister of Trade may vary from time to time.

Keep in mind that a company is duty bound to notify the Corporate Affairs Commission of changes in the particular of secretaries in accordance with section 339 of the Act.

11.24 Company meetings

The general meeting of members is the primary organ of the company, the board of directors being the secondary organ. The meetings of the company, which are of three types, are explained below.

11.24.1 Statutory meeting – Section 235, CAMA

(a) A public company must hold the statutory meeting within six months from the date of incorporation.

(b) The court may wind up the company for failing to hold the meeting as stipulated, (See section 571 (b) CAMA), or extend the period for holding it on the application of the company. The company and its officers may also be fined for not holding the meeting.

(c) The directors of the company must send to the members at least 21 days before the meeting a notice of the meeting together with a **statutory report that contains pre-**incorporation issues.

(d) An auditor must certify the statutory report as it relates to share allotment.

(e) The directors must file promptly the duly certified statutory report and deliver it to the CAC for registration within 14 days after the meeting.

(f) The members of the company may give 21-day notice to propose any relevant motion at the meeting.

11.24.2 Annual General Meeting – Section 237, CAMA

Except in the case of a small company or any company having a single shareholder, every company registered in Nigeria shall hold a general meeting in each year of its existence subject to the following provisions:

(a) Annual General Meeting (AGM) is to hold once a year in addition to any other

meeting in that year.

(b) Not more than 15 months shall lapse between the date of one AGM and the next.

(c) Except for the first meeting, the CAC may extend the time for holding an AGM by three months.

(d) The company must hold its first AGM within 18 months of incorporation, and the meeting need not hold in the year of incorporation or the next.

(e) All the businesses transacted at an AGM shall be deemed **special business,** and other businesses such as declaration of dividends, presentation of financial statements as well as the reports of the directors and auditors, election of directors, the appointment and fixing of remuneration of the auditors as well as the appointment of the audit committee, and disclosure of remuneration of managers shall be **ordinary business**.

(f) There are penalties on the company and every officer that default in holding AGM as provided for by the CAMA.

11.24.3 Extraordinary General Meeting – Section 239

(a) The board of directors may convene an extraordinary general meeting when they believe it is appropriate to do so. However, any director may convene the meeting if there are not sufficient directors in the country to form a quorum.

(b) This meeting may also be requisitioned by the member(s) of the company that hold at the date of requisition not less than one-tenth of the paid-up capital of the company or representing not less than one-tenth of the voting rights of members of the company at the date of requisition.

(c) The members that have the power to requisition the meeting may also convene the meeting not later than three months if the directors fail to convene the meeting

after requisition.

(d) The requisitionists may then recover from the company any reasonable expenses incurred by them due to the directors' inaction.

(e) Members of the company must be given a 21-day notice of an extraordinary general meeting.

(f) All statutory and general meetings must be held in Nigeria.

11.24.4 Notices, voting and resolutions

(a) **Notices of meeting - Section 241, CAMA**

i. The notice required for all types of general meetings is 21 days from the date on which the notice was sent out.

ii. A general meeting of a company called with a shorter notice than 21 days shall be deemed regular if all members entitled to attend and vote at the meeting so agree.

(b) **Contents of notice – Section 242, CAMA**

The notice of a meeting shall specify:

i. the place, date and time of the meeting;

ii. sufficient details of the general nature of the business to be transacted at the meeting; and

iii. if the meeting is to consider a special resolution, the terms of the resolution;

No business may be transacted at any general meeting unless notice of it has been duly given.

(c) **Persons entitled to notice of a general meeting – Section 243, CAMA**

The following persons shall be entitled to receive notice of a general meeting:

i. Every member;

ii. Every person upon whom the ownership of a share devolves by reason of his being a legal representative, receiver or a trustee in bankruptcy of a member;

iii. Every director of the company;

iv. Every auditor for the time being of the company; and

v. The company secretary, and the Commission in the case of a public company.

(d) **Attendance at meetings – Section 252, CAMA**

Every person who is entitled to receive notice of a general meeting of the company as provided under section 243 is entitled to attend such a meeting. Furthermore, every member has a right to attend and speak at any general meeting of the company and vote on any resolution proposed at the meeting, notwithstanding any provision in the articles of association.

However, a member may be precluded from attending a general meeting where the articles provide that a member can only attend and vote at such a meeting if all calls or sums payable by him in respect of shares in the company have been paid up. (See section 107, CAMA).

Note that any member of a company entitled to attend and vote at a meeting of the company is entitled to appoint another person as his proxy, who may or may not be a member of the company, with full powers to exercise all the rights which the

appointor member is able to exercise at such meeting. (See section 254, CAMA).

(e) **Power of Court to order meetings – Section 247, CAMA**

Where it is impracticable to call a meeting of a company or of the board of directors in accordance with provisions of either the articles of association or the CAMA, the Court may, either *suo motu* (of its own motion) or on the application of any director of the company or of any member of the company, order that a meeting of the company or board be called. The Court may also give ancillary or consequential directions including but not limited to a direction that one member of the company present in person or by proxy in the case of a meeting of the company, and one director in the case of the board, may apply to the Court for an order to take decision which shall bind all the members.

Keep in mind that any meeting called, held and conducted in accordance with an order of Court under the section, will for all purposes be deemed to be a meeting of the company or of the board of directors duly conducted.

(f) **Voting – Section 248, CAMA**

At any general meeting, a resolution put to vote shall be decided by show of hands, unless a poll is (before or on the declaration of results of the show of hands) demanded by the any of the following:

i. the chairman if he is a shareholder or proxy;

ii. at least three members present in person or by proxy;

iii. a member(s) present in person or by proxy and representing at least one-tenth of the total voting rights of all the members having the right to vote at the meeting; or

iv. any member(s) holding shares in the company with right to vote at the meeting, being shares on which an aggregate sum has been paid up equal to at least one-tenth of the total sum paid up on all shares conferring that right.

Note that a declaration of the Chairman of the result of a vote on a show of hands shall be conclusive of evidence of the fact without proof of the number of proportion of votes recorded in favour or against such resolution unless a poll is demanded.

(g) **Companies that need not hold annual general meetings – Section 237, CAMA**

The opening statement of the provisions of section 27, CAMA exempts a small company or a single-shareholder company from holding an annual general meeting.

A small company is described in section 868, CAMA as a company having the meaning assigned to it under 394 of the Act.

(h) **Companies authorised to hold virtual meetings**

A private company is authorized to hold its general meetings electronically provided that such meetings are conducted in accordance with its articles of association (S. 240 CAMA). The same right has been given to public companies by the Business Facilitation (Miscellaneous Provisions) Act 2023 (section 11, Part I of the Schedule).

11.25 Company audit - Appointment, qualifications, rights, duties, and removal of auditors

11.25.1 Appointment and qualifications of auditors – SS. 401 & 403, CAMA

(a) Every company shall appoint an auditor or auditors at each annual general meeting to audit its financial statement (S.401(1) CAMA).

(b) The provisions of any Act establishing a body of accountants shall apply to any

investigation or audit of companies, and any of the following persons are disqualified from being appointed an auditor of a company: an officer or servant of the company a partner or employee of an officer or servant of the company; or, a body corp orate (S. 403(1) CAMA).

(c) No person shall audit a public company unless the Securities and Exchange Commission (SEC) has registered the person on such terms and conditions as it may prescribe from time to time - S62, Investments and Securities Act, 2025 (ISA).

(d) Non-registration of the person immediately above subjects the company investigated to a penal fine of ₦1,000,000.00 (One million naira), and the auditor to a fine of₦100,000.00 (One hundred thousand naira) as well as a further penalty of ₦5,000.00 (five thousand naira) for every day of violation (S. 65, ISA).

(e) The officers, servants or agents of the company who connived in violating the provisions of the ISA above shall be liable to the same extent as the corporate body (S. 66 (1), ISA).

(f) The SEC may administratively enforce the above penalties (S. 66 (2), ISA).

(g) Section 403 (4), CAMA disqualifies the following categories of persons from being appointed as an auditor of a company:

i. a person disqualified for appointment as auditor of the company's subsidiary or holding company; or

ii. a debtor to the investigated company or to a related company who is a shareholder in the investigated company for an amount exceeding ₦500, 000.00; or

iii. a shareholder or spouse of a shareholder of a company whose employee is an officer of the company; or

iv. a partner in or whose partner, employee or employer is responsible for the keeping
of the register of debenture holders of the company; or

v. an employee of or a consultant to the company that has been for a period of more than one year, been in the maintenance of the investigated company's financial records or preparation of any of its financial statements; or

vi. a person disqualified under subsection (6) of this section.

A person shall not act as auditor of a company when he knows he is disqualified for appointment as one and anyone who, while acting as an auditor of a company, becomes disqualified during his term of office, he shall immediately vacate his office and give notice in writing to the company that he has stepped down from being an auditor on account of that disqualification (S. 403 (6), CAMA).

Note that a firm is qualified for appointment as auditor of a company, if all the partners are qualified for appointment as auditors of the company. And a person who acts as an auditor in contravention of subsection (6) or fails to give notice of vacating his office as required under the subsection, commits an offence and liable to a penalty as specified by the Commission.

11.25.2 Duties and powers of auditors – Section 407, CAMA

(a) Duties of auditors

The auditors shall make a report to the members of the company on the accounts, balance sheet as well as profit and loss accounts to be laid before the general meeting.

In the case of a public company, the auditors shall also make a report to an audit committee of an equal number of directors and representatives of the shareholders (not exceeding six).

The audit committee shall examine the auditors' report and make recommendations on it to the general meeting

Specifically, the duties of an auditor are to investigate and form an opinion on whether or not:

i. the company has kept the proper accounting records and the auditors have received proper returns for their audit from the branches not visited by them (S. 407 (1) (a), CAMA);

ii. the company's balance sheet and its profit and loss account agree with the accounting records and returns (S. 407 (1) (b), CAMA); and

iii. the information in the directors' report for the accounting year is consistent with those accounts (S. 407 (5), CAMA).

An auditor shall exercise reasonable care, diligence and skill in the performance of his duties (S. 415 (1), CAMA).

(b) **Rights/powers of auditors**

i. If auditors are of the opinion that proper accounting records have not been received from (the company or) branches visited by them, or if the balance sheet and or the profit and loss are not in agreement with the accounting records, the auditors shall state that fact in their report (S. 407 (2), CAMA).

ii. Every auditor of a company has a right of access at all times to the company's books, accounts. In addition, he is entitled to require from the company's registered office such information and explanations as he thinks necessary for the performance of the auditor's duties (S. 407 (3), CAMA).

iii. If the requirements of Parts V and VI of the Second Schedule (that is

respectively chairman's and directors' emoluments, pensions and compensation for loss of office emoluments as well as particulars relating to number of employees remunerated at higher rate), and Parts I and II of the Third Schedule and Matters to be disclosed under section 384 of CAMA are not complied with by the company in the accounts, it is the auditors' duty to include in their report a statement giving those required particulars, as much as as they are reasonably able to do. (S. 407 (4), CAMA).

11.25.3 Removal of auditors – Section 409, CAMA

A company may by ordinary resolution remove an auditor before the expiration of his office, and shall notify the CAC of the removal within 14 days (S. 409, CAMA).

11.25.4 Liability of auditors - Section 415

An auditor is liable for loss or damage suffered by the company as a result of the auditor's negligence ((S. 415 (2), CAMA).

11.25.5 Auditors as chartered accountants that must register with the Securities and Exchange Commission (SEC) Section 90 of the ISA, 2025 a person that audits a public company to register with the SEC on such terms and conditions that the Commission may prescribe.

Any public company that appoints an auditor that is not so registered is liable to a penalty of N5,000,000 and a further penalty of N50,000 for every day during which the violation continues.

Such an auditor must issue a statement in his report to the company audited on the existence, adequacy, and effectiveness or otherwise of the internal control system of the public company.

11.25.6 Resignation of auditors – Section 412

(a) An auditor of a company may resign his office by issuing a notice in writing to that effect and depositing it at the company's registered office, and such notice operates to end his term of office on the date of which notice is deposited or on such later date as may be specified in the notice. (S. 412 (1), CAMA);

(b) For an auditor's notice of resignation to be effective, it must contain the following:

i. a statement that there are no circumstances connected with the resigning auditor which ought to be brought to the notice of the members or creditors of the company, (S. 412 (2) (a), CAMA); or

ii. where there are such circumstances as mentioned in paragraph (a) of section 412 (2) (a) above, a statement of any such circumstances to be made in the notice of resignation.

Keep in mind that where a notice of resignation by an auditor is deposited with a company, the company shall send a copy thereof to the CAC within 14 days and where the notice contains a statement under S. 412 (2) (b), CAMA), copies of the notice shall be sent to every person who is entitled under section 387 of the Act, to receive copies of the financial statements.

Anyone aggrieved by the notice may within 14 days of receiving same, apply to the Federal High Court for an order under S. 412 (5), CAMA).

11.26 Administration of companies and appointment and functions of the administrator – Sections 443, 444 & 496, CAMA

The system of administration of companies as well as the appointment and functions

of an administrator to rescue the company from insolvency are provided for under the CAMA. In all situations where the need to manage a company's affairs, business and property arise, an administrator for the purpose of rescuing the company is appointed.

In section 444 of CAMA, an administrator of a company is empowered to do all such things as may be necessary for the management of the affairs, business and property of the company over which he has been appointed an administrator. The objectives for which an administrator performs his functions include:

(a) rescuing the company, the whole or any part of its undertaking, as a going concern;

(b) achieving a better result for the company's creditors as a whole than would be achieved if the company were wound up, without first being in administration; or

(c) realising the property of the company in order to make a distribution to one or more secured preferential creditors.

Keep in mind that the primary objective of the administrator in carrying out his functions is the rescuing of the company, and this the administrator must do except he is of the opinion that it is reasonably impracticable to rescue the company or that a better result could be achieved for the creditors of the company where the administrator pursues some other course of action among the ones listed in section 444 (1) (b) and (c), CAMA.

11.26.1 Appointment of administrators – Section 443, CAMA

The appointment of an administrator for the purposes of the administration of a company may be made by the following:

(a) The court, pursuant to an order thereof under section 449 of CAMA;

(b) The holder of a floating charge under section 452 of CAMA; or

(c) the company or its directors under section 459 of the Act.

(a) Appointment by the Court – Section 449, CAMA

Under section 449, a Court may make an administration order in relation to a company where it is satisfied that:

i. company is or is likely to become unable to pay its debts; and

ii. administration order is likely to achieve the purpose of administration.

(b) Appointment by holder of a floating charge on a company's property (Section 452, CAMA)

The holder of a floating charge over a company's property may appoint a person as an administrator of a company:

i. where the instrument creating the charge states expressly that section 452 of CAMA applies to the floating charge for the appointment of an administrator of the company; or

ii. the instrument empowers the holder of the charge to appoint a receiver within the meaning of the relevant provisions of the Act.

(c) Appointment by a company or its directors – Section 459, CAMA

The appointment of an administrator by a company or its directors is subject to the conditions specified in sections 459 – 462 of CAMA.

Note that an administrator shall not be appointed for a company under section 459:

i. where a petition for winding-up of the company has been presented but not yet disposed of by the Court; or

ii. where an administration application has been made and is not yet disposed of;

iii. or a receiver/manager of the company is in office.

Note that apart from the appointment made by the Court, other modes of appointment are regarded as and referred to as "appointment out of Court", and if the out-of-court appointment has a cross-border element, an application *ex-parte* shall be made to the Court for its approval.

Keep in mind that whether or not appointed by the Court, an administrator is an officer of the Court (S. 446, CAMA).

11.26.2 Functions of an administrator – Section 496, CAMA

The general powers of an administrator extend to the doing of anything necessary and/or expedient for the management of the affairs, business and property of a company.

While an administrator is carrying out his functions under the Act, any person who has dealings with him in good faith and for value need not inquire into whether or not the administrator is acting within his powers.

The administrator of a company is also empowered to exercise the additional powers specified in the Eleventh Schedule of the CAMA reserved for receivers and managers of the company. (S.497, CAMA).

The specific powers under the Eleventh Schedule that are exercisable by the administrator are the power to:

i. take possession of, collect and get-in the property of the company, and for that purpose, to take such proceedings as may seem to him expedient;

ii. sell or otherwise dispose of the property of the company by public auction or private contract;

iii. raise or borrow money and grant security therefor over the property of the company;

iv. appoint a solicitor or accountant or other professionally qualified person to assist him in the performance of his functions;

v. bring or defend any action or other legal proceedings in the name and on behalf of the company;

vi. refer to arbitration any questions affecting the company;

vii. effect and maintain insurances in respect of the business and property of the company;

viii. use the company's seal;

ix. do all acts and to execute in the name and on behalf of the company, any deed, receipt or other document;

x. draw, accept, make and endorse any bill which he is unable to do himself or which can more conveniently be done by an agent and power to employ and dismiss employees;

xi. appoint any agent to do any business which he is unable to do himself or which can more conveniently be done by an agent and power to employ and dismiss employees;

xii. do all such things (including the carrying out of works) as may be necessary for the realisation of the property of the company;

xiii. make any payment which is necessary or incidental to the performance of his functions;

xiv. carry on the business of the company;

xv. establish subsidiaries of the company;

xvi. transfer to subsidiaries of the company the whole or any part of the business and property of the company;

xvii. grant or accept a surrender a lease or tenancy of any property of the company, and to take a lease or tenancy of any property required or convenient for the business of the company;

xviii. make any arrangement or compromises on behalf of the company;

xix. call up an uncalled capital of the company;

xx. rank and claim in the bankruptcy, insolvency, sequestration or liquidation of any person indebted to the company and to receive dividends, and to accede to trust deeds for the creditors of any such person;

xxi. present or defend a petition for the winding up of the company;

xxii. change the situation of the company's registered office; and

xxiii. do all other things incidental to the exercise of the foregoing powers.

11.27 Arrangement, compromise, netting and winding-up of companies

11.27.1 Arrangement – Section 710, CAMA

A company may be re-organised in various ways in order to effect changes in the rights and relations both of the members as well as the creditors. This re-organisation may or may not culminate in the transfer of the property or undertaking of one company to another as it does on a merger or a takeover.

The CAMA provides in section 710 to 712 for arrangement and compromise within a company. Section 710 of the Act defines "arrangement" as:

"Any change in the rights and liabilities of members, debenture holders or creditors of a company or any class of them or in the regulation of a company, other than a change effected under any other provisions of the Act or by the unanimous agreement of all parties affected".

The Investments and Securities Act, 2025 (ISA) has provisions on compromise, arrangement, mergers, takeovers, or issue of securities or offer for subscription (sections 140-149). Under those provisions, all such transactions by a public company require the prior approval of the Securities and Exchange Commission (SEC) – section 140(1).

In addition, the ISA prohibits the making of a takeover bid by any person(s) without the approval to proceed of the as at the date of the takeover, except as otherwise provided by the rules and regulations of the SEC.
It is important to also note that when a merger that involves a public company is by way of amalgamation or any other combination with another undertaking, the following steps, among others, are specified by section 141.

(a) The SEC may approve in principle that the company involved apply to the Federal High Court to order separate meetings of the shareholders of the companies planning to merge so as to obtain their total agreement with the merger proposed; and

(b) if a majority representing not less than three quarters in the value of the shares of members while present at the separate meetings, or by proxy agree to the scheme, it shall be referred to the SEC for approval.

(c) After SEC's approval the parties to the merger shall apply to the Federal high court to sanction or approve the merger, which then binds the parties

It is to be noted from the definition of "arrangement" under section 710 of the CAMA that the Act makes provision for the change in the rights or liabilities of the members, debenture holders or creditors of the company involved or any class of them.

It has been said that the terms "compromise" and arrangements are not synonymous, and that an agreement which enables the majority of the creditors to **accept less than is due to them** may be a compromise on the part of the creditors as a whole. However, where the shareholders **do not give up anything**, no compromise is involved, but only an

arrangement results (See *Yinka Folawiyo & Sons Ltd. v TA Hammonds Projects Ltd* (1977).

The CAMA makes provisions for two types of situations namely:

i. arrangement on sale of company's property during member's voluntary winding-up under section 714; and

ii. compromise with creditors and members under sections 715 and 716.

11.27.2 Compromise – Section 711, CAMA

Where a compromise is proposed between a company and its creditors, the court may order that a meeting of the creditors or class of creditors or of the members of the company, be summoned. If a majority representing not less than three quarters in value of the shares of members or class of creditors vote in support, the compromise or arrangement may be referred by the court to the securities and exchange commission which then appoints an inspector to investigate the terms of the said compromises and make a written report within a time specified by the court.

If the court is satisfied as to the fairness of the compromise or arrangement, it will be approved and shall thereafter be binding on all the creditors or class of creditors or on the members. If a compromise has been sanctioned by the CAC for registration and a copy of every such order shall be annexed to every copy of the memorandum of the company issued after the order has been made.

Once the scheme of arrangement is sanctioned by the Court, it is binding on all the creditors even if the secured creditors did not vote in favour of it. The directors under a scheme of arrangement or compromise remain in control of the company and the powers of the shareholders are not affected under this scheme.

11.27.3 Netting – Section 718, CAMA

The CAMA defines netting as to mean the following:

(a) termination, liquidation or acceleration of any payment or delivery obligation or entitlement under one or more qualified financial contracts entered into under a netting arrangement;

(b) calculation or estimation of a close-out value, market value, liquidation value or replacement value in respect of each obligation or entitlements terminated, liquidated or accelerated under paragraph (a);

(c) conversion of any values calculated or estimated under paragraph (b) into a single currency;

(d) determination of the net balance of the values under paragraph (c) whether by operation of set-off or otherwise.

Pursuant to the preceding, a netting agreement means any of the following:

(a) An agreement between two parties that provides for netting of present or future payment or delivery obligations or entitlements arising under or in connection with one or more qualified financial contracts entered into under the agreement by the parties to the agreement (master netting agreement);

(b) A master agreement between two parties that provides for netting of the amounts due to under two or more master netting agreements (a "master-master netting agreement); and

(c) A collateral arrangement related to or forming part of one or more of the foregoing.

The provisions of a netting agreement are enforceable in accordance with their terms, against an insolvent party and in applicable cases against a guarantor or other person giving security for a party and the enforcement shall not be stayed or avoided or otherwise limited by any action of the liquidator.

11.28 Winding up of a company – Section 571, CAMA

This is the legal way of terminating the life of a company or dissolving the association. According to section 571 of CAMA, winding up may take any of the following forms:

(a) By the Federal High Court;

(b) Voluntarily by the company; or

(c) Subject to the supervision of the court.

11.28.1 Winding up by the Federal High Court – Section 571 CAMA

The Federal High Court (FHC) that has jurisdiction in the area that the registered office of a company is may be approached to wind up the company. The court has companies winding up rules. According to section 571 of CAMA, the court may wind up the company if:

(a) The company has decided by a special resolution that the court should wind it up;

(b) The company (if a public company), has defaulted in delivering its statutory report to the CAC or in holding the statutory meeting. Keep in mind that a shareholder may bring a petition before the court for winding up on this ground only after the expiration of 14 days after he last day on which the meeting ought to have been held;

(c) The number of the members of the company has fallen below two if it is a company with more than one shareholder;

(d) The company is unable to pay its debts (to a creditor to whom the company is indebted in a sum exceeding N200,000 which is due and has been demanded);

(e) The condition precedent to the operation of the company has ceased to exist; or

(f) The court is of the opinion that it is just and equitable that the company be wound up.

Who may petition the court for winding up?

i. The company, following a special resolution;

ii. A creditor or an assignee of a debt owed by the company;

iii. A contributory in the case of a company limited by guarantee;

iv. A trustee in bankruptcy;

v. The Official Receiver that is, the Deputy Registrar of the Federal High Court so designated by the Chief Judge;

vi. The CAC with the approval of the Attorney-General of the Federation; or

vii. A receiver authorised by the debenture deed.

11.28.2 Voluntary winding up

Voluntary winding up may take the form of members' voluntary winding up or creditors' voluntary winding up. Members' voluntary winding up occurs when the company has made a declaration of solvency and delivered the declaration to the CAC.

It is mandatory for the directors or majority of them to make a statutory declaration under section 625, at least 5 weeks before the passing of the winding up resolution by the general meeting, that they have made a full enquiry into the affairs of the company and they are of the opinion that the company will be able to pay its debts in full within the period specified in the declaration or not later than 12 months.

Creditors' winding up occurs where the company has filed no declaration or solvency with the CAC.

Separate meetings of the creditors and of the members must be held so as to resolve to wind up the company. Then, an extraordinary general meeting shall be called to pass a resolution for winding up in accordance with section 620 of CAMA.

By virtue of section 620, a company may wind up voluntarily in the following situations:

(a) When the period for its duration under the articles of association expires and the company has passed an ordinary resolution that it be wound up; or

(b) If the company resolves by special resolution that it be wound up

11.28.3 Winding up subject to the supervision of the court

By virtue of section 649, when a company is being voluntarily wound up following a special resolution to the effect, the court may, on petition order that the voluntarily winding shall continue, but subject to the supervision of the court and with such liberties for the creditors, contributories or others to apply to court on the terms and conditions as the court thinks fit.

Keep in mind that a petition for winding up subject to the supervision of the court is deemed to be a petition for compulsory winding up over which the court will have supervisory powers.

11.29 Mergers and its types under the Federal Competition and Consumer Protection Act (FCCPA), 2018

11.29.1 Definition of mergers – Section 92, FCCPA

Under the Federal Competition and Consumer Protection Act (FCCPA), 2018, a "merger" occurs when one or more undertakings directly or indirectly acquire or establish direct or indirect control over the whole or part of another undertaking (S.92 (1) (a) FCCPA). Note that the merger contemplated under paragraph (a) may be achieved in three (3) ways as follows:

(a) Through the purchase or lease of then shares, an interest or assets of the other undertaking in question; or

(b) Through the amalgamation or other combination with the other undertaking in question; or

(c) Through a joint venture.

Under the FCCP Act, an undertaking is deemed to have control over the business of another undertaking in any of the following situations:

(a) More than half of the issued capital or assets of one undertaking is beneficially owned by another;

(b) One undertaking is entitled to cast a majority of the votes that may be cast at a general meeting of another undertaking, or one undertaking has the ability to control the voting of a majority of those votes, either directly or through a controlled entity of that undertaking;

(c) One undertaking is able to appoint or veto the appointment of a majority of directors of the undertaking;

(d) When one undertaking is a holding company and the other is a subsidiary of that company as contemplated under the Companies and Allied Matters Act;

(e) When an undertaking that is a trust, has the ability to control the majority of the votes of the trustees or to appoint or change the majority of the beneficiaries of the trust; or

(f) When one undertaking has the ability to materially influence the policy of the undertaking in a manner comparable to a person who, in ordinary commercial practice, can exercise an element of control referred to in paragraph (a) to (f). (S. 92 (2) FCCPA).

11.29.2 Types of merger under the FCCPA – Section 92(4) FCCPA

There are two (2) types of merger under the FCCPA as follows:

(a) "Small merger", which means a merger with a value below the threshold stipulated by the Federal Competition and Consumer Protection Commission by regulations; and

(b) "Large merger" which means a merger with a value above the threshold stipulated by the Commission by regulations.

Keep in mind that under section 94 FCCPA, the Commission is the only authority for the approval of mergers undertaken in Nigeria in accordance with the regulations as well as procedural rules made by the Commission. The provisions of any other law, except that of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) is subject to the FCCPA in all matters relating to competition and consumer protection (S. 104, FCCPA).

11.29.3.1 Tax law obligation of companies in business restructuring

The Nigeria Tax Act (NTA) makes provisions in Chapter 9 thereof of rules that apply companies that undergoing business restructuring. However, he focus here is narrowed to merger situations.

In the event of a merger of two or more trades or businesses, a new trade or business shall not be deemed to have commenced as a result of the merger. Thus, the provisions of the NTA as they relate to cessation of trade or business shall not apply to the trade or business that ceased as a result of the merger.

In the event of a sale or transfer of a trade or business which results into the cessation of a trade or business, the provisions of Part V of Chapter Two of the NTA on cessation of trade, business, profession or vocation shall apply to the trade or business that was sold or transferred.

The relevant tax authority shall be notified by the parties thereto of any restructuring of a trade, business, profession or vocation prior to commencing such arrangement (section 189, NTA).

11.29.4 Requirements for registration of business names and incorporated trustees

There are other types of organization that the CAC regulates under the CAMA. Having considered registered company which is administered and regulated by the CAMA, 2020 Part B; the Limited Liability Partnership; which is regulated by Part C thereof; and the Limited Partnership which is regulated by Part D, it is also necessary to discuss other types of organisations, such as registered business name under Part E, and the Incorporated Trustees under Part F of the CAMA, 2020.

11.30 Registration of business names

Oftentimes, individuals and partners carry on business under business names which are different from their own actual names, in order to provide such individuals or partners some measure of protection of their business names and also protect the public from the misleading or fraudulent use of such names, certain business names are required to be registered under Part E of the CAMA, 2020.

11.30.3 Business names that must be registered

By virtue of section 814 (1) CAMA, the following business names must be registered:

(a) In the case of a firm (general partnership), if the business name does not consist only of the true surnames of all partners without any addition other than the true forenames of the individual partners or the initials of such forenames;

(b) In the case of an individual, if the name does not consist of his true surname without any addition other than his true forenames or their initials; or

(c) In the case of a company (whether or not registered under the CAMA, 2020), if the name does not consist (only) of its corporate name without any addition.

11.30.4 Non-mandatory registration of business names

There is no requirement of registration of a business name under section 814 (2) CAMA, where the addition to such name merely indicates the following:

(a) That the business is carried on in succession to the former owner;

(b) Where two of more individual partners have the same surnames and the only addition is “s” at the end of the surname; or

(c) Where the business is carried on by a receiver or manager appointed by the court.

11.30.5 Procedure for registration

Section 815 (1) provides that every individual, firm or company required to register to take steps NOT LATER than 28 days after commencing business in respect of which registration is required, to furnish to the Registrar at the Business Name Registry in the state wherein the principal place of the business is situated, a statement in the prescribed form. The statement must contain the following particulars:

(a) The business name, or, if the business is carried on under two or more business names, each of these business names;

(b) The general nature of the business;

(c) Full postal address of the principal of business;

(d) Full postal address of every other place of business;

(e) If registration is that of a firm (general partnership);

(f) Present forenames and surname, any former forenames or surnames, nationality, and if that nationality is not the nationality of origin, the nationality of origin, age, sex, (gender) usual residence and any other business occupation of each of the individual who are partners;

(g) If a company is a partner in the firm, the corporate name and registered office of such corporation must be contained in the statement;

(h) If the registration is that of the individual; present forenames and surname, any former forenames or surnames, nationality, and if that nationality of origin, the nationality of origin, age, sex (gender) usual residence and any other business occupation of the individuals who are partners;

(i) If registration is that of a company; the name and registered office of the company; and the date of commencement of business whether, before or after the coming into operation of the Act.

11.30.6 Registration – Section 816 CAMA

On receipt of the statement of particulars, if the Registrar of Business Names (who is also the Registrar General appointed under Section 9 CAMA [Section 812 CAMA]), is satisfied that the provisions of the law have been complied with, will enter the business name in the register of business names and a certificate in the prescribed format, containing the business will be issued to the applicant in respect of which registration is carried out. The Registrar shall also add to the business name in the register, the identification letters of the State – where the business name is registered - which shall be in brackets at the end of the business name and the identification letter of the State shall form part of the business name.

The Registrar of Business Names, has power to refuse to register the use of certain business names or cancel the registration, where such names have been (mistakenly) registered. This the Registrar can do if in her opinion the registration of such business name will mislead the public, unless the consent of the Commission (CAC) has been first obtained. Section 852 (2) (a-d) CAMA give such names.

11.30.7 Post registration issues – Section 818

(a) Changes in particulars submitted for registration

Subsequent to registration, if the applicant makes any changes in the particulars submitted to the Registrar for the registration, she must notify the Registrar of these changes within 28 days of their occurrence unless the changes are merely in respect of the age of an individual whose name appears in the statement of particulars. The Registrar has the discretion to either amend the certificate previously issued or issue a fresh certificate.

(b) Publicity – Section 820

Sequel to issuance of certificate of registration, the certificate must be exhibited and maintained in a conspicuous position at the principal place of business and where the firm or company or individual has more than one place of business, certified copy of the certificate must be exhibited and maintained in a conspicuous position in each of the other places of business;

i. Publication of true names

True names of the true operators registered under the business name must be published in legible characters, in all trade catalogues, trade circulars, show cards, and business letters;

ii. In the case of an INDIVIDUAL, his present forenames or the initials and the present surname and any forenames or surname and nationality;

iii. In the case of a FIRM, the present forenames or the initials and the present surname and any former forenames or surname and nationality of all the partners in the firm or in the case of a company being a member, the corporate name; and

iv. the registration number of a business name.

11.30.8 Removal of name from the register – Section 819 CAMA

The Registrar has power to remove a business name from the register if the firm, individual or company is no longer carrying on business.

11.30.9 Annual returns – Section 822 CAMA

Section 570 provides that every firm, company or individual carrying on business name shall not later than the 30th day of June in each year, except the calendar year in which the business is registered, delivered to the Commission, a return in the prescribed form showing the following –

i. Particulars of the firm, company or individuals;

ii. The nature of the business carried on in the business name, and

iii. The state of the financial affairs of the business carried on in the business name during the preceding period of January 1 to December 31.

11.31 Incorporated trustees – Sections 823 – 850 CAMA

These are non-business and non-profit making organisations. They are formed under section 823 CAMA, to facilitate acquisition of corporate persons by a community of natural persons bound together by custom, religion, nationality or any association of persons established for religious, educational, literary, scientific, social developments, sporting or charitable purpose. The community of persons desiring incorporation may decide to appoint two or more trustees and thereafter apply to the Commission (CAC) for the incorporation of such trustees under Part F of the Companies and Allied Matters Act, 2020 (which repealed the CAMA CAP C.20 Laws of the Federation of Nigeria, 2004) to have incorporated trustees in the name;

(a) It does not do business and it does not distribute profits;

(b) It receives income as grants, levies;

(c) The income must be applied solely towards the promotion of its objects;

(d) Income cannot be distributed to members but (out-of-pocket) expenses can be paid to members e.g., a member going to Lagos to promote the organisation;

(e) Ownership of landed property or undertaking in lieu

(f) The Commission as well as a court of competent jurisdiction (in this case the Federal High Court), may in appropriate circumstances order the suspension of trustees and appoint interim manager(s) to manage the affairs of the association as well as order the replacement of a trustee removed Section 839, CAMA.

11.30.3 Procedure for incorporation – Section 825 CAMA

An application for registration is made under section 823 to the Ccommission, in the form prescribed by the latter. The application which must be signed by the person making it must state the following:

i. The name of the proposed corporate body which must contain the words "Incorporated Trustees of …."

(b) The aims and objects of the association which shall be for the advancement of any religious, educational, literary, scientific, social, development, cultural, sporting or charitable purpose, and shall be lawful; and

(c) The name, address and occupation of the Secretary of the association, if any.

The following documents must accompany the application as attachments:

a. Two printed copies of the constitution of the association;

b. Signed copies of the minutes of the meeting where the trustees are appointed with authorisation to make necessary registration application to the Commission;

c. The impression or drawing of the proposed common seal, if there is one.

The CAC may demand a declaration or other evidence verifying the statement and particulars contained in the application as may be deemed necessary.

11.30.4 Appointment and qualification of trustees – Section 826 CAMA

A trustee must not be an infant, a person of unsound mind, an undischarged bankrupt or have been convicted of an offence involving fraud or dishonesty within five years of his proposed appointment. Trustees may be replaced or additional ones appointed in accordance with the provisions of Section 834 of CAMA. The powers vested in the trustees by or under the Act must be exercised in line with the directions of the

association or of the council or governing body, (ss. 836 – 837).

If the incorporated body intends to replace any of its trustees or appoint additional trustees, it may do so by applying for the approval of the Commission. The application will be made in the prescribed form accompanied with a resolution at a general meeting. Before approval, the application will be published and processed in the same way as an application for a change of name or object. If approved, the Commission will indicate in writing to the corporation and the appointment will become valid from the date of the resolution appointing the trustees. (Section 834, CAMA).

11.30.5 Contents of constitution of incorporated trustees – Section 827

The constitution of the association proposed to be registered as incorporated trustees must contain *inter alia,* he following:

(a) The name or title of the association which shall comply with the provisions of section 852 (2) (a-d) CAMA, in respect of prohibited and restricted names and shall start with the words "Incorporated Trustees of ….";

(b) The aims and objects of the association; and

(c) The provisions in respect of the following:

i. Appointment, powers, duties, tenure of office and replacement of trustees;

ii. The use and custody of common seal, (if there is one);

iii. The meetings of the association;

iv. The number of members of the governing body, if any, the procedure for their appointment and removal, and their powers; and

v. Where subscriptions and other contributions are to be collected, the procedure for disbursement of the funds of the association, the keeping of accounts and the auditing of such accounts.

11.30.6 Advertisement and objections – Section 828, CAMA

If the Commission is satisfied that the application is in order (that is in compliance with sections 825 – 827 of CAMA, it will cause it to be published in a prescribed form in two daily newspapers circulating in the area where the association is to be situated and at least one of the newspapers shall be a national newspaper.

The advertisement will invite objections, if any, to the registration of the body. Such objections will state the grounds on which it is made and must reach the Commission WITHIN 28 DAYS of the last of the two publications in the newspapers.

If there are objections made to the registration of the body, the Commission will consider them and may require the objectors and applicants to furnish further information or explanation, and may uphold or reject the objection as it considers fit and inform the applicants accordingly.

11.30.7 Registration – Section 829 CAMA

Where after the publication, no objection is received within the specified time or if objection is received, it is considered and rejected by the Commission, it may, "having regard to all the circumstances" assent to the application and shall register the trustees and issue a certificate in the prescribed form.

11.30.8 Effect of registration and certificate of incorporation – Section 830 CAMA

From the date of registration, the trustees shall become a body corporate, and will have perpetual succession and a common seal (if the association wishes), with power to sue and be sued in its corporate name. a certificate of incorporation will be issued and it will vest in the corporation all property and interests of whatever nature or tenure held by any person in trust for the community, body or association of persons. The certificate is also prima facie evidence of compliance with all the preliminary requirements of incorporation and the date stated on the certificate is deemed to be the date on which incorporation has taken place.

11.30.9 Alteration of incorporated body's name and objects – Section 832 CAMA

The CAMA provides for situations whereby the name and the objects of the corporation may become altered and the procedure for doing this. Under section 832 CAMA, the trustees will apply to the Commission in the prescribed form setting out the alterations desired and attaching a copy of a duly certified resolution of the trustees approving the change(s).

The Commission shall consider the application and if satisfied that the proposed alteration is *prima facie* the Commission will cause the proposed alteration or changes to be published in two daily newspapers in the same way as an application for incorporation, calling for changes. The Commission will also direct the corporation to display a notice of the proposed change in a conspicuous place at the corporation's headquarters and or any branch office for 28 days where a majority of the members are likely to see it.

Thereafter the Commission will consider the application in the same way as an application for incorporation and if the Commission approves the application for alteration, the change will be made and in the case of a change of name, the Commission will issue a new certificate in the new name to replace the former name.

11.30.10 Alteration of provisions of the constitution – Section 833 CAMA.

Subject to compliance with provisions of sections 827 (on content of the constitution), and 828 (on advertisement and objections), the constitution of the association may be altered by a resolution passed by a simple majority of the members of the association and

approved by the Commission.

11.30.11 Suspension of trustees and appointment of interim managers – Section 839, CAMA

(a) Suspension by the Commission – Section 839 (1) CAMA

The Commission has powers to order the suspension of the trustees of an association and appoint an interim manager for the management of the affairs of an association where the Commission reasonably believes that:

i. there is or has been any misconduct or mismanagement in the administration of the association;

ii. it is necessary or desirable for the purposes of –

- protecting the property of the association;
- securing a proper application for the property of the association towards achieving the objects of the association, the purposes of the association of that property or of the property coming to the association;
- public interest; or
- the affairs of the association are being run fraudulently;

iii. and the Commission may make regulations in respect of the following:

- The functions, powers and remuneration of the interim manager and the manner in which the interim manager shall make reports to the Commission; and
- Making reports to the Commission, and such other things as may be necessary for the effective administration of the association during the period of its interim administration.

The Commission's powers under this section in respect of any association are exercisable with the approval of the Minister of Trade.

(b) Suspension by the Court – Section 839 (2) CAMA

The trustees of the corporation shall be suspended by an order of Court upon the petition of the Commission or by members constituting one-fifth of the association and the petitioners shall present all reasonable evidence or such evidence as demanded by the court from them.

In considering the petition, the court may make any or all of the following:

(i) Order or suspend any person, officer, agent or employee of the association from office or employment, for a period of not more than 12 months from the date of the order of suspension; or

(ii) Order the appointment of such number of additional trustees as it considers necessary for the proper administration of the association.

11.30.12 Merger and dissolution of associations

(a) Merger of associations – Section 849 CAMA

There may be merger of two or more associations with similar aims and objec under terms and conditions as the Commission may prescribe by its regulations.

(b) Dissolution of a body corporate formed under the Act – Section 850 CAMA

Any body corporate formed under the Act may be dissolved by the Court on a petition brought for that purpose by the governing body council, or by one or more of the trustees, or members of the association constituting at least fifty percent of the total membership, or by the Commission. At the hearing of the petition, allpersons whose rights and or interests may in the opinion of the Court be affected by the dissolution, shall be ordered to be put on notice.

The corporation may be dissolved on the grounds namely that the aims and objectives for which it was established have been fully realised and no useful purpose would be served by keeping it alive, that the body was formed to exist for a specified period and that period has expired and its continued existence is unnecessary, that all the aims and objectives have become illegal or otherwise contrary to public policy, that it is just and equitable in all the circumstances that the body corporate be dissolved, and that the certificate of registration of the association has either been withdrawn, cancelled or revoked by the Commission.

After the dissolution of the corporation and the satisfaction of its debts and liabilities, there remains any property of the corporation, such property cannot be distributed to members of the association, but must be given or transferred instead to some other institutions having objects similar to those of the dissolved body, such institutions to be determined by members of the association before or at the time of dissolution. If the property is not transferred to such institutions, it may be transferred to some charitable object.

11.32 Collective investment scheme types

Section 150 of the ISA, 2025 defines a collective investment scheme as "a scheme or arrangement in whatever form, including an open-ended and close-ended investment scheme, under which members of the public or qualified investors are invited or permitted to invest money or other assets in a portfolio…."

The scheme involves the following:

(a) Contribution of money or other assets toward a participatory interest in a portfolio of a scheme by way of ownership of shares or units, for examples;

(b) Pooling of such assets to be managed as a whole; and

(c) Sharing of the risks and benefits of the investment by the investors in proportion to their participatory interest or contributions as may be determined by the deed of the scheme

The scheme involves a managing company or manager and a trustee, which is normally another company, very often, a bank.

The types of collective investment scheme that section 151 of the ISA are as follows:

(a) Unit Trust: In a unit trust, the managing company acquires some securities, e.g., shares or debentures quoted on the Stock Exchange, and transfers them to the trustees who become sole custodian of the securities. These blocks of securities are then divided into units and offered to the public for investment and these may in turn be quoted on the exchange. The investors become the beneficiaries under the trust deed and are entitled to the securities according to their holdings.

(b) Open-ended investment company: The open-ended investment company is described as a company with an authorised share capital whose articles authorises the acquisition of its own shares structured in such a way that the company is permitted to issue different classes of shares to its investors, with each class of shares representing a separate portfolio with a distinct investment policy.

For a company to be registered under the ISA as an open-ended investment company, such a body corporate must have been registered under CAMA, maintain a capital and reserve as prescribed by the Securities and Exchange Commission (SEC) from time to time, permitted by the articles of association to acquire its own shares, and satisfy all conditions which the SEC may prescribe from time to time.

The assets and investment of such a company shall be in the custody of a registered custodian or trustee.

(c) Real estate investment company: This a company that carries on the business of investing in real property and section 193(1) of the ISA provides that a body corporate registered for the sole purpose of acquiring intermediate or long-term interests in real estate or property development may raise funds from the capital market through the issuance of securities

which shall have the following characteristics:

i. an income certificate which gives the investor a right to a share of the income of any property or property development; and

ii. an ordinary share in the body corporate giving the investor voting rights in the management of the body corporate.

A real estate investment company or a trust may be registered by the Commission if such company is a body corporate registered under CAMA, if it has a capital and reserve as prescribed by the Securities and Exchange Commission (SEC) from time to time, if it carries on business as a collective investment scheme solely in property, and it complies with the requirements which the SEC may from time to time prescribe through its Rules and Regulations.

(d) Specialised or alternative investment scheme; or

(e) Such other schemes as the SEC may approve, usually by its rules and regulations.

11.33 Summary and Conclusion

This chapter explained important aspects sole proprietorship, partnerships, and the company as forms of business organisations that are regulated by the provisions of the CAMA, 2020. It also touched some key aspects of incorporation of the trustees of non-governmental organisations. The contents covered the modes of registering, managing, and winding up of the organisations. In addition, the introductory aspects of the law on mergers and other forms of business combination, which are currently in the Federal Competition and Consumer Protection Commission Act, 2018 and the ISA 2025, were highlighted. The chapter closed with a cursory look at the meaning and types of collective investment scheme under the ISA 2025.

11.34 REVISION QUESTIONS

SHORT ANSWER QUESTIONS

1. Which of the following is not a feature of incorporated trustees?

   A. Doing of business and distribution of profits

   B. Receipt of income through grants and levies in order to meet its expenses

   C. Application of income received solely to the promotion of its objects

   *D. Legal personality

   E. Income not distributable but out-of-pocket expenses payable to members

2. The articles of association of a company:

   A. Regulate the company's external relations

   *B. Regulate the company's internal relations

   C. Contain the businesses or objects for which the company is registered

   D. Contain the registered office of the company

   E. Constitute a contract between the members of the company on the one hand and members of the public on the other hand

3. Upon incorporation, the company as a corporate entity becomes an artificial personality. A consequence of this, is that:

   A. The company becomes a private person in the community

   B. The company becomes an important person in the society

   C. All companies are capable of restricting the rights to transfer their shares

   *E. The company becomes a separate and distinct identity from its members, directors and promoters

   F. The company can only be sued, but it cannot sue in return

SHORT ANSWER QUESTIONS

1. What is required if a proposed business name is not the true name of the proprietor? *****Registration

2. The law that regulates mergers in Nigeria is ____***** Federal Competition and Consumer Protection Act.

3. The _____and _____, are the Constitution of the company in Nigeria *****Memorandum and Articles of Association.

ESSAY QUESTIONS

1. State the functions of the Corporate Affairs Commission (CAC).

Answer

The functions of the CAC are to:

(a) administer the CAMA, regulate and supervise the formation, incorporation, management and striking off and winding up of companies including business names, management and removal of names from the register and formation, incorporation, management and dissolution of incorporated trustees;

(b) establish and maintain companies' registry and offices in all the states of the federation, suitably and adequately equipped to perform its statutory functions;

(c) arrange and conduct an investigation into the affairs of any company, incorporated trustees or business names (and even though not expressly mentioned, into the affairs of a limited partnership entity and a limited liability partnership entity) where the interests of the shareholders and partners as well as the public so demand;

(d) ensure compliance by companies' business names and incorporated trustees and limited partnership entity and a limited liability partnership entity (even though not expressly mentioned), with the provisions of the CAMA and such other regulations as may be made by the Commission;

(e) perform such other functions as may be specified by the CAMA or any other enactment; and

(f) undertake such other activities as are necessary or expedient for giving full effect to the provisions of the CAMA.

2 State the circumstances in which registration of business names is **NOT** compulsory.

Answer

There is no requirement of registration of a business name under section 814(1), CAMA, where the addition to real name of the proprietor merely indicates the following:

(a) when the business is carried on in succession to a former owner;

(b) when two or more individual partners have the same surname and the only addition is "s" at the end of the surname; and

(c) where the business is carried on by a receiver or manager appointed by the court.

3 Describe the registration procedure of the Incorporated Trustees organisation under Part F of the Companies and Allied Matters act.

Answer

Upon a satisfactory application made to the Commission, the Commission will cause it to be published in a prescribed form in two daily newspapers circulating in the area where the corporation is to be situated. The advertisement will invite objection and if any objections are made, the Commission will consider them and may require the objectors and applicants to furnish further information or explanation and will resolve the objection one way or the other. Where, after the publication, no objection is received within the specified time, or where one is received, considered and resolved in favour of the applicant, the Commission may approve the application and register it, and a certificate of registration will be issued.

CHAPTER TWELVE

Banking and negotiable instruments

12.0 Chapter contents

- The meaning and functions of bank
- The implication of banker/customer relationship and the duties of parties
- The definition and characteristics of negotiable instruments
- Bills of exchange, cheques, and promissory notes
- Holder, holder for value and holder-in-due-course
- Rights and duties of parties to bills of exchange

12.0.1 Learning objectives

Upon completion of this chapter, readers should be able to explain the core principles of the law of banking and negotiable instruments covering:

- the meaning and functions of bank
- the implication of banker/customer relationship and the duties of parties
- the definition and characteristics of negotiable instruments
- bills of exchange, cheques, and promissory notes
- holder, holder for value and holder-in-due-course
- rights and duties of parties to bills of exchange

12.1 Meaning of a bank

A bank is any “person”, being incorporated as a financial institution and in possession of a valid banking licence, who carries on banking business. Such an institution can receive money deposits, collect, transfer and pay moneys, exchange, lend, invest or safeguard money for its customers, and is generally involved in the flow of money in the economy of the nation.

12.2 Functions of banks

The basic functions of a bank are to provide financial and advisory services known as banking business to its customers. Section 131 of the Banks and Other Financial Institutions Act, 2020 defines "banking business" as the business of:

(a) Receiving deposits on current account, savings deposit account or other similar accounts;

(b) Paying and collecting cheques drawn by or paid in by customers;

(c) Provision of financial consultancy and advisory services relating to corporate and investment matters;

(d) Making or managing investments on behalf of any person whether such suchbusiness are conducted digitally, virtually or electronically only; and

(e) Such other transaction as the Governor of the Central Bank of Nigeria may by order in the Federal Gazette designate as banking business.

12.3 Banker and customer relationship

A banker is in the business of banking, and a person becomes its customer either when the banker opens an account in the person's name or when the banker accepts his instruction to open an account, and the bank receives a deposit from the person to be credited to the account. When a banker opens an account for the customer, the relationship established is that of debtor and creditor. When the account is in credit, the customer is the creditor and the banker the debtor. The position is reversed when the account is overdrawn. Customer's deposit of money in a bank under the banker's control but not held in the form of a trust although he has obligations in connection with it. The banker has an obligation to repay. When the banker accepts the custody of documents or goods, he acts a bailee, and when he agrees to hold moneys on trust, he becomes a trustee.

A bank customer is any person that has an account in his name with the bank. Therefore, only the person whose name appears in the books of the bank as holding an account is a customer of the bank.

12.4 Duties of a banker

(a) A bank has a duty to collect customers' cheques, cash and other payable instrument by the customer;

(b) A bank owes the duty to strictly abide by the mandate of the customer, including the duty to honour the customer's cheque and other written demands to pay, provided always that

(i) the customer's account is in fund;

(ii) the customer has credit agreement with the bank;

(iii) the customer's mandate, eg cheque, is regularly drawn; and

(iv) there is no legal impediment against the payment

(c) The banker has the duty to operate the customer's account with requisite confidentiality and secrecy, subject only established legal exceptions, which include -

(i) disclosure under the compulsion of law;

(ii) public duty to disclose;

(iii) disclosure in the interest of the bank; and

(iv) customer's consent.

(d) The banker must give reasonable notice to the customer before closing his account;

(e) The banker must bring to the customer's immediate notice any suspicious dealings with the account likely to lead to fraud or other unauthorised dealings with the customer's account;

(f) The banker must provide the customer with regular updates and statements of account;

(g) The bank owes the customer the duty to keep his account separate, except there is an agreement to the contrary;

(h) The banker owes a duty not to pay out the customer's money upon a validly countermanded cheque;

(i) The bank has an implied duty not to charge the customer unreasonable interest on loans and other credit facilities; and

(j) The bank has a duty to take reasonable care in opening accounts for new customers.

12.5 Duties of customer to the banker

(a) Duty to draw his cheque with care and diligence with a view to protecting his account from fraudulent dealings;

(b) Duty to give instructions in writing to the bank when withdrawing his money;

(c) Duty to notify the bank promptly of any knowledge of suspicious dealings on his account as he becomes aware of it, e.g., a missing cheque book or leaf as well as forgery of his signature; and

(d) Duty to pay appropriate bank charges and interest on loans

12.5.1 Termination of banker's duty to pay

The banker is not obliged to honour a cheque if the customer has countermanded or stopped it. An oral countermand may be alright initially but has to be followed up with a written one. Notice of the customer's death, notice of the customer's mental disorder and notice of bankruptcy or receiving order are all circumstances under which the banker should not honour a cheque. Service of a garnishee order stops the banker from making payments to the customer and to show cause why payment should not rather be made to the judgment creditor.

Forged and altered cheques are obviously not genuine and cannot be honoured.

NEGOTIABLE INSTRUMENTS

12.6 Introduction

Negotiable instruments have become the most acceptable way of monetary transactions today. The meaning, types and characteristics of negotiable instruments are therefore necessary to look at to ensure a proper understanding of them. It is equally important to be able to make a distinction among bills of exchange, cheques and promissory notes. Again the rights and duties of bankers and customers are also relevant and receive attention.

12.7 Meaning, types, and characteristics of negotiable instruments

12.7.1 Negotiable instruments

A Negotiable Instrument can be defined as a chose in action relating to financial or commercial documents, which must be in writing. It is transferable with full legal title by mere delivery of the instrument (but with endorsement by the transferor, if it is an order bill). They are substitutes for money and as such, the holder takes title free from any defences or objections to their validity that might have been good against the transferors. There are two types of Negotiable Instruments, namely, Bills of Exchange and Promissory Notes.

12.8 Bills of exchange

A bill of exchange is an unconditional order in writing, signed and addressed by one person (the drawer) to another (the drawee), requiring the drawee to pay on demand, or at a determinable or fixed future date, a specified sum of money to a third person (the payee). The payee is frequently the same person as the drawer of the bill. The term bill of exchange usually refers to foreign exchange transactions, rather than domestic transactions. On accepting a bill of exchange, the drawee becomes the party primarily responsible for paying it. The main known example is cheque.

a. Cheque

A cheque is a financial instrument made payable upon demand on date stated and drawn on a bank. The issuer of the cheque is the drawer who orders the bank at which he has an account, referred to as the drawee, to pay a named individual or entity or the bearer of the cheque, called the payee, a specified sum of money upon presentation of the cheque. A cheque includes a money order.

There are four (4) different types of cheques; bearer cheque, order cheque, crossed cheque and banker's draft.

i. Bearer cheque

This is a cheque made payable to bearer, e.g, a cheque made payable to "cash" is payable to the holder of the cheque.

A bearer cheque is transferable by mere delivery without any endorsement.

ii. Order cheque

A cheque drawn in favour of a named person or endorsed by the payee to another person is an order cheque. The endorsement is by signature of the payee at the back of the cheque.

iii. Crossed cheque

A crossed cheque has two parallel transverse lines drawn across the face of the cheque by the drawer. Crossed cheques cannot be paid over the counter, but through the drawer's bank to the payee's bank account.

There are two different types of crossing, which are General Crossing and Special Crossing

- **General crossing –** This makes the cheque not negotiable and non transferable. The crossing is with the words "& company" or " & co" or "a/c payee only" or " not negotiable" written between the two parallel transverse lines. Any of these statements on the face of the cheque precludes the banker from paying the cheque over the counter or to any other person's bank account.
- **Special crossing –** This crossing has same features of general crossing, but also with a specified banker written between the two parallel transverse lines, as the drawee to pay the payee by interbank transfer of funds.

d. Banker's draft

i. Banker's draft is a written order for the payment of money drawn by one person, through a bank, directing the bank to pay a third person through the payee's bank account a sum of money on date specified.

ii. Travellers cheque is a written order to its foreign branch for the payment of money drawn by a local bank on that foreign branch, directing the foreign branch to pay the holder of the instrument, specified amount stated on specified date.

12.9 Promissory note

A promissory note is a written instrument containing an unconditional promise by a party, called the maker, who signs the instrument, to pay to another, called the payee, a definite sum of money either on demand or at a specified or ascertainable future date. The note maybe made payable to the bearer, to a party named in the note, or to the order of the party named in the note. A promissory note differs from an IOU in that the former is a promise to pay and the latter is a mere acknowledgment of a debt. A promissory note is negotiable by endorsement if it is specifically made payable to the order of a person. A promissory note must contain an undertaking to pay. In **Orthodox School of Peki v Tawlma Abels [1974] GLR 421**, it was shown that Exhibit A was not a promissory note within the meaning of the Bills of Exchange Act, 1961(Act 55) because neither the commencement date for the monthly instalments nor the quantum of the monthly instalments payable had been fixed.

a. Order paper and bearer paper

OrdeSssr Paper and bearer paper may look similar, but there is a very important difference between the two, which is negotisbility. An order paper is made payable to a specified individual or entity, while a bearer paper is payable to bearer or cash. An order paper is negotiated by endorsing it to another person, which entails signing the back of the instrument and transferring it to another. An order paper, "to order of John" is negotiated by John endorsing the back of the instrument, transferring it to another

person. John in addition to his endorsement may write "Pay to the order of Jeff". To effect negotiation and therefore transferability of a bearer paper, all that is required is delivery of possession of the instrument to the one to whom it is being transferred.

b. Certificate of deposit (Treasury bill)

Certificate of deposit (Treasury bill) is a financial instrument, which a banker uses to acknowledge the receipt of a deposit from the depositor and promises to repay the deposited sum to the deposit or upon demand.

12.10 Negotiability

In order to be negotiable, (capable of being transferred, or "transferability"), the instrument must be in writing, contain an unconditional promise to pay a certain sum in money, on demand or at a fixed and determinable future time; It must be made payable to bearer or order and be signed by the maker of a promissory note or the drawer of a bill of exchange.

12.11 Endorsement

A valid endorsement must be written on the bill itself and signed by the endorser. It must be an endorsement of the entire bill, and where it is payable to the order of two or more payees or endorsees who are not partners, all must endorse. An endorsement may be special, blank or restrictive.

A special endorsement specifies the person to whom or to whose order the bill is to be payable. An endorsement in blank specifies no endorsee and a bill so endorsed becomes payable to the bearer. When a bill has been indorsed in blank, any holder may convert the blank endorsement into a special endorsement by writing above the endorser's signature directing to pay the bill to, or to the order of, himself or some other person. A restrictive endorsement prohibits the further negotiation of the bill or expresses that it is a mere authority to deal with the bill as directed and not a transfer of property. The endorsement may be "for deposit only", "pay to Charles, in trust for

Linda", "for deposit to my account with Standard Chartered Bank".

12.12 Parties to a bill of exchange

There are three (3) main parties to a bill of exchange, namely the drawer, drawee, and payee.

a. The Drawer

The drawer of a bill of exchange is the person that makes the order to pay, by signing the bill personally or through his authorised representative. The order is an undertaking by the drawer to pay the payee personally, the sum stated on the bill if the drawee refuses to do pay the payee. However, the drawer of the bill may be discharged if the payee neglects or refuses to present the bill before it lapses, or to duly inform the drawer of its dishonour or to note and protest within a reasonable time

b. The Drawee

The drawee is the person on whom the bill is drawn to pay the payee. If there are several drawees, the liability to pay the payee is joint and several. Where the drawee is unknown or fictitious, or lacks capacity, the bill becomes a promissory note deemed to have been made by the drawer.

c. The Payee

The payee is the beneficiary of the bill, whose name must be stated on the bill if it is an order bill. However, if it is a bearer bill, there is no need to name the payee.

d. Other ancillary parties

There are other ancillary parties to a bill of exchange, but of less importance, which include an Endorser and an Acceptor.

i. Endorser and Endorsee

An endorser is a payee who endorses or countersigns a bill to make it negotiable or deliverable to another person. The person to whom such bill is endorsed is the endorsee.

ii. Acceptor

An acceptor of a bill is the drawee who accepts to take over the obligation and gives more security to the payee. Acceptance is usually done in writing by stating "Accepted" on the face of the bill.

12.13 Holder of a bill of exchange

A holder of a bill of exchange is the payee or endorsee who is in possession of the bill. A holder for value is the person who has given value of the bill for which value had been given by a previous holder. A holder in due course is a person who has possession of the bill, or a person to whom a bill has been negotiated, which is complete and regular on the face it. A bill is said to be complete and regular on its face when there is no apparent irregularity either in the drawing or in its endorsement.

A bill payable on demand must be presented within a reasonable length of times, else it lapses. But if a bill is payable on a fixed date or at sight, it does not lapse until the last statutory three days of grace has expired.

12.14. Noting and protesting

Noting and protesting are only applicable to foreign bills of exchange. Noting is the process by which a dishonoured foreign bill is delivered to the court through a legal practitioner or a Notary Public. Protest is the formal certification of the dishonour of a bill and must be lodged at the place where the bill was dishonoured.

12.15 Types of bill of exchange

a. Inland Bill

Inland bill is a local bill either drawn or payable in the country, or drawn on a person resident in the country.

b. Foreign Bill

A foreign bill is any other than an inland bill. A foreign bill must be noted and protested if it is dishonoured , either by non-acceptance or non-payment, otherwise the bill becomes discharged and the drawer and the endorsers will be free from liabilities.

c. Inchoate or incomplete bill

A bill, which is defective or lacking in some material particular is referred to as Inchoate or Incomplete bill. e.g, if amount in figure is different from amount written in words on the bill. The defect must be rectified within a reasonable time to make it valid.

d. Accommodation bill

A bill signed by a person who has not received value for the bill, but merely signs it for the purpose of fixing his name on the bill, is referred to as accommodation bill. That person who signed the bill is called accommodation party.

12.16 Rights and duties of parties to a bill of exchange

a. Holders

The rights and powers of the holder of a bill include **suing on the bill** in his own name. The holder in due course as a transferee generally takes free of claims and defences between the original parties to the instrument and may **enforce payment** against all parties liable on the bill. Claims relating to ownership, lien

on the instrument or **right of rescission** of endorsement can be sustained against the holder in due course if they arise subsequent to taking but not claims arising before taking.

b. Dishonour

A bill is dishonoured by non-acceptance when it is duly presented for acceptance and such acceptance is refused or cannot be obtained or when presentment for acceptance is excused and the bill is not accepted. Also, a bill is dishonoured by non-payment when it is duly presented for payment and payment is refused or cannot be obtained and when presentment is excused and the bill is overdue and unpaid. When a bill has been dishonoured by non-acceptance or by non-payment, notice of dishonour must be given to the drawer and each endorser, and any drawer or endorser to whom such notice is not given is discharged.

12.17 Discharge

A negotiable instrument may be discharged in the following ways:

a. Full Payment of the Instrument

Full payment of the instrument in due course by the drawee or acceptor in good faith and without notice of any defect discharges liability on it.

b. Express waiver or renunciation

Where the holder absolutely and unconditionally renounces his rights against the acceptor, the instrument stands discharged. The waiver must be in writing unless the bill is delivered up to the acceptor.

c. Alteration

Any material alteration on the instrument discharges any party whose obligation is affected by the alteration.

d. Cancellation

An instrument is discharged by intentional and apparent cancellation of the instrument by the holder or his agent.

e. Acceptance

When an instrument that was previously dishonoured by a person who was not originally liable is subsequently honoured, it becomes discharged.

f. Negotiation

Negotiation is when the acceptor returns a statute instrument to the drawer, or when an acceptor becomes the holder of the bill or at maturity. These situations also discharge obligations on the instrument.

g. Lost and replaced instrument

When an instrument with the holder is lost, and is replaced by the drawer, obligations on the lost instrument is discharged. In such a case, the holder must indemnify the drawer, if the instrument is later found and its proceeds claimed by another person.

12.18 REVISION QUESTIONS

MULTIPLE-CHOICE QUESTIONS

1. Where consideration has previously been given for a bill, a person in possession of that bill is _____

   A. A holder for another party
   B. A holder in default
   C. A holder in due course
   D. A holder in due process
   E. A holder for value ****

2. Which of the following is NOT a negotiable instrument?

A. Bill of exchange
B. Cheque
C. Credit card ****
D. Debentures
E. Promissory Note.

3. A special crossing of a cheque makes its value recoverable through

A. The counter
B. Foreign bank
C. A particular cashier
D. The payees account ****
E. The Central Bank

4. Which ONE of the following is NOT the duty of a banker to its customer?

A. Duty to honour cheques
B. Duty of secrecy
C. Duty to give financial grants to its customer *****
D. Duty to pay only on its customer's instruction
E.

5. Duty not to make unauthorized withdrawals when a bill of exchange is drawn on a bank which is payable on demand, it is called -

A. Promissory note
B. Share warrant
C. Treasury bill
D. Cheque *******
E. Bank note

SHORT ANSWER QUESTIONS

1. A holder of a bill of exchange for which consideration has been given is called_____*********a holder for value

2. When a bill which has been accepted by the drawer, he becomes the _____******Acceptor

3. What length of period must a cheque be in circulation before it becomes stale? _____****** 6 months

4. In cheques, the two types of crossing on cheques are special crossing and_____******general crossing

5. The legal term used to describe the stoppage by a customer of his own cheque is _____*****countermand

ESSAY QUESTIONS

1. Negotiable instruments are of different types.

Required:

State four (4) types of negotiable instruments

Solution

The following are negotiable instruments:

i. Dividend warrants;
ii. Promissory notes;
iii. Bills of exchange;
iv. Debentures; and
v. Share
vi. Cheques.

2. Bills of exchange are used for financial transactions.

Required

State and explain briefly 3 (three) features of a bill of exchange.

Solution

The features of a bill of exchange are as follows:

i. Unconditional order

It must be an unconditional order or instruction or command to the drawee to pay the payee, and not a request. An example is cheque.

ii. Must be in writing

It is a document and must therefore be in writing, which could be hand- written, typed, printed or in pencil.

iii. A**ddressed by one person to another**

It must be signed by the person giving it, that is, by the drawer or his duly authorised agent. A bill is invalid if the signature on it is forged or placed thereon without the drawer's consent.

iv. The order must be in amount specified in figures and words. Where there is discrepancy between the figure and the words, the sum denoted by the words is the amount payable.

3. A negotiable instrument may be discharged in many ways.

Required:
State four (4) ways by which a bill of exchange may be discharged.

Solution

A bill may be discharged in any of the following ways:

i. By payment in due course;

ii. By an acceptor becoming the holder of the bill;

iii. By waiver;

iv. By alteration;

v. By renunciation.

4. A banker has a duty to honour the cheque of its customer when the cheque is presented for payment.

You are required to state 4 (four) circumstances under which a banker may dishonour a customer's cheque.

Solution

A banker may not honour the cheque of its customer under the following circumstances:

i. If there is a countermand by the customer;

ii. If the banker receives prior notice of the death of the customer;

iii. If the banker is informed of the customer becoming insane;

iv. If the bank receives a garnishee order placed on the customer's account

v. If the banker receives notice of commencement of winding-up proceedings being commenced against a corporate customer.

5. Sese maintains two accounts with Excel Bank; one is in his own name and the other, his business account where he is the sole signatory. His personal account was in debit of ₦100,000 while the business account was in credit of ₦500,000. The bank on its own removed ₦100,000 from the business account to offset the debit in the personal account. Sese is aggrieved and intends to sue the bank.

You are required to advise Sese.

Solution

The legal position is that a banker owes its customer a duty not to make withdrawals from the customer's account without the consent of the customer or reasonable notice to the customer of the intention to do so.

In the case under review, Excel bank breached this provision by transferring funds between the two separate accounts and is liable in damages for breach of this duty.

Sese is thus advised to sue Excel bank for reversal of the transfers made between the two accounts and also claim damages for breach of fiduciary duty.

CHAPTER THIRTEEN

Law of trusts

13.0 Chapter contents

- Concept and meaning of trusts
- Parties to a trust
- Essential elements of a trusts
- Uses of trusts
- Classifications of trusts: Private trust and public trust
- Types of public t r u s t s
- Duties and powers of trustees
- Rights of beneficiaries under a trust
- Termination of trust.

13.0.1 Learning objectives

At the end of this chapter, readers should have an understanding of the basic law relating to:

- concept and meaning of trusts
- parties to a trust
- essential elements of a trusts
- uses of trusts
- classifications of trusts: Private trust and public trust
- types of public t r u s t s
- duties and powers of trustees
- rights of beneficiaries under a trust
- termination of trust.

13.1 Concept of trust

The concept of Trusts emanated with the intention of equity to avoid the hardship presented by common law particularly on incidents relating to land ownership. Trust is part of English doctrine of equity now adopted universally.

13.2 Meaning of and parties to a trust

Trust is a contractual relationship created when a person, referred to as trustee is appointed either by the owner of a property or compelled by law to hold the property for the benefit of some other persons, referred to as the beneficiaries, or other object of trust.

The trustee may also be a beneficiary under the trust, which property could be real or personal. The parties to a Trust are the Owner of the property, the trustee and the beneficiary.

13.3 Essential elements of trusts

13.3.1 Trust has three (3) essential elements, called " the 3 certainties of trust" which are: certainty of intention (words), certainty of subject matter, and

Certainty of object.

a. **Certainty of intention (in written words)**

Certainty of intention is when the creator of the trust, who is called the 'settlor' shows his clear intention by words in writing to create a Trust. The settlor's words must be clear and unambiguous that something specific shall be done to create the trust.

b. Certainty of subject matter

This refers to the specific property of the trust and the interests to be recognised by beneficiaries under the trust. The exact subject matter to be enjoyed by the beneficiaries must be clearly stated and identifiable.

c. Certainty of object

This means that the settler must clearly identify the beneficiaries of the trust properties. In other words, such beneficiaries must be ascertainable or capable of being ascertained.

13.4 Uses of trusts

The uses of trusts include the following:

a. It protects the property of the legal owner from undue interference or conversion and rancour from intruders.

b. It gives the beneficiaries who are the legal owners of the Trust properties, but who lack legal capacity to hold titles to such properties themselves.

c. It makes it possible for more than one person to own land.

d. It facilitates the purposes of charitable purposes.

e. It enables property to be used to the benefit of persons in succession.

f. It helps in avoiding or minimising property tax liabilities.

13.5 Classification of trusts

Trusts can be classified into private trust, public trust, and judicial trust

13.5.1. Private trust

Private trust is created by the settlor to take care of his personal and private interests, to become effective during his lifetime or by will after his death, which is said to be done *inter vivos.* There are two types of private trust - express trust and implied trust.

a. Express trust

Express trust is created strictly by the settlor in writing deliberately and with full intention to take care of his personal and private interests, to become effective during his lifetime or after his death or as contained in his will.

b. Implied trust

Implied trust is created through the implicit or explicit actions of the settlor to presume his intention to create a trust, which may take effect in his lifetime or after his death or through his will.

13.5.2. Public trust

Public trust is a creation of government mainly for charitable purposes, which are to benefit the general public or a significant part of it. There are four types of public trust, which are judicial or constructive trust, trust corporation, custodian trust.

Public trust must have three essential elements, which are explained below:

a. It must be for the benefit of the public

A public trust or charitable trust must be in the interest of the general public. It could be for the alleviation of poverty or other humanitarian purposes.

b. It must be wholly or exclusively for charitable purpose

A public trust must be legal and wholly and exclusively created for charitable purposes. It cannot be created for both the general public and partly for other purposes. Thus, a charitable trust must be one created to include advancement of education, relief of poverty, encouragement of sports, promotion of the armed forces, community development, maintenance of museums, propagation of religion and welfare of animals.

Although there is no statutory definition of charity, a charitable trust must be one, which is created for the following purposes:

i. The relief of poverty;
ii. The advancement of education;
iii. The advancement of religion; or
iv. Other purposes beneficial to the community.

13.5.3. Judicial or constructive trust

This is a Trust imposed on the parties by equity, notwithstanding their intentions. A judicial trustee is a person appointed by the court who is in a fiduciary position and must not make gain or benefit from trust property. The general rule is that, when a person has fiduciary duty with respect to a trust property, and he derives personal gains there from, such person would be deemed to be a trustee of such gains and must be to the benefit of the beneficiaries of the trust property.

13.5.4 Trust corporation

A trust corporation is created by a corporate body that is expressly authorised by its memorandum of association to so act. Where it is a government agency, it must be empowered by an enabling Act or By-law.

13.5.5. Custodian trust

Custodian trust is created when a person is appointed to hold the property or documents in respect of a trust property. The appointed trustee is does not participate in the day-to-day administration of the trust property.

13.6 Duties and powers of trustees

a. Duties of trustees

The trustee owes fiduciary duties to the trust and is obligated to perform the following duties in respect of the trust properties:

i. The trustee has the duty ensure that the trust instrument and his appointment as trustee are regular and validly made, as any defect may affect the powers of the trustee to act under the trust instrument.

ii. The trustee has a duty not to delegate his duties under the trust to other persons, as trustees are usually appointed by the confidence the settlor has in the personal skill of the trustee.

iii. The trustee has the duty not to be partial in his dealings with beneficiaries of the trust, and must therefore act without favouritism or bias.

iv. The trustee has a duty to act in accordance with the terms of the trust, and must not allow personal prejudices to affect his duties under the trust.

v. The trustee has a duty of loyalty to the terms of the trust. Thus, he must not allow his personal interest conflict with his duties under the trust, and must not be interested in the trust property.

vi. The trustee must render account and information of his management of trust properties to the beneficiaries. He thus has a duty to keep accurate records and accounts of dealings under the trust.

vii. The trustee must be gratuitous as he not paid for his services, except the trust instrument expressly authorise payment of stated fees to the trustee. A trustee is, however, entitled to be reimbursed for expenses reasonable incurred in the discharge of his duties.

viii. The trustee has the ultimate duty to distribute trust property to beneficiaries in accordance with the trust terms.

b. Powers of Trustees

In order to enable the trustee efficiently administer the trust, he enjoys statutory and implied powers in the performance of his duties under the trust. These powers include the following:

i. The trustee has power to invest trust funds to enhance the value of the trust or prevent depreciation of the value of the fund. There are, however, securities in which trustees can invest under the statute. These are, securities of the government (Federal and States as well as government corporations), shares and debentures of companies listed on the stock exchange.

ii. The trustee has power to insure the trust property and shall be free to pay the premium from the trust fund, or profit from the insured property, or income from any other property within the trust.

13.7 Rights of beneficiaries under a trust

Beneficiaries of trust properties are equitable owners of the trust property, while the trustee is the legal owner of the trust by power of attorney conveyed to him by the owner of the property. The rights of a beneficiary of a trust include the following:

i. A beneficiary has the basic right to ensure that the trust is duly administered in accordance with the terms of the trust, such that the trustee does not dissipate trust funds or commit fraud on the trust property.

ii. A beneficiary has the right to take legal action against the trustee to account for trust funds and also to compel tracing of trust property, where such property has been fraudulently transferred from the trust.

iii. A beneficiary can sue for injunction to restrain the trustee from endangering the trust; e.g where the trustee is undergoing bankruptcy proceedings, or that he is exhibiting signs of dishonesty in the management of trust funds.

13.8 Termination of trusts

A trust may be terminated through four ways, namely disclaimer by the trustee, removal by the owner, retirement of the trustee and death of the trustee.

a. Disclaimer

A person appointed trustee may decline the appointment and disclaim the trust, which may be done expressly in writing, or by oral pronouncement, or by conduct (refusing to act).

b. Removal

A trustee may be removed by the owner of the trust property. This could happen if the trustee refuses to act, or found to be unfit, or stays outside the country for a period of 12 months in a stretch.

c. Retirement

A trustee may wish to be discontinue in office and therefore may formally retire to discharge him from office. The retirement process may be as provided in the trust instrument, or by application to the court for other granting him retirement, or by consent of the beneficiaries.

d. Death

The death of an appointed trustee automatically terminates his appointment.

13.9 REVISION QUESTIONS

MULTIPLE CHOICE QUESTIONS

1. Which of the following is **NOT** a type of Trust?
   A. Custodian trust
   B. Implied trust
   C. Judicial trust
   D. Organizational trust *****
   E. Express trust

2. The following are the duties of a trustee **EXCEPT**
   A. Investment of trust funds in listed companies stock
   B. Impartiality towards trust beneficiaries
   C. Take unilateral decisions on the distribution of trust properties *****
   D. Loyalty to the terms of the trust
   E. Non-delegation of his duties

SHORT ANSWER QUESTIONS

1. The two main classes of Trusts are Private trust and _____****Public Trust

2. The parties to a trust are the owner of the trust property, _____ and _____***Trustee and Beneficiary.

ESSAY QUESTIONS

1. State **FOUR** purposes of Public Trust.

Answer

2. The following are the purposes of Public Trust:
   a. Relief of public poverty;
   b. Advancement of Education;
   c. Advancement of Religion; and
   d. Other purposes that are beneficial to the community

3. State and Explain **TWO** ways by which a Trust may be terminated.

Answer

A trust may be terminated through:

a. **Disclaimer**

b. A person appointed trustee may decline the appointment and disclaim the trust, which may be done expressly in writing, or by oral pronouncement, or by conduct (refusing to act).

c. Removal

A trustee may be removed by the owner of the trust property. This could happen if the trustee refuses to act, or found to be unfit, or stays outside the country for a period of 12 months in a stretch.

d. Retirement

A trustee may wish to discontinue in office and therefore may formally retire to discharge him from office. The retirement process may be as provided in the trust instrument, or by application to the court for order granting him retirement, or by consent of the beneficiaries.

e. Death

The death of an appointed trustee automatically terminates his appointment.

CHAPTER FOURTEEN

Alternative dispute resolution

14.0 Chapter contents

- Alternative dispute resolution (ADR) mechanisms
- The advantages of ADR over litigation
- Limitations to the advantages of ADR mechanisms

14.0.1 Learning objectives

At the end of this chapter, readers should be able to:

- Define alternative dispute resolution (ADR) and its types; and
- Understand the advantages of ADR over litigation as well as its limitations.

14.1 Introduction

Over the years, litigation has dominated the concept of dispute resolution and justice dispensation. The focus of litigation however, is on judicial intervention through adversarial procedure in the resolution of dispute between the parties in dispute, be they natural persons or incorporated bodies.

The current trend in dispute resolution however, is to de-emphasise adjudicatory procedure and embrace the emerging alternative dispute resolution methods, which will now be examined in the areas of its meaning and purport, its types as well as the advantages it has over litigation.

14.2 Alternative dispute resolution (ADR) mechanisms

ADR is a group of flexible approaches to resolving disputes more quickly and at a lower cost than going through the tedious road of adversarial proceeding. It is a term that has become associated with a variety of specific dispute resolution options such as Negotiation, Mediation, Conciliation, Mini-trial, Case Evaluation and a lot of other hybrid mechanisms.

ADR mechanisms are generally intended to stand as alternatives to the traditional court process. They usually involve the use of impartial intervenors who are referred to as “third parties” (no matter how many parties are involved in the dispute) or “neutrals”.

Some scholars have defined ADR more broadly to mean finding better ways to resolve disputes, including those that have not reached – and may never reach – the courts or other official forum. Others place the emphasis on the need to find ways to alleviate the burden on courts.

14.3 Types of ADR

There are varied and diverse ADR processed out of which disputants can choose. They include but are not limited to the following:

14.3.1 Negotiation

Negotiation is a voluntary, unstructured and usually private process through which parties can reach a mutually gentlemanly agreement for the resolution of their disagreement. It is usually an informal dispute resolution system whereby disputants have firm and total control of the entire arrangement. The success or failure of this process more often than not depends entirely on the disputants themselves since the process offers an opportunity for them to talk on one-on-one basis. A common feature of negotiation is the absence of a third-party facilitator. Disputants personally present their case, marshal their arguments and lead evidence. They may or may not appoint individuals or professionals such as lawyers, accountants, etc. to represent their interests. As a result of the totality of the foregoing attribute of this dispute resolution type, Negotiation is considered as the fastest, last-expensive, most private, least complicated and most party-control oriented process.

14.3.2 Mediation

Mediation is a negotiation carried out with the assistance of a neutral third party. It is a voluntary process that offers disputants meaningful and creative solution at a fraction of the cost of the litigation system. Mediation is a facilitative process in which disputing parties engage the assistance of a neutral third party who acts as a mediator in their dispute. The neutral third party has no authority to make any decisions that are binding on the parties, but uses certain procedures, techniques and skills to help them to negotiate a resolution of their dispute by agreement without adjudication.

While the role of the neutral third party in arbitration is to consider the issues and make a decision, which is sometimes binding on the parties, the neutral third party in mediation does not have any authority to make any decisions or award for the parties. Indeed, that is not the duty of the mediator. Even where the mediator expresses a view about the merits of a dispute, that opinion is not binding on the disputants and in no circumstances would a mediator have the power to impose his views on the disputants. Indeed, such power would be contrary to the spirit of mediation, which is inherently consensual.

14.3.3 Mini-trial

This is yet another alternative dispute resolution mechanism. It is a process whereby counsel for each disputant makes a presentation on the legal, factual as well as evidentiary stance in support of his case. This proceeding is usually before an official with authority to effect settlement of disputes, and a neutral third party who serves as an adviser.

Through this presentation, all disputants in a case are afforded an opportunity to assess the strength and weakness of their position and thereby decide whether or not to settle out of court or resort to adversarial procedure. If, at the end of their presentation, the parties are unable to agree on settlement, the third-party neutral adviser evaluates the case for both sides by examining the facts as presented, the evidence tendered and the position of the law on the issues.

Thereafter, the adviser gives an opinion, which, strictly speaking, is not binding on the disputants. This opinion which is usually a reflection of the probable outcome should the disputants go to a full trial, often encourages the disputants to go into further confidential settlement negotiations in an attempt to each a mutually acceptable agreement.

14.3.4 Ombudsman

An Ombudsman is a third party who receives and investigates complaints or grievances aimed at an institution by its constituents, clients or employees. The Ombudsman may take action such as bringing an apparent injustice to the attention of high-level officials, advising the complainants of the available options and resources, proposing a settlement of a dispute or proposing systemic changes in the institution. The Ombudsman is often employed in a staff position in the institution or by a branch or agency of government with responsibility for the institution's

performance.

14.3.5 Facilitation

This is a collaborative process to help a group of individuals or parties with divergent views reach a goal or complete a task to the mutual satisfaction of the participants. The Facilitator functions as a neutral process expert and avoids making substantive contributions. The task to the Facilitator is to help bring the parties to consensus on a number of complex issues.

14.3.6 Fact-finding

Fact-finding, as a dispute resolution process, is employed mostly in the public sector collective bargaining. The Fact-finder does not have the power of either a Judge or an Arbitrator. Thus, he cannot make a binding decision for the parties. Rather, the Fact-finder, drawing on both the information provided by the parties and research findings of his own efforts, makes recommendation to the parties for the resolution of the dispute between them. Although his recommendations are not binding on the parties, one important advantage of this mechanism is that it has capacity to pave the way for further negotiations and mediations.

14.3.7 Med-Arb

The is an innovation in dispute resolution process. It is a process under which the Med-Arbiter is authorised by the parties to serve first as a mediator and secondly, as an arbitrator. When the Med-Arbiter serves as an arbitrator, he is given other powers to resolve any issues not resolved through mediation. Thus Med-Arb is often resorted to so as to resolve all outstanding issues not resolved during mediation process.

14.3.8 The multi-door court house

The multi-door courthouse concept is the idea of American Professor E. A. Sander. It is an arrangement to offer a variety of dispute resolution services in one place with a single intake desk, which would screen clients. The idea is one, which seeks to radically change the traditional conception of the court as the only “door” to getting justice. Instead, by this media, other “doors” are created to which a disputant could access the court and hence justice. These other “doors” include arbitration, fact-finding and mediation. Already, there are many multi-door courthouses in Nigeria; the Lagos, Abuja, Abeokuta and Ibadan Multi-door courthouses.

14.3.9 Arbitration

Arbitration is a process of dispute resolution in which a neutral third party called the "arbitrator" makes a decision after a hearing at which both parties have made representations. Where arbitration is voluntary, the disputing parties select the arbitrator who has the power to give a binding judgment.

A compulsory arbitration is that which occurs when the consent of one of the parties is enforced by statutory provisions as in the case of arbitration involving labour disputes under the Trade Disputes Act (as amended). An arbitrator may be legally qualified to preside over the process, but usually he should have special knowledge of the subject matter of the dispute. Arbitration clauses are mostly characteristic of insurance contracts and partnership agreements.

Essentially, arbitration means commercial arbitration whether or not administered by a permanent arbitral institution. The current spate of complex international contracts and multilateral negotiations has necessitated the insertion of arbitration clauses in the documents. The machinery for settling disputes arising from international commercial agreements include the International Chamber of Commerce in Paris, the "Paris Club," the London Court of Arbitration, the UNCITRAL Arbitration Rules and the Convention on the Settlement of Investment Disputes. The enforcement of awards made by International Commercial Arbitration is governed by the Convention on Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) to which Nigeria is a subscriber.

However, parties to a dispute may prefer settlement by other extralegal methods or by more informal processes. Many disputes arising between employers and employees are thereby resolved by means of "Conciliation."

Arbitration and Mediation Act, 2023

In Nigeria, the statute that governs the practice and procedure of arbitration is the Arbitration and Mediation Act, 2023 Laws of the Federation of Nigeria.

Section 2 prescribes that every arbitration agreement may be in the form of arbitration clause in a contract or in the form of a separate complete agreement, but it must be in writing, which may be electronic in nature.

The agreement for settlement of dispute between the parties shall be binding on them and enforceable against each of them to the exclusion of any other dispute resolution method unless the agreement provides otherwise or in void (section 1(3) of the Act).

Composition of arbitral tribunal

By virtue of sections 6 and 7 of the Act, the parties to arbitration may agree on the number of arbitrators to constitute an arbitral tribunal. If there is no agreement as to the number of arbitrators, the panel shall have just one arbitrator.

In the absence of an agreement by the parties on the number of arbitrators to constitute the panel:

(a) in a situation of three arbitrators, each party shall appoint one, and the two parties shall appoint the third, failing which an arbitral institution in Nigeria or the court (as the appointing authority designated by the parties) may appoint the person; and

(b) in the situation of one arbitrator, with the parties failing to appoint the one within 30 days after one party has requested in writing that a dispute be referred to arbitration, an arbitral institution or the Court as the parties may designate may appoint the sole arbitrator.

14.4 Advantages of ADR over litigation

There are many good reasons why many people all over the world are resorting to arbitration rather than the use of 'self-help' in resolving disputes. These reasons among many others include the following:

(a) ADR affords cordial and peaceful environment rather than the adversarial system of the law courts; thus, it is more convenient and dignifying to go into ADR;

(b) The opportunity which parties have to appoint an expert on the particular subject matter in dispute to hear and decide the issue, is an important asset to ADR;

(c) When it comes to overall cost, there is no doubt that ADR is cheaper than litigation as a means of resolving conflicts;

(d) ADR proceedings are usually faster than the court proceedings that are more prone to frequent adjournments. Commercial arbitration is therefore, usually preferred because time is of essence in commercial and business transactions. There are no pleadings and awards come within 90 days;

(e) ADR is much more privacy-friendly unlike the undue publicity, which might attend civil litigation and adversely affect the image of the parties;

(f) The proceedings in ADR are less tortuous and technical than those in the civil proceedings in courts. There are simple well-defined rules in arbitration that apply to specific situations and circumstances, which parties may agree to adopt;

(g) As in the courts, there is strict adherence to the principles of natural justice; and

(h) States as well as multi-national companies prefer arbitration to international litigation. Arbitration takes its pride of place as alternative means of dispute resolution.

14.5 Limitations to the advantages of ADR mechanisms

In spite of the advantages of ADR mechanisms, there are limitations to its desirability, which include the following:

(a) ADR outcomes enforceability is largely limited.

(b) The bargaining powers of the parties could be unequal, which make their power equation unequal.

(c) The mechanisms have no formal precedent as there are in judicial precedents.

(d) The mechanisms depend on the parties' willingness.

(e) The presiding official (arbitrator, mediator, or conciliator) could be bias or prejudiced.

REVISION QUESTIONS

14.0 MULTIPLE-CHOICE QUESTIONS

1. A process that helps a group of individuals with divergent views to reach a common goal or complete a task to their mutual satisfaction is called
   A. Mediation
   B. Negotiation
   C. Fact finding
   D. Facilitation
   E. Mini-trial

2. An Arbitral Tribunal comprises

   A. 7 members

   B. 5 members

   C. 3 members

   D. 2 members

   E. Any number nominated by parties

3. A non-adversarial process through which parties to a dispute seek an amicable settlement is referred to as

   A. Mini-trial

   B. Conciliation

   C. Arbitration

   D. Negotiation

   E. Ombudsman

4. All the statements below are essentials of an arbitral process **except**

   A. The dispute or differences must be justiciable

   B. The parties are compelled to resolve the dispute through arbitrators

   C. There must be a formal reference of the dispute to the decision of a third party

   D. There must exist a dispute relating questions of law or fact

   E. The third party must expressly or impliedly be required to decide according to the law

5. Which of the following is not an advantage of ADR over litigation?

   A. ADR provides a more cordial and peaceful environment for settlement of disputes

   B. ADR is not as expeditious, as litigation

   C. AD.R provides for more privacy, unlike litigation

   D. There is strict adherence to rules of natural Justice

   E. AD.R is more cost effective than litigation

14.1 ESSAY QUESTIONS

1. The current trend in dispute resolution in the business world is to de-emphasize the adjudicatory procedure by adopting alternative dispute resolution processes. State **four** advantages of alternative dispute resolution processes over litigation.

2. Chief Odu, an estate valuer employed the services of Mr. Akpabio in his building construction firm. They both had an understanding that the business could be converted into a partnership of the two if, after about three months, they were both satisfied that they could work together. Unfortunately they fell apart almost immediately. Later, four mutual friends of theirs, on their own initiative, constituted themselves into a panel to look into the dispute with view to settle it. The panel took evidence from the parties and, on the basis that the parties were equal partners, gave awards. Chief Odu is dissatisfied with the award and has commenced an action in court to nullify them.

   Advise both parties on their rights.

3. (a) Precious and Praise voluntarily entered into a contract with a clause in the contract agreement that in case any dispute arises between the parties, arbitration tribunal shall be the final arbiter. In the course of their business, a dispute arose and both parties do not know the ways in which arbitrators are appointed. Advise both parties.

   (b) What are the advantages of arbitration over conventional courts?

14.8 ANSWERS TO MULTIPLE-CHOICE QUESTIONS

- D
- E
- B
- B
- B

14.9 ANSWERS TO ESSAY QUESTIONS

1. (a) ADR process is more convenient than litigation.

   (b) Parties themselves could appoint the arbitrator.

   (c) ADR is cheaper than litigation.

   (d) ADR is faster than litigation.

2. The procedure for referring a matter to arbitration was not followed. It should include an agreement by the parties on the appointment of arbitrator. Since there was no agreement that there would be resolution by arbitration, the arbitration proceeding is flawed, and will not preclude a party from seeking redress in court. A party who is aggrieved by an arbitral award may, within 3 months, apply for its setting aside as was considered by the Supreme Court in ***Taylor Woodrow (Nig)*** **v** ***S.E. GMBH***

3. The issue is the procedure for appointment of arbitrator. It must be consensual and each party should be entitled to appoint one arbitrator while the two shall than appoint a third one jointly.

CHAPTER FIFTEEN

Fraudulent false accounting, accountants as expert witnesses in fraud cases, and basic law on money laundering

15.0 Chapter contents

- Fraudulent false accounting
- The roles of an accountant as an expert witness in computer fraud situations
- Money laundering

15.1 Learning objectives

Upon completion of this chapter, readers should be knowledgeable in the basics of the law on:

- Fraudulent false accounting
- The roles of an accountant as an expert witness in computer fraud situations
- Money laundering

15.2 Fraudulent false accounting

The offence of fraudulent false accounting is usually charged along with stealing or forgery. Section 438 of the criminal code, which deals with fraudulent false accounting provides as follows:

"Any person who, being a clerk or servant, or being employed or acting in the capacity of a clerk or servant, does any of the following acts with intent to defraud:

(i) Destroys, alters, mutilates, or falsifies, any book, document, valuable security, or account, which belongs to or is in the possession of his employer or has been received by him on account of his employer, or any entry in any such book, document or account or is privy to any such act; or

(ii) Makes, or is privy to making any false entry in any such book, document, or account; or

(iii) Omits, or is privy to omitting, any material particular from any such book, document, or account; is guilty of a felony and is liable to imprisonment for seven years."

Where an employee makes a false entry in his own document of matters relating to his master's business he is not guilty of fraudulent false accounting since the document was not provided by his master. If the defendant is charged with making a false entry, it must be proved that the entry was false to his knowledge, and if the entry is correct no offence is committed.

It is immaterial that the defendant derived no benefit from the fraudulent false accounting and that he merely facilitated stealing by another person.
It is immaterial that he did it under instructions from some superior officer provided he knew that the intent was to defraud.

15.3 The role of an accountant as an expert witness in computer fraud situations

An expert is a person who is especially skilled in the field in which he is giving evidence, and whether or not a witness can be regarded as an expert is a question of law for the judge to decide. An expert witness is a person who, by a formal and organised training in his chosen profession, has acquired a deep knowledge of the area he is called upon to give evidence on. The term 'expert' is elusive and there is no provision that the special skill attributable to an expert must be acquired through formal education, professionally or otherwise. It is enough that the person claiming to be an expert has the skill that he professes or asserts to have.

Where the evidence of an expert is relevant and necessary, the expert must be called as a witness. He must state his qualifications and satisfy the court that he is an expert on the subject on which he gives his opinion. He must also state the reasons for his opinion.

An accountant's roles as an expert witness in a computer fraud situation include:

(i) Satisfying the court that the document sought to be tendered was generated in the ordinary course of the business/transaction that is now the subject matter of the case at hand;

(ii) Satisfy the Court that the document is either the original or certified true copy of the document generated from the computer; and

(iii) In addition, his function must be related to the subject matter of the document. This is because the expert witness will usually be cross- examined with a view of discrediting the conclusions reached by him as an expert.

15.4 Money laundering

The current law on prevention of money laundering is the **Money Laundering (Prevention and Prohibition) Act, 2022**. The Act makes provisions for the prevention of money laundering by limiting the amount of cash payments that could be made or accepted, regulating over the counter exchange transaction, providing for the proper identification of customers, and empowering the competent authority to place surveillance on certain bank accounts among other things.

Some of the important provisions of the Act aimed at preventing money laundering include:

(a) Limitation of the amount of cash payment

Section 2 of the Act provides that except in a transaction through a financial Institution, no person shall make or accept cash payment of a sum greater than:

(b) ₦5,000,000 or its equivalent, in the case of an individual,

(c) ₦10,000,000 or its equivalent, in the case of a body corporate.

In the case of an international transfer of funds and securities, section 3(1) provides that a transfer to or from a foreign country of funds or securities of a sum greater than US$10,000 or its equivalent shall be reported to the Nigerian Financial Intelligence Unit, Central Bank of Nigeria, Securities and Exchange Commission, within one day of the transaction.

By virtue of section 3(3), transportation of cash or negotiable instruments in excess of US$10,000 or its equivalent by individuals in or out of the country shall be declared to the Nigerian Customs Service.

(b) Identification of customers

Section 4(1) of the Act provides that a financial institution and designated non-financial business and profession shall –

(a) identify a customer by means of identification documents as may be prescribed by regulations made pursuant to money laundering prohibitions;

(c) identify the customer by independent source documents, data or information;

(d) identify the beneficial owner through reliable sources such as a financial institution or designated non-financial business and profession; and

(e) act reasonably to ascertain that a person acting purportedly for a customer has the requisite authority.

Financial institutions and designated non-financial businesses and profession have the obligation to take customer due diligence measures –

(a) in establishing business relationships;

(b) in carrying out occasional transactions, whether once or linked, that exceed the authorised thresholds;

(c) when, even without exceeding the authorized threshold, there is suspected money laundering or terrorist financing; or

(d) there is suspicion about the veracity or adequacy of the customer identification data obtained previously

(e) carrying out occasional wire transfers of money.

Section 4(5) provides that a casual customer shall comply with the provisions of subsection (2) of this section for any number or manner of transactions including wire transfer involving a sum exceeding US$1,000 or its equivalent if the total amount is known at the commencement of the transaction or as soon as it is known to exceed the sum of US$1,000 or its equivalent.

By virtue of section 4(6), where a financial institution or designated non-financial business and profession suspects or has reasonable grounds to suspect that the amount involved in a transaction is the proceeds of a crime or an illegal act, it shall require identification of the customer notwithstanding that the amount involved in the transaction is less than US$1,000 or its equivalent.

Section 4(7)-(9) have due diligence prescriptions for a financial institution or designated non-financial business and profession dealing with foreign and domestic politically exposed persons.

(e) Special surveillance of certain transactions

Section 7 (1) of the Money Laundering (Prohibition) Act provides that where a transaction:

3.0 involves a frequency which is unjustifiable or unreasonable;

3.1 is surrounded by conditions of unusual or unjustified complexity;

3.2 appears to have no economic justification or lawful objective;

3.2.1 is inconsistent with the known transaction pattern of the account or business relationship, or

3.3 in the opinion of the financial institution or non-financial business and profession involves the proceeds of a criminal activity, unlawful act, money laundering, or terrorist financing, the Act deems the transaction to be suspicious, and requires the financial institution or designated non-financial business and profession involved in the transaction to report the matter to the Nigerian Financial Intelligence Unit immediately.

According to section 7(2) of the Act, a financial institution or designated non-financial business and profession shall within 24 hours after the transaction referred to in subsection (1) of this section -

(a) draw up a written report containing all relevant information on the matters stated in subsection (1) of this section together with the identity of the principal and, where applicable, of the beneficiary or beneficiaries;

(b) take appropriate action to prevent the laundering of the proceeds of a crime or an illegal act; and

(c) report the suspicious transaction and actions to the Nigerian Financial Intelligence Unit.

15.4.1 Mandatory disclosure by financial institutions

Section 11(1) of the Act provides that notwithstanding anything to the contrary in any other law or regulation, a financial institution or designated non-financial business and profession shall report to the Nigerian Financial Intelligence Unit in the case of a financial institution and to the Special Control Unit Against Money Laundering (SCUML) in the case of a designated non-financial institution or profession in writing within seven days any single transaction, lodgment or transfer of funds in excess of:

(a) ₦5,000,000 or its equivalent, in the case of an individual; or

(b) ₦10,000,000 or its equivalent, in the case of a body corporate.

Any financial institution or designated non-financial institution and profession that contravenes the provisions above commits an offence and is liable on conviction to a fine of at least ₦250,000 and not more than ₦1,000,000 for each day for whichthe contravention continues.

15.4.2 Surveillance of bank account

Section 15(1) of the Act provides that a competent authority pursuant to an order of the Federal High Court, may in order to identify and locate proceeds,

properties, objects or other things related to the commission of an offence under this Act, The Economic and Financial Crimes Commission (Establishment) Act or any other law:

(a) place any bank account or any other account comparable to a bank account under surveillance;

(b) obtain access to any suspected computer system;

(c) obtain communication of any authentic instrument or private contract, together with all bank, financial and commercial records, when the account, telephone line or computer system is used by any person suspected of taking part in a transaction involving the proceeds of a financial or other crime.

15.4.3 Offences under the Act

The Act imposes stiff penalties on contravention of the requirements of the Act. The penalties, which vary, depending on the type of offence, whether the offender is a natural or artificial person (body corporate), and whether it is a first time or repeated offence, are in sections 18-22 of the Act.

The Federal High Court located in any part of Nigeria has jurisdiction over the offences.

15.5 REVISION QUESTIONS

15.5.1 MULTIPLE-CHOICE QUESTIONS

1. The intentions of the Money Laundering (Prohibition) Act is specifically achieved by provisions which includes all but one of the following
   A. Identification of customer by financial institution
   B. Mandatory disclosure by financial institution
   C. Surveillance of bank accounts
   D. Concealing or disguising the genuine nature or origin of property or resources*
   E. Limitation of cash payments do stipulated amount, by individuals or organization excepts through a financial institutions.

2. A clerk, servant or employee appointed as a clerk or servant who destroys, alters or mutilates any accounting record or book belonging to the employer commits the offence of
   A. Stealing
   B. Forgery
   C. Fraudulent false accounting*
   D. Money Laundering
   E. Cheating

3. An accountant's roles as an expert witness in a computer fraud include:
   A. Satisfying the court that the document sought to be tendered was generated in the ordinary course of the business/transaction in focus*
   B. Reporting on the status of financial institutions
   C. Identifying the functionalities of computers
   D. Identifying the parties to the fraud
   E. Showing certification in computing

15.5.2 SHORT ANSWER QUESTIONS

1. To which regulator must a financial institution report a cash lodgment by an individual that exceeds N5,000,000? *(Nigerian Financial Intelligence Unit)

2. Which Court has jurisdiction over money? laundering cases? *(Federal High Court)

3. The offence of fraudulent false accounting is usually charged with _____ or _____. *(stealing or forgery)

15.5.3 ESSAY QUESTION

State **THREE** matters on which a financial institution must do customer due diligence.

ANSWER TO ESSAY QUESTION

Financial institutions have the obligation to take customer due diligence measures:

(a) in establishing business relationships;

(b) in carrying out occasional transactions, whether once or linked, that exceed the authorised thresholds;

(c) when, even without exceeding the authorized threshold, there is suspected money laundering or terrorist financing; or

(d) there is suspicion about the veracity or adequacy of the customer identification data obtained previously

(e) carrying out occasional wire transfers of money.

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